

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

Injury No.: 99-182773

Employee: Eddie Mays
Employer: United Parcel Service
Insurer: Liberty Mutual Fire Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: October 28, 1999
Place and County of Accident: Kansas City, Clay 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 chief 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 chief administrative law judge dated February 3, 2005. The award and decision of Chief Administrative Law Judge Kenneth J. Cain, issued February 3, 2005, is attached and incorporated by this reference.

The Commission further approves and affirms the chief 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 25th day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Eddie Mays

Injury No. 99-182773

Employer: United Parcel Service
Insurer: Liberty Mutual Fire Insurance Co.
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: December 2, 2004
Briefs Filed: Final brief filed January 11, 2005
Checked by: KJC/abj

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 28, 1999.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Clay 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 occurred or occupational disease contracted: Employee, while in the course and scope of his employment as a delivery driver for United Parcel Service, sustained an accident when he slipped on some grease while walking through a shopping mall to make a delivery. Employee sustained injuries to his right shoulder, neck, and upper back.
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: Right shoulder, neck, and upper back.
14. Nature and extent of any permanent disability: Right rotator cuff tear, herniated disc at C3-C4, and strain to upper back muscles.
15. Compensation paid to date for temporary disability: \$20,000.52
16. Value necessary medical aid paid to date by employer/insurer? \$27,555.13
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$921.55
19. Weekly compensation rate: \$578.48/\$303.01
20. Method wages computation: \$287.250 and by agreement of parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

18 2/7 weeks of additional temporary total disability (or temporary partial disability) @ \$578.48 = \$10,577.92 (\$20,000.52 previously paid for period 11-1-99 to 12-15-99; 12-24-99 to 1-16-00; and 10-31-00 to 4-22-01)

100 weeks of permanent partial disability from Employer @ \$303.01 = \$30,301.00

N/A weeks of disfigurement from Employer

N/A permanent total disability benefits from Employer

22. Second Injury Fund liability: None.

TOTAL: \$40,878.92

23. Future requirements awarded: None.

Said payments to begin as of date of the award and to be payable and to 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Stephen Lynn.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Eddie Mays Injury No. 99-182773

Employer: United Parcel Service

Insurer: Liberty Mutual Fire Insurance Co.

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: December 2, 2004 Checked by: KJC/abj

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

1. The nature and extent of the disability sustained by the employee;
2. liability of the employer for past temporary total disability benefits for the periods January 17, 2000, to October 30, 2000, and for April 23, 2001, to August 12, 2003;
3. liability of the employer for future medical benefits; and
4. liability of the State Treasurer as Custodian of the Second Injury Fund for compensation.

At the hearing, Mr. Eddie Mays (hereinafter referred to as "Claimant") testified that he was born on April 12, 1968, and that he was 36 years old. He stated that he had a high-school diploma and one or two semesters of college. He stated that he worked at United Parcel Service from January 2, 1987, until October 28, 1999.

Claimant testified that he worked on several jobs for UPS. He stated that his jobs were unloader, sorter, second-day sorter, next-day air driver, and truck driver. He stated that he was required to routinely lift 50 pounds and occasionally up to 75 pounds. He stated that the work was physical.

Claimant complained of two injuries at work during the fall of 1999. He stated that on September 10, 1999, he felt back and right shoulder pain while driving his truck. He stated that although he did not know what caused the pain, he had done a lot of lifting at work on that day. He stated that he worked in Missouri on that day.

Claimant indicated that his employer referred him for treatment with Dr. Chenoweth at Altrutech. He stated that afterwards, he was fine until he grabbed a “bunch of golf clubs” at work and re-injured his right shoulder. He stated that he was again referred to Dr. Chenoweth, who released him to return to work on October 25, 1999. He admitted that his pain had greatly improved by that time.

Claimant testified that he sustained another injury at work on October 28, 1999, when he slipped on some grease and fell to the floor while walking through a local shopping mall to make a delivery. He stated that the wall stopped him from sliding across the floor. He also stated that the 600-pound cart he was pushing rolled on top of his body.

Claimant stated that he initially complained of injuries to his right upper back, the base of his neck, and his right shoulder. He stated that he immediately reported the fall to both his supervisor at work and to the mall supervisor. He stated that the next day he could not move the upper part of his body and that he was again referred to Dr. Chenoweth for treatment.

Claimant testified that his initial treatment was only to the right shoulder and not the upper back and neck. He stated that in December 1999, Dr. Alexandra Strong ordered an MRI and diagnosed a partial tear of the right shoulder. He also stated that although he told Dr. Strong that his neck was his real problem, she advised him that she was only authorized to treat his right shoulder. He stated that she recommended arthroscopic surgery for his rotator cuff tear.

Claimant testified that he initially chose not to have the arthroscopic surgery because he had experienced past problems with various anesthetics. He stated that as a teenager, he almost died following hand surgery and his reaction to the anesthetics. He stated that he was willing to have the surgery if Dr. Strong used a local anesthetic or a block. He also stated that she kept him off work.

Claimant testified that his employer terminated his temporary total disability benefits on January 17, 2000. He stated that he was not physically able to work at that time. He stated that his employer did not reinstate the benefits until October 31, 2000, when it referred him to Dr. Lowry Jones for treatment. He stated that he complained to Dr. Jones of shoulder, upper back, and neck pain. He stated that Dr. Jones advised him that he would treat the shoulder first and then the neck.

Claimant testified that Dr. Jones performed an acromioplasty and arthroscopic surgery to repair the rotator cuff tear in January 2001. He stated that Dr. Jones released him to return to work in April 2001 for his shoulder complaints. He further indicated that Dr. Jones ordered a cervical spine MRI in May 2001, which revealed a herniated disc, and that the doctor then placed him on work restrictions, which his employer could not accommodate. He stated that he treated with Dr. Jones until July 11, 2001.

Claimant testified that his employer last provided treatment for his shoulder and upper back complaints on May 29, 2001. He stated that his employer provided no treatment for his neck complaints other than the MRI. In addition, Claimant testified that he was experiencing some problems with his right testicle, leg, and hip and that on February 23, 2000, he saw Dr. Bergant of KC Neurology for those conditions. He indicated that he had initially experienced the problems about a month after the October 1999 accident and that they became worse in January of the following year.

Claimant also admitted, however, that he had experienced testicular pain prior to his accident at work. He stated that he began experiencing such problems in 1995 and that his pain became constant and more severe after the October 1999 accident.

