

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

Injury No.: 03-136465

Employee: Billy Joe McMunn
Employer: Complete Roofing, Inc. (Settled)
Insurer: Missouri Employer's Mutual (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 20, 2008. The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued November 20, 2008, 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 21st day of July 2009.

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: Billy Joe McMunn

Injury No. 03-136465

Dependents: N/A

Employer: Complete Roofing, Inc.

Additional Party: Second Injury Fund

Insurer: Missouri Employer's Mutual

Appearances: Gary Matheny for the employee. Eileen Krispin for the Second Injury Fund.

Hearing Date: August 21, 2008

Checked by: LCK/kh

SUMMARY OF FINDINGS

- Are any benefits awarded herein? Yes.
- Was the injury or occupational disease compensable under Chapter 287? Yes.
- Was there an accident or incident of occupational disease under the Law? Yes.
- Date of accident or onset of occupational disease? On or about April 11, 2003.
- State location where accident occurred or occupational disease contracted: Cole County, Missouri.
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
- Did employer receive proper notice? Yes.
- Did accident or occupational disease arise out of and in the course of the employment? Yes.
- Was claim for compensation filed within time required by law? Yes.
- Was employer insured by above insurer? Yes.
- Describe work employee was doing and how accident happened or occupational disease contracted: The employee injured his low back while moving a ladder.
- Did accident or occupational disease cause death? No.
- Parts of body injured by accident or occupational disease: Low back and body as a whole.
- Nature and extent of any permanent disability: 22% of the body as a whole referable to the low back against the employer-insurer. Permanent total disability against the Second Injury Fund.
- Compensation paid to date for temporary total disability: None.

- Value necessary medical aid paid to date by employer-insurer: None.
- Value necessary medical aid not furnished by employer-insurer: N/A.
- Employee's average weekly wage: \$770.00.
- Weekly compensation rate: \$513.59 for permanent total disability. \$340.12 for permanent partial disability.
- Method wages computation: By agreement.
- Amount of compensation payable: Permanent Total Disability against the Second Injury Fund.
- Second Injury Fund liability: Permanent Total Disability.
- Future requirements awarded: See Findings of Fact and Rulings of Law.

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: Gary Matheny.

FINDINGS OF FACT AND RULINGS OF LAW

On August 21, 2008, the employee, Billy McMunn, appeared in person and with his attorney, Gary Matheny, for a hearing for a final award in the employee's claim against the Second Injury Fund. The Second Injury Fund was represented at the hearing by Assistant Attorney General Eileen Krispin. 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

- On April 11, 2003 Complete Roofing, 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 Missouri Employers Mutual.
- On April 11, 2003 Billy McMunn was an employee of Complete Roofing, Inc., and was working under the Workers' Compensation Act of Missouri.
- The employer had notice of the employee's alleged accident.
- The employee's claim was filed within the time allowed by law.
- The employee's average weekly wage was \$770.00. The rate of compensation for permanent total disability is \$513.59 per week and for permanent partial disability is \$340.12 per week.
- The employer-insurer did not pay any medical bills.
- The employer-insurer did not pay any temporary total disability benefits.
- The parties agreed to a change of venue from Cole County Missouri to Jefferson County Missouri.

Judicial notice of the contents of the Division's files for the employee was taken. On June 29, 2006, the employee settled his claim against the employer-insurer for 22% of the body as a whole referable to the low back.

ISSUES

- Accident

- Medical causation
- Liability of the Second Injury Fund for permanent total disability or permanent partial disability

EXHIBITS

The following exhibits were admitted into evidence:

Employee's Exhibits

- Copy of stipulation for compromise settlement against the employer-insurer
- Medical records of Mid-America Orthopedic Surgery, Inc.
- Medical records of Dr. Gragnani
- Certified copy of the employee's Workers' Compensation file in injury number 90-006489
- Medical records of Dr. Sides
- Medical records of St. Anthony's Medical Center
- Medical records of Des Peres Hospital
- Medical records of Dr. Chabot
- Medical records of Pain Management Center
- Medical records of Dr. Anderson
- Medical records of Dr. Anderson
- Deposition of Dr. Berkin which includes his CV and report
- Deposition of Susan Shea which includes her CV and vocational assessment report

Witness: Billy McMunn the employee

Briefs: The employee filed his brief on August 29, 2008. The Second Injury Fund filed its brief on September 4, 2008.

FINDINGS OF FACT:

The employee is 56 years old. He went through 10th grade and received a GED. He has no other training or vocational experience. His vocational history is almost all in the roofing industry. He worked in a box plant for about 6 months and was involved in the production of corrugated boxes. He also worked in a window plant. He started working in the roofing industry around 1971 and worked until 2004. He started as a roofer and was also a foreman. A roofing foreman works side by side with the roofers. He injured his left ankle in the late 1970's in a motorcycle wreck, had surgery, and continued to do roofing but his ankle was sore.

Prior Low Back Condition:

The employee injured his low back lifting propane on January 30, 1990. He saw Dr. Vanderlugt in February with left buttock pain. The doctor diagnosed lumbosacral sprain syndrome and degenerative joint disease. Therapy was prescribed. In April the doctor ordered a lumbar CT scan which showed a minimal bulging disc without significant herniation at L5-S1. In June the employee had an MRI that showed disc degeneration at L2-3, L3-4, L4-5 and L5-S1 but no focal disc herniation or significant encroachment. A bone scan showed degenerative joint disease at the lumbosacral junction. He had a negative EMG and NCV for nerve root involvement. In July Dr. Vanderlugt stated that the employee needed vocational rehabilitation but was not disabled and would see him on an as needed basis.

The employee saw Dr. Gragnani at the end of August. The employee worked as a roofer since 1971 and had back pain for at least the last five years. Dr. Gragnani noted the January 30 low back incident and that the employee

had been off work. He reviewed the prior MRI and the CT scan and noted that there was degeneration at the last three lumbar discs but no evidence of a disc herniation or nerve root compression. Dr. Gragnani ordered another CT scan which was normal. He returned the employee to work duties.

In October, Dr. Gragnani stated that the employee returned to work and had increased discomfort in his back without any particular injury. Dr. Gragnani ordered an MRI and bone scan which showed a disc bulge at L5-S1