Claimant testified that from June 14 to August 8, 2002, he was treated at The Headache and Pain Center with complaints of upper and low back pain. He stated that from November 2001 to January 2002, he was treated at the Providence Health Center where he received two shots to his low back. He stated that by January 2002, his low back pain was constant. He stated that he could not work at that time due to neck and low back pain.

Claimant testified that on January 16, 2003, Dr. Wilkinson at KU Medical Center performed surgery at the L4-L5 levels of Claimant’s low back. He stated that after the surgery he had less testicular and low back pain. Nevertheless, he stated that he remained unable to sit for extended periods of time. He also stated that he was still receiving therapy for his low back and taking morphine and hydrocodone for his back and neck pain.

Claimant testified that on a scale of 1 to 10, his neck pain was at a 10 level without medication and at a 3 with it. He stated, however, that the medication caused dizziness, slowness, and constipation. He stated that he could not drive while on it. He also stated that his right shoulder was still weak, numb, and painful. He stated that he could no longer lift a 5-pound

bag of sugar with his right arm. He stated that he still experienced a deep ache in his upper back and numbness and some pain on his left side.

Finally, Claimant admitted to several back injuries prior to 1999. He stated that in 1994, he sprained his back in a work-related incident in Kansas and that a Dr. Smith rated his disability at 5 to 10 percent. He stated that he missed some work following the injury and that Dr. Smith placed him on a 50-pound lifting restriction.

On cross-examination by his employer, Claimant admitted that his former attorney referred him to two different doctors over an eight-day period in February 2000 for medical opinions. He admitted that he told Dr. Koprivica, one of the doctors, about his shoulder complaints and indicated that he believed at the time that his low back problems might be due to a disease rather than a neurological impairment. He admitted that prior to October 1999 he had been treated for Chlamydia.

Claimant admitted that prior to 1999 doctors had performed hernia surgery and an appendectomy on him. He admitted that doctors had performed a bilateral de Quervain's release. He admitted to numerous back strains and asthma prior to 1999.

Claimant acknowledged that the chiropractic records from Dr. Miller from August 2000 showed that he complained of right upper back pain, constant neck pain on the right side, and right shoulder pain. He acknowledged that the records did not mention any low back complaints.

Claimant admitted that his former attorney referred him to Dr. Prostic in August 2001 and acknowledged that Dr. Prostic's report showed complaints of right upper back, neck, and shoulder pain. He stated that he did not recall whether he had complained of low back problems to Dr. Prostic. He did indicate, however, that he believed Dr. Prostic's report was based on his complaints from the September and not the October 1999 accident. He stated that he had problems convincing his two former attorneys that his complaints arose from the October as opposed to the September 1999 incident.

Claimant admitted that in February 2002 he had a preliminary hearing involving his workers' compensation claims in Kansas and that the judge denied medical treatment for his neck and low back. He admitted that he had filed a lawsuit against UPS based on an alleged violation of the Americans with Disabilities Act. He admitted that his complaint involved his employer's failure to accommodate his disability and to employ him. He stated that he believed that UPS should have returned him to work on April 24, 2001.

Claimant testified that he had settled his prior workers' compensation claims involving his low back injuries in Kansas in August 1994 for \$4,951.81. He admitted that he had sustained several injuries to his low back in the 1980s and 1990s.

On cross-examination by the Second Injury Fund, Claimant acknowledged that the settlement referred to above was based on a permanent partial disability of approximately 3 percent to the body as a whole. He admitted that he settled his prior bilateral carpal tunnel case in Kansas based on a permanent partial disability of 10 percent to the body as a whole.

Claimant admitted that he was working full-time prior to September 1999. He admitted that although a doctor had placed him on a 50-pound weight restriction prior to September 1999, he had continued to lift more than the 50 pounds.

On redirect examination, Claimant testified that on April 24, 2001, the date he alleged in his Federal lawsuit that his employer should have taken him back to work, he was still under a restriction of no lifting over 50 pounds from his waist to shoulder level and no lifting over 75 pounds from the floor. He stated that he could not have done his job at UPS with those restrictions. He stated that he used that date in his complaint because his employer had terminated his temporary total disability benefits on that date.

The medical evidence consisted of numerous reports and records as well as the deposition testimony of Drs. Steven Wilkinson, M.D. and Daniel Zimmerman, M.D. Dr. Wilkinson, who testified on Claimant's behalf on March 12, 2004, indicated that he was a neurosurgeon at the Kansas University Medical Center. He stated that he had practiced at the medical center for 12 years and that he had performed numerous low back surgeries.

Dr. Wilkinson testified that Claimant complained of neck and back pain on the initial examination on October 14, 2002. He stated that Claimant's prior low back MRI scan had revealed lumbar stenosis at L4-L5 and L5-S1. His initial diagnosis was lumbar stenosis.

Dr. Wilkinson testified that on January 16, 2003, he performed a L4-L5 decompressive laminectomy on Claimant. He

stated that Claimant improved after the surgery but still complained of some back and leg pain. He was still treating Claimant at the time of the deposition.

Dr. Wilkinson further noted that a more recent cervical MRI showed persistent disc problems at C3-C4, which he did not believe were “really that significant” for Claimant’s symptoms. He also noted Claimant’s complaints of continuing shoulder and back pain. He stated that Claimant would probably need continuing medication and future physical therapy and possibly additional nerve blocks for his back. He stated that theoretically, patients with persistent problems sometimes required a dorsal column stimulator.

Finally, Dr. Wilkinson testified that Claimant should be limited to sedentary activities with the ability to change positions frequently. He stated that the restrictions were permanent. Following a hypothetical question which asked the doctor to assume that Claimant sustained a fall at work on October 28, 1999, when he slipped on some oil and that he initially experienced pain in his right shoulder, neck, and upper back, and that shortly thereafter he began experiencing pain in his low back which worsened over time and spread into his hips, buttocks, groin, testicle, and into his right leg, Dr. Wilkinson testified that he believed that the fall in 1999 was a substantial cause of Claimant’s back problems.

On cross-examination by Claimant’s employer, Dr. Wilkinson admitted that he had not reviewed all of Claimant’s medical records and some of the diagnostic tests results. He admitted that he had not reviewed the reports from the doctors to whom Claimant had been referred by his prior attorneys or the doctor to whom Claimant had been referred by the administrative law judge in Kansas. He admitted that he had not reviewed the records of Dr. Jones, who performed Claimant’s shoulder surgery.

Dr. Wilkinson acknowledged that none of Claimant’s medical records from 1999 through 2001 mentioned any complaints by Claimant of low back problems. He acknowledged that the reports and records from the doctors to whom Claimant was referred by his prior attorneys during that period did not mention any complaints by Claimant of low back problems. He acknowledged that many of the reports and records made no mention of any neck complaints and that the first such notation was in a report by Dr. Koprivica, to whom Claimant had been referred by his prior attorney in February 2000. He also acknowledged that a “November 1, 1991” [sic] record of Dr. Chenoweth contained Claimant’s handwritten notes pertaining to his complaints and that no mention was made of any low back or neck problems. He acknowledged that Claimant did complain of an upper back injury.

Dr. Wilkinson acknowledged that Dr. Strong’s records from December 1999 also contained Claimant’s handwritten description of the injury and that there were no complaints regarding any low back or neck problems. He acknowledged that the August 2000 report from Dr. Downs, to whom Claimant was referred by the administrative law judge in Kansas to perform a neutral examination, mentioned no complaints by Claimant of low back or neck problems. He acknowledged that Dr. Prostic, to whom Claimant was referred by a prior attorney, made no mention of any low back complaints in his report in August 2001, nearly two years after the October 1999 accident.

Dr. Wilkinson admitted that his diagnosis of stenosis pertained to a narrowing of the spinal canal, usually resulting from degenerative changes. He admitted that Claimant’s need for the surgery was due to the lumbar stenosis. He admitted that the history Claimant provided to him at the time of the examination was different than the history provided to him at the deposition. He admitted that the history Claimant provided to him at the time of the examination made the low back injury seem more causally related to the fall at work. He admitted that based on the information he received at the deposition, he believed that the fall in 1999 was “probably essentially a nonfactor relative to his low back.”

Finally, Dr. Wilkinson indicated that Claimant did not need any surgical treatment for his neck. He stated that some of Claimant’s shoulder symptoms could be related to the neck. He stated that given the information he was provided at the deposition, he could not to a reasonable degree of medical certainty state that Claimant’s low back problems and the treatment for it were related to the fall at work. He stated that he believed that Claimant could work with restrictions and that the restrictions were related to Claimant’s low back.

On redirect examination, Dr. Wilkinson stated that Claimant was completely disabled as far as his back was concerned. He stated that he would not conclude that the incident where Claimant slipped in the cooking oil was no factor in the relationship to the stenosis and the surgery. He stated that the 1999 fall at work was probably one of the many cumulative things that had happened to Claimant over time.

On recross-examination, Dr. Wilkinson stated that the substantial causes of Claimant’s back problems were multiple injuries and things that occurred over time.

Dr. Zimmerman, an internist, also testified by deposition on Claimant's behalf. He stated that he was the district medical director for the Department of Labor's Workers' Compensation Division at the federal level. He also indicated that he maintained a private medical practice.

Dr. Zimmerman testified that he first examined Claimant on September 15, 2003. He stated that Claimant complained of neck problems, diminished strength in the lower extremities, and mid and low back pain. He stated that on physical examination, Claimant had a mild degree of restriction in the range of motion at the thoracic level. He stated that Claimant had restrictions in his range of motion of the right shoulder. He noted that Claimant had an absence of reflexes at the biceps level on the right side, which he considered indicative of a significant nerve root injury at the cervical level.

Dr. Zimmerman's diagnosis was right shoulder anterolateral acromioplasty, chronic thoracic paraspinous myofascitis, and lumbar disc disease at L4-L5 causally related to the accident on October 28, 1999. He stated that he did not diagnose a cervical spine impairment, although he acknowledged that the June 5, 2001, MRI showed a moderate-sized diffusely protruding herniated intervertebral disc at C3-C4 encroaching on the anterior epidural space posteriorly.

Following a hypothetical question which asked the doctor to assume various facts, including that Claimant had raised complaints regarding low back pain as of October 4, 2001, and that the pain radiated down the right leg, Dr. Zimmerman concluded that Claimant's low back problems were causally related to the fall at work on "October 28, 1999." He noted that he had reached that conclusion on causation because Claimant's prior low back injuries had not resulted in any chronicity. He defined "chronicity" as an impairment requiring six months of ongoing treatment or management.

Following another hypothetical question regarding Claimant's neck complaints, Dr. Zimmerman indicated that the fall on October 28, 1999 "could have something to do with the bulging/herniated disc." The hypothetical asked the doctor to assume that Claimant had not injured his neck subsequent to October 1999 and that prior to the accident at work had not experienced any neck problems. The doctor also stated that it would be unusual for a 35-year-old person to have significant pathology at the cervical level unassociated with some sort of traumatic event. He indicated that Claimant's work "probably could be considered" a substantial factor in causing the neck injury and that Claimant was temporarily and totally disabled from doing his job at United Parcel Service from the date of injury until at least the date he saw him on September 15, 2003.

Finally, Dr. Zimmerman placed restrictions on Claimant and concluded that Claimant had sustained a permanent partial disability of 25 percent of the right upper extremity at the shoulder level due to the October 1999 fall at work. He concluded that Claimant had sustained a permanent partial disability of 30 percent to the body as a whole due to the low back injury from the October 1999 accident. In addition, he concluded that Claimant had sustained a permanent partial disability of 10 percent to the body as a whole due to the upper back and thoracic area injuries and that all the injuries from the October 1999 accident had resulted in a permanent partial disability of 55 percent to the body as a whole.

On cross-examination by Claimant's employer, Dr. Zimmerman admitted that he had only examined Claimant on one occasion. He admitted that the examination was at the request of Claimant's attorney. He admitted that he had never treated Claimant. He admitted that he was trained as an internist. He admitted that he was not a specialist in orthopedic medicine.

Dr. Zimmerman acknowledged that Claimant's medical records did not refer to any low back pain, complaints, or problems until nearly two years after the accident at work. He admitted that he did not believe that Claimant had sustained any permanent partial disability relative to the cervical spine. He admitted that he concluded that Claimant's low back complaints were work related because that was Claimant's opinion and he saw no reason to contradict Claimant.

The numerous medical reports and records offered into evidence by Claimant were essentially cumulative of the testimony. Claimant's Exhibit B was the medical report of Dr. Edward J. Prostic, M.D., dated August 27, 2001, and addressed to Claimant's former attorney. In the report, Dr. Prostic noted that Claimant complained of pain about his right upper back, neck, and shoulder. Claimant's Exhibit C was a February 29, 2000, report from Dr. P. Brent Koprivica, M.D., addressed to Claimant's former attorney. Dr. Koprivica discussed Claimant's history and noted Claimant's complaints of pain on the right side of his neck, right shoulder, and right biceps.

In a supplemental report dated April 10, 2000, Dr. Koprivica rendered disability ratings for Claimant's alleged right shoulder and neck impairments. Claimant's Exhibit G was a report from Dr. J. Michael Smith, M.D., dated February 20, 1995, and which pertained to Claimant's low back injuries prior to October 1999. Dr. Smith concluded that Claimant had sustained a permanent partial impairment of 5 to 10 percent to the body as a whole due to the lumbosacral spine injuries.

Claimant's Exhibit J contained records from Altrutech. The record dated November 1, 1999, indicated that Claimant

described a fall at work three days earlier and that he complained of right shoulder and upper back pain. Claimant's Exhibit L contained medical records from Dr. Lowry Jones, M.D. On July 11, 2001, Dr. Jones noted that Claimant complained of neck and upper back pain. He stated that Claimant requested a statement indicating that Claimant could not work due to neck and back pain. He noted that Claimant's employer's workers' compensation insurer's position was that the neck and back complaints were not work related.

Earlier, on May 29, 2001, Dr. Jones noted Claimant's history of neck, upper back, and shoulder pain and indicated that the treatment had initially focused on the right shoulder. He stated that Claimant had few complaints regarding his neck and upper back until May 2001. He placed lifting and repetitive work restrictions on Claimant due to the neck complaints. He also noted that Claimant had complained of neck and upper back problems during his initial examination of Claimant in October 2000.

On April 17, 2001, Dr. Jones noted that he was going to release Claimant to return to work effective with April 23, 2001. He later explained that the release only pertained to Claimant's right shoulder injury. The records showed that on January 19, 2001, Dr. Jones performed a right shoulder arthroscopy with limited debridement of the rotator cuff and an anterolateral acromioplasty. He noted that due to Claimant's history of hyperthermia, the surgery was attempted under a regional block. He stated that the regional block was not successful and that a general endotracheal anesthetic with an oral endotracheal tube was used without complications.

In a chart entry dated October 31, 2000, Dr. Jones noted that Liberty Mutual Insurance Company had referred Claimant for an evaluation of his right shoulder, upper back, and neck. He noted the MRI finding of a rotator cuff tear and indicated that Claimant had some muscle tension in the neck and upper back.

Claimant's Exhibit P contained the medical records of James A. Bergant, M.D., of KC Urology Care, P.A. In a note dated February 23, 2000, Dr. Bergant noted that three weeks earlier Claimant had been treated for Chlamydia. On May 24, 2000, Dr. Bergant recommended diagnostic testing. Results from a CT scan of Claimant's pelvis were normal.

Dr. Taliaferro's records, dated February 21, 2002, indicated that most of Claimant's problems were related to degenerative disc disease with central spinal stenosis in the back. Dr. Frank P. Holladay, M.D., in a letter dated October 4, 2001, stated that he did not believe that Claimant's alleged low back pain could be related to the accident in 1999. He stated that Claimant's neck and shoulder complaints could be related to the accident.

Claimant's employer offered into evidence the reports of Dr. Chris D. Fevurly, M.D., and various other reports and records. Dr. Fevurly, a specialist in occupational medicine, evaluated Claimant on April 30, 2004. He noted that Claimant had an excellent range of motion of the cervical spine and full motion of the shoulder. He stated that Claimant had no instability of the right shoulder or weakness on rotator cuff strength testing. He stated that Claimant's range of motion of the thoracolumbar spine was "well preserved." He also indicated that despite using a cane, Claimant moved at a "rapid pace."

Dr. Fevurly concluded that Claimant's Waddell's test results were negative. He also concluded that Claimant's accidents at work in "September" and October 1999 resulted in right rotator cuff tendinopathy and chronic cervical thoracic pain. He concluded that based on the medical records which showed that Claimant did not complain of low back pain until 2001, nearly two years after the alleged accidents, that there was no causal relationship between Claimant's low back and testicular pain and the work events of September through October 1999.

Dr. Fevurly further indicated that based on the records, Claimant reached maximum medical improvement on October 4, 2001, the date Claimant was evaluated by Dr. Holladay. He concluded that Claimant had sustained a permanent partial disability of 10 percent of the right upper extremity due to the rotator cuff tear and 5 percent to the body as a whole due to the chronic regional cervical thoracic pain, which resulted from the 1999 accidents at work. He concluded that the injuries combined to result in a permanent partial disability of 11 percent to the body as a whole.

Finally, Dr. Fevurly concluded that the 1999 accidents at work had not resulted in any permanent partial disability to Claimant's low back or testicular area. He concluded that that Claimant was not in need of any future medical treatment.

Employer/Insurer's Exhibit 13 was the August 3, 2000 report of Dr. Daniel Downs, M.D., of Jackson County Orthopedics. The report indicated that the examination was performed at the request of a workers' compensation administrative law judge in the state of Kansas. Dr. Downs concluded that Claimant had sustained a permanent partial impairment of 15 percent of the right upper extremity.

Dr. Downs also indicated in a supplemental report to the judge in Kansas that Claimant had telephoned him to correct

the description of how the 1999 accident had occurred. He stated that Claimant told him that when he slipped in the oil, he fell but did not strike the floor. He stated that Claimant told him that he had injured his neck and shoulder in the incident.

In a report dated April 30, 2004, and addressed to Claimant's employer's attorney, Dr. Downs indicated that he had re-examined Claimant on the above date. He noted that Claimant exhibited multiple traits of symptom magnification. He stated that Claimant had an excellent range of motion of the shoulder. He concluded that Claimant had not injured his cervical spine in the accident. He concluded that Claimant did not have any permanent impairment or limitations related to the neck. He stated that at most the work-related accident was a permanent aggravation of Claimant's pre-existing problems in the spine.

Dr. Downs further stated that it was "medically reasonable" that a twisting injury as described by Claimant could have caused an aggravation of pre-existing discogenic back pain, even to the point of requiring surgery. He stated that it was "medically reasonable" that the back problem that Claimant was treated for by Dr. Wilkinson was the "natural history and progression of pre-existing problem of degenerative disc disease." He concluded that Claimant had a permanent partial disability of 20 percent to the body as a whole based on the low back impairment and that "It would most attribute to his injury that could have aggravated his back to a degree of 5 percent to the body as a whole."

Employer's Exhibit 20 contained the reports of Dr. Frank Holladay at the Neurosurgery of Kansas City Clinic. Dr. Holladay noted on October 4, 2001, that he did not believe that Claimant's low back pain was caused by the October 1999 accident at work. He stated that based on the history, "I do not feel that the lower back pain could be directly related, however, per his history the neck and shoulder pain certainly could be related to his described injury."

LAW

After considering all the evidence, including the doctors' depositions, the medical reports and records, the other exhibits, the testimony at the hearing and observing Claimant's appearance and demeanor, I find and believe that Claimant met his burden of proving that he sustained injuries to his right shoulder, neck, and upper back in the October 28, 1999, accident at work. I find that he met his burden of proving that he sustained a permanent partial disability of 25 percent to the body as a whole as a result of the injuries from the October 1999 accident at work. At a rate of \$303.01 per week, for 100 weeks, his employer is liable for \$30,301.00 in permanent partial disability benefits. Claimant's employer is ordered to pay that amount to Claimant.

I find that Claimant met his burden of proving his employer's liability for an additional 18 2/7 weeks of temporary total disability benefits, representing the period May 29, 2001, to October 4, 2001. At a rate of \$578.48 per week, for 18 2/7 weeks, Claimant's employer is liable for an additional \$10,577.92 in temporary total disability benefits. Claimant's employer is ordered to pay that amount to Claimant.

Finally, I find that Claimant failed to prove his need for any future medical treatment to cure and relieve him from the effects of his injuries to his right shoulder, neck, and upper back. Therefore, he failed to prove his employer's liability for any such benefits. He also failed to prove the Second Injury Fund's liability for any compensation.

Case law clearly provides that the employee has the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis-Cardinal Ritter, Inst., 793 SW 2d 195 (Mo.App. E.D. 1990); Griggs v. A.B. Chance Co., 503 SW 2d 697 (Mo.App. W.D. 1973); Hall v. Country Kitchen Restaurant, 936 SW 2d 917 (Mo. App. S.D. 1997). Claimant, as noted above, met his burden of proof on some of the disputed issues.

Claimant alleged injuries to his right shoulder, neck, and upper and lower back in the October 28, 1999, accident at work. He alleged that the accident occurred as he was pulling a delivery cart through a local shopping mall and slipped on some grease and fell to the floor. He stated that his right upper back, the base of his neck, and his shoulder struck the floor. He stated that the wall prevented him from sliding along the floor.

Claimant's employer did not dispute that Claimant had sustained an accident at work on October 28, 1999. His employer did not dispute that Claimant injured his right shoulder in the accident. His employer did dispute that Claimant injured his neck and upper and lower back in the accident. The most credible, competent evidence, however, supported Claimant's allegation of a right shoulder, neck, and upper back injury in the October 1999

accident at work. Claimant did not prove that he injured his low back in the accident.

The evidence showed that Claimant received authorized treatment for his right shoulder within a few days of the accident. The authorized treating doctor's records from November 1, 1999, showed that Claimant complained of a back injury at that time. The diagnosis on November 1, 1999, was contusion and strain of the right shoulder and upper back muscles.

No evidence was offered which showed that Claimant had sustained the strain to his upper back in any other accident during the three days between October 28 and November 1, 1999. No credible evidence was offered which showed that Claimant had injured his upper back or strained the muscles prior to October 28, 1999. No evidence was offered which showed that the authorized doctor on November 1, 1999, had incorrectly recorded Claimant's upper back complaints or that the doctor had misdiagnosed Claimant's condition as a strain of the upper back muscles. Thus, Claimant clearly met his burden of proving that he injured his right shoulder and upper back in the October 1999 accident at work.

Claimant also proved that he injured his neck in the October 1999 accident at work. Dr. Wilkinson, a neurosurgeon at the Kansas University Medical Center, testified that Claimant's shoulder symptoms could have been related to Claimant's neck problems. The most credible, competent evidence showed that within a few months of the October 1999 accident, Claimant was complaining of neck problems. Dr. Koprivica's February 2000 report showed that Claimant complained of pain on the right side of his neck and in his right shoulder.

In addition, Dr. Frank Holladay, a neurosurgeon, after reviewing Claimant's medical records and examining Claimant, concluded that Claimant's neck pain "certainly" could be related to the October 1999 accident at work. Dr. Fevurly, a specialist in occupational medicine, examined Claimant at Claimant's employer's request and concluded that the "work-related events led to a chronic cervical thoracic pain."

Drs. Wilkinson, Holladay, and Fevurly were credible in their opinions. The evidence supported their opinions. Thus, based on the most credible, competent evidence, Claimant again met his burden of proving that his neck pain and problems were caused by the October 1999 accident at work. Claimant clearly proved that his employment was a substantial factor in causing or contributing to his neck pain and problems.

Claimant, as noted above, however, failed to prove that he injured his low back in the October 1999 accident at work. The medical records showed that Claimant did not complain of any low back pain or problems until nearly two years after the October 1999 accident at work. He offered no credible, competent medical evidence which showed that it would take two years for low back pain to develop after a fall such as the one he sustained on October 28, 1999.

In addition, the medical evidence offered by Claimant failed to support his allegation that he injured his low back in the October 1999 accident at work. Dr. Wilkinson, the neurosurgeon who testified on Claimant's behalf, was confronted with on cross-examination Claimant's medical records for the nearly two-year period subsequent to the October 1999 accident. Dr. Wilkinson acknowledged that the medical records did not show any complaints by Claimant of low back problems for nearly two years after the accident. Dr. Wilkinson then concluded that the fall in 1999 was "probably essentially a nonfactor relative to his low back." He admitted that he could not to a reasonable degree of medical certainty state that Claimant's low back problems and the treatment Claimant received for them were related to the fall at work.

In fact, Claimant offered no credible, competent objective medical evidence which supported his allegation that his low back complaints first raised in 2001 were related in any way to the October 1999 accident. The diagnosis for his low back problems was lumbar stenosis. Dr. Wilkinson admitted that stenosis was usually a degenerative condition. Claimant simply failed to show that his alleged low back pain and problems were clearly work related. Claimant failed to show that his work was a substantial factor in causing his alleged low back pain and complaints. Claimant clearly failed to meet his burden of proving his employer's liability for his alleged low back pain and complaints.

Claimant did, however, prove that he sustained a permanent partial disability of 25 percent to the body as a whole as a result of his injuries from the October 1999 accident at work. The uncontroverted evidence

showed that Claimant sustained a right rotator cuff tear as a result of the October 1999 fall at work. He had surgery to repair the tear. He complained of continuing pain in his right shoulder and limitations in his range of motion. He was credible in his testimony as to his pain. The medical evidence supported that aspect of his testimony.

Dr. Zimmerman, an internist who testified on Claimant's behalf, concluded that Claimant had sustained a permanent partial disability of 25 percent of the right upper extremity rated at the shoulder or 232-week level due to the October 1999 fall at work. Dr. Fevurly, who wrote a report on Claimant's employer's behalf, concluded that Claimant had sustained a permanent partial disability of 10 percent of the right upper extremity due to the fall at work. Dr. Downs, an orthopedic surgeon, performed a "neutral" examination of Claimant at the request of an administrative law judge in Kansas and concluded that Claimant had sustained a permanent partial impairment of 15 percent of the upper extremity. Dr. Downs did not render a Missouri disability rating.

Thus, based on all the evidence, including the ratings by the three doctors, I find that Claimant proved that he sustained a permanent partial disability of 17.5 percent of the right upper extremity, rated at the 232-week level, due to his rotator cuff tear from his October 1999 fall at work. I further find that Claimant proved that he sustained a permanent partial disability of 10 percent to the body as a whole due to his injuries to his cervical and thoracic spine in the October 1999 accident at work.

Claimant complained of severe cervical pain. Although his June 2001 MRI of the cervical spine showed a moderate-sized diffusely protruding herniated intervertebral disc at C3-C4, the evidence did not support his complaints of severe pain and disability. Dr. Wilkinson, who testified on Claimant's behalf, concluded that Claimant did not need surgery due to the C3-C4 herniated disc. He further indicated that he did not believe that the C3-C4 disc problem was "really that significant" for Claimant's symptoms.

Even Dr. Zimmerman, who testified on Claimant's behalf, initially indicated that he had not diagnosed a cervical spine injury as a result of Claimant's October 1999 fall at work. Later, he concluded that Claimant had sustained a permanent partial disability of 10 percent to the body as a whole due to the upper back and thoracic area injuries. He did not render a disability rating pertaining specifically to Claimant's alleged cervical spine injury.

In addition, while Claimant's employer's medical evidence supported Claimant's allegation that he had injured his cervical spine in the October 1999 accident, it did not support Claimant's complaints of severe pain and disability. Dr. Fevurly, who, as noted earlier, wrote a report on Claimant's employer's behalf, concluded that Claimant's work events caused or "significantly" contributed to Claimant's chronic regional cervicothoracic pain. He concluded that Claimant had sustained a permanent partial disability of 5 percent to the body as a whole due to chronic regional cervical and thoracic pain.

Dr. Downs also wrote a report on Claimant's employer's behalf and concluded that Claimant exhibited multiple traits of symptom magnification and that Claimant had not sustained any permanent partial disability due to the alleged cervical spine injury. Dr. Downs' opinions were not entirely credible and he even admitted that Claimant had "at most a permanent aggravation of multiple existing problems." He did not explain why the permanent aggravation did not constitute disability or the effects of it.

Thus, based on all the evidence, including Claimant's testimony, the MRI finding of a herniated disc at C3-C4, and the disability ratings, I find that Claimant met his burden of proving that he sustained a permanent partial disability of 10 percent to the body as a whole for the cervical and thoracic spine injuries he sustained in the October 1999 accident at work.

Moreover, as noted above, Claimant clearly proved that his right rotator cuff tear resulted in a permanent partial disability of 17.5 percent of the right upper extremity at the shoulder or 232-week level, or approximately 10 percent to the body as a whole, and that his cervical and upper back injuries resulted in a permanent partial disability of 10 percent to the body as a whole. The disability from the shoulder and the neck and upper back injuries considered individually resulted in a permanent disability of approximately 20 percent to the body as a whole. Claimant proved that due to the combined effect of the disability to his shoulder and neck and upper back, that he had sustained a permanent partial disability of 25 percent to the body as a whole.

Claimant offered Dr. Zimmerman's opinion as evidence that the disability from the various injuries combined to result in an enhanced disability to his body as a whole. Dr. Zimmerman was credible in that aspect of his testimony. No evidence was offered which contradicted that aspect of his testimony. Thus, based on the most credible, competent evidence, Claimant proved that his right shoulder and neck and upper back injuries combined to result in a permanent partial disability of 25 percent to his body as a whole.

At a rate of \$303.01 per week, for 100 weeks, Claimant's employer is liable for \$30,301.00 in permanent partial disability benefits. Claimant's employer is ordered to pay that amount to Claimant.

Claimant also proved his employer's liability for additional temporary total disability benefits. Claimant's employer paid temporary total disability benefits for the period November 1 to December 15, 1999, and from December 24, 1999, to January 16, 2000. In addition, Claimant's employer paid temporary total disability benefits for the period October 31, 2000, to April 22, 2001.

Claimant argued that his employer was liable for temporary total disability benefits for the period January 17, 2000, to October 30, 2000, for 41 weeks, and for the period April 23, 2001, to August 12, 2003. He offered the opinion of Dr. Zimmerman as support for his argument. Dr. Zimmerman specifically concluded that Claimant was temporarily and totally disabled from the date of the injury until he saw Claimant on September 14, 2003.

Dr. Zimmerman's opinion, however, lacked merit. Dr. Zimmerman offered no objective evidence to support his opinion. His opinion was conclusory. He did not examine Claimant during the period in which he claimed that Claimant was temporarily and totally disabled. He also based his opinion on Claimant's alleged low back injury in addition to the right shoulder and upper back injuries. As noted earlier, Claimant failed to prove that he injured his low back in a work-related accident. Thus, Dr. Zimmerman's opinion was entitled to little weight.

Claimant did prove that he was temporarily and totally disabled for part of the disputed periods. Dr. Strong, Claimant's initial treating orthopedic surgeon, scheduled Claimant for rotator cuff repair surgery on December 16, 1999, and on January 17, 2000. Claimant cancelled both surgeries. Nevertheless, he argued that his employer improperly terminated the benefits on January 17, 2000, because he had a reasonable basis for refusing the surgery.

The statutes allow an employer to terminate benefits if the employee unreasonably refuses to submit to medical treatment. The applicable statute provides as follows:

"No compensation shall be payable for the death or disability of an employee, if and insofar as the death or disability may be caused, continued or aggravated by any unreasonable refusal to submit to any medical or surgical treatment or operation, the risk of which is, in the opinion of the division or the commission, inconsiderable in view of the seriousness of the injury."

§287.140.5 RSMo. 1993.

Claimant did not prove that he had a reasonable basis for refusing the surgeries in December 1999 and January 2000. He testified that he was afraid to have the surgeries under a general anesthetic because as a teenager he had experienced a negative reaction to the general anesthetic and almost died. He testified that he was always willing to have the surgery with the use of a local anesthetic or block.

The medical records showed that Claimant was diagnosed with malignant hyperthermia. That condition refers to a reaction to general anesthesia, often resulting in a sudden rapid rise in body temperature, and is associated with such problems as tachycardia, tachypnea, sweating, and cyanosis. Thus, based on that diagnosis, Claimant proved that he had a reasonable basis for refusing surgery if it could only be done with a general anesthetic. Dr. Koprivica so noted in February 2000 and Dr. Jones' records, to a lesser extent, supported Claimant's allegation regarding the reasonableness of Claimant's concern over surgery with a general anesthetic.

The evidence, however, did not support Claimant's allegation that the initial authorized treating orthopedic surgeon was only willing to do the surgery under a general anesthetic. Thus, as noted above, the evidence did not

show that Claimant had a reasonable basis for refusing the surgeries. Dr. Strong's records showed that she was willing to attempt to do the surgery in both December 1999 and January 2000 with a local anesthetic. Claimant cancelled both surgeries. He did not allow her to even attempt the surgery with a local anesthetic or block. There was no evidence that it was reasonable for him to refuse the surgery with a local anesthetic or block.

In addition, Dr. Jones, the orthopedic surgeon to whom Claimant was referred by his employer, indicated on October 31, 2000, that the surgery could certainly be done primarily under a scalene block. On January 19, 2001, Dr. Jones attempted to do the surgery under a local anesthetic but ended up using a general anesthetic. Dr. Jones noted that Claimant tolerated the procedure well and experienced no problems with the general anesthetic.

Thus, Claimant's argument that he was entitled to temporary total disability benefits for the period January 17 to October 31, 2000, based on his alleged reasonable refusal of surgery was without merit. As noted above, he offered no evidence that his refusal of the surgery under a local anesthetic or block was reasonable. The evidence showed that his treating orthopedic surgeon was willing to attempt the surgery in December 1999 and January 2000 with a local anesthetic or block. Claimant cancelled both surgeries. He clearly failed to show that his actions were reasonable in refusing to accept the recommended treatment and he failed to prove his employer's liability for temporary total disability benefits for the period January 17 to October 31, 2000.

The parties stipulated that Claimant's employer reinstated the temporary total disability benefits effective with October 31, 2000, when Dr. Jones became the authorized treating doctor and Claimant accepted the treatment recommendations. Claimant's employer paid such benefits until April 22, 2001. Claimant argued, however, that he was also entitled to such benefits for the period April 23, 2001, through August 12, 2003. The evidence did not support Claimant's argument that he was entitled to such benefits for that entire 2 1/3-year period.

Dr. Jones performed the rotator cuff repair on January 19, 2001. On April 17, 2001, Dr. Jones noted that he was going to release Claimant to return to work effective with April 23, 2001. Apparently, based on that release, Claimant's employer terminated the temporary total disability benefits.

On May 29, 2001, however, Dr. Jones indicated that the work release effective for April 23, 2001, pertained to Claimant's alleged shoulder problems. He noted that due to Claimant's alleged cervical problems, he was placing Claimant under restrictions of no repetitive work overhead and no lifting to the shoulder level. He stated that Claimant complained of "very" significant cervical spine pain, particularly at extension. He recommended an MRI of Claimant's cervical spine.

The cervical spine MRI showed a herniated disc at C3-C4. On July 11, 2001, Dr. Jones noted that Claimant was doing well as far as the shoulder was concerned and that the lifting restriction of 70 pounds pertained to Claimant's neck pain and problems. He also indicated that Claimant had requested a note stating that Claimant could not work due to neck and back problems. He noted, however, that Claimant's employer's workers' compensation insurer was denying that such problems were work related.

As noted earlier, Claimant met his burden of proving that he injured his cervical spine in the October 1999 accident at work. He testified that his job as a delivery driver for the United Parcel Service required him to lift 70 pounds. He was credible in his testimony on that aspect of his job. No evidence was offered which contradicted his testimony. Thus, based on the most credible, competent evidence, Claimant met his burden of proving that due to the medical restrictions placed on him by the authorized treating doctor, that he became temporarily and totally disabled after April 23, 2001, when his employer terminated such benefits.

Claimant proved that due to his cervical spine injury, he was temporarily and totally disabled effective with May 29, 2001, when Dr. Jones, the authorized treating doctor, placed the medical restrictions on him due to cervical pain and problems. He also proved that he remained temporarily and totally disabled through October 4, 2001. Thus, he proved his employer's liability for such benefits for the period May 29 to October 4, 2001, or for 18 2/7 weeks. His employer is ordered to pay temporary total disability benefits to him for that period.

Dr. Jones's last chart entry was July 11, 2001. There was no evidence that Dr. Jones examined or treated Claimant after that date. Dr. Fevurly, however, wrote a report addressed to Claimant's employer dated May 10,

2004. Dr. Fevurly concluded in the report that Claimant had sustained a rotator cuff tear and a cervicothoracic spine injury in the October 1999 fall at work. He concluded after reviewing the medical records that Claimant had reached maximum medical improvement from the 1999 work-related injuries on October 4, 2001, the date of the evaluation performed by Dr. Holloday.

Dr. Fevurly was credible in his opinion as to when Claimant reached maximum medical improvement. The evidence supported his opinion. No credible evidence was offered which contradicted his opinion. As noted earlier, Dr. Zimmerman's opinion on that issue was completely lacking in credibility. Thus, based on the most credible, competent evidence, Claimant met his burden of proving that he remained temporarily and totally disabled during the period May 29 to October 4, 2001.

At a rate of \$578.48 per week, for 18 2/7 weeks, Claimant's employer was liable for an additional \$10,577.92 in temporary total disability benefits. Claimant's employer is ordered to pay that amount to him.

Finally, Claimant argued that he was entitled to future medical treatment. Again, he failed to meet his burden of proof. As noted earlier, Claimant did not prove that he injured his low back in the October 1999 accident at work. Therefore, Dr. Wilkinson's conclusion that Claimant needed future treatment for the low back was irrelevant. Moreover, as noted earlier, Dr. Wilkinson even admitted on cross-examination that he could not to a reasonable degree of medical certainty state that Claimant had injured his low back in the October 1999 accident at work.

Claimant only proved that he injured his right shoulder, neck, and upper back in the October 1999 accident at work. None of the treating neurological or orthopedic surgeons recommended any future medical treatment for Claimant's right shoulder, neck, or upper back. Dr. Wilkinson, who testified on Claimant's behalf, admitted that although Claimant's MRI of the cervical spine showed persistent disc problems at C3-C4, he believed that they were not "really that significant." He did not recommend any future treatment.

Dr. Jones, who did the rotator cuff repair, similarly indicated that Claimant had achieved a good result from the surgery. In July 2001, Dr. Jones stated that the findings from his examination of Claimant's right shoulder were essentially normal. He stated that Claimant's shoulder was doing very well. He did not make any recommendations of future medical treatment.

In addition, Dr. Fevurly noted on May 10, 2004, that, "There is no reasonable indication or expectation for further surgical, pan [sic] clinic, or physical therapy intervention to the work-related right shoulder and cervicothoracic pain. The never ending evaluation and treatment to the tecticular and lumbar spine should also be concluded as it has resulted in no clinical benefit and it is now more likely to harm him rather than benefit him. The treatment of choice is reassurance and encouragement to return to a more active life style. His further recovery is now completely up to him and he must become an active participant in his recovery."

Drs. Wilkinson, Jones, and Fevurly were credible in their opinions. No credible evidence was offered which contradicted their opinions. Thus, based on the most credible, competent evidence, Claimant failed to meet his burden of proving that he needed any future medical treatment to cure and relieve him of the effects of his work-related right shoulder, neck, and upper back injuries.

Finally, Claimant also failed to prove that the Second Injury Fund had any liability in the case. The statute provides that to establish Second Injury Fund liability in a permanent partial disability case, the employee must prove that he sustained an injury on the job and that the injury was of such seriousness as to result in a permanent partial disability of 12.5 percent to the body as a whole, or 15 percent of a major extremity if the injury was to a major extremity. §287.220.1 RSM0 (1993).

The statute also provides that in such cases, the employee must prove that he had a disability which pre-existed the injury on the job and that the pre-existing disability was of such seriousness as to result in a permanent partial disability of 12.5 percent to the body as a whole or 15 percent of a major extremity if the pre-existing injury was to a major extremity. *Id.* The threshold disability amounts do not apply in cases where the employee proves that he was rendered permanently and totally disabled due to the pre-existing disability combining with the disability from the injury on the job to render the employee permanently and totally disabled. *Id.*

Also, in addition to the threshold disability amounts, to establish Second Injury Fund liability, in both permanent partial and permanent total disability cases, the employee must show that the pre-existing disability constituted a hindrance or obstacle to his employment or re-employment. *Id.*; See also Garibay v. Treasurer, 930 SW 2d 57 (Mo.App.1996); Rose v. Treasurer, 895 SW2d 591 (Mo.App.1995); and Wuebbeling v. West County Drywall, 898 SW 2d 615 (Mo. App. 1995).

First, Claimant offered no credible, competent evidence which showed that his alleged pre-existing disability constituted a hindrance or obstacle to his employment or re-employment. Thus, on that basis alone he failed to prove that the Second Injury Fund had any liability in the case.

Claimant alleged pre-existing disability due to several low back injuries and as a result of a bilateral de Quervain's release. He admitted that subsequent to those injuries he continued to work for United Parcel Service. He testified that his job duties for United Parcel Service required heavy lifting. He offered no evidence that the alleged pre-existing low back injuries or upper extremity injuries had constituted a hindrance or obstacle to him in performing the heavy lifting on his job at United Parcel Service or in performing any other job. He clearly failed to prove that his pre-existing low back and bilateral upper extremity injuries constituted a hindrance or obstacle to his employment or re-employment.

Claimant also failed to prove that his alleged pre-existing disability had resulted in a permanent partial disability of 12.5 percent to the body as a whole or 15 percent of a major extremity. Claimant alleged pre-existing disability as a result of low back injuries. He admitted that he settled his workers' compensation cases based on a permanent partial disability of 3 percent to the body as a whole for all the cases. Obviously, that did not constitute 12.5 percent to the body as a whole or meet the threshold requirement of the statute.

Similarly, Claimant admitted that he settled his pre-existing bilateral upper extremity case based on a permanent partial disability of 10 percent to the body as a whole. Again, that did not constitute a permanent partial disability of 15 percent of each major extremity, or 12.5 percent body as a whole, as is required by the statute. Claimant clearly failed to prove that the Second Injury Fund had any liability in the case based on permanent partial disability.

Claimant also failed to prove that he was permanently and totally disabled. Missouri courts have repeatedly held that the test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether an employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition. Garcia v. St. Louis County, 916 SW 2d 263 (Mo.App. 1995); Lawrence v. RVII School District, 834 SW 2d 789 (Mo.App.1992); Carron v. St. Genevieve School District, 800 SW 2d 6 (Mo.App.1991); Fischer v. Arch Diocese of St. Louis, 793 SW 2d 195 (Mo. App.1990). The employee's age, education, work experience, and injuries must be considered.

Claimant offered no evidence that he was permanently and totally disabled. His own rating physician, Dr. Zimmerman, did not conclude that he was permanently and totally disabled. No vocational expert testified that he was permanently and totally disabled. Moreover, the evidence clearly showed that Claimant was not permanently and totally disabled. Claimant is a young man. He is only 36 years old. He has a high-school education and some college courses. Dr. Jones, his treating orthopedic surgeon, indicated that Claimant had a good result from the rotator cuff repair. He concluded that Claimant was able to work after the injury and repair. Drs. Wilkinson and Fevurly indicated that Claimant's cervical spine injury was not that severe. Neither concluded that Claimant was permanently and totally disabled due to the shoulder, neck, or upper back injuries.

Thus, the evidence clearly showed that Claimant failed to prove that he was permanently and totally disabled. As such, and because he failed to prove that his alleged pre-existing disability met the threshold requirements as set out in the statute for permanent partial disability, he failed to prove the Second Injury Fund's liability for benefits based on either permanent partial or permanent total disability.

In conclusion, Claimant proved that he sustained injuries to his right shoulder, neck, and upper back in the October 1999 accident at work. He proved that he sustained a permanent partial disability of 25 percent to the body as a whole as a result of the injuries. He also proved his employer's liability for an additional 18 2/7 weeks of

temporary total disability benefits. He did not prove his employer's liability for future medical treatment or the Second Injury Fund's liability for compensation.

Date: _____

Made by: _____

Kenneth J. Cain
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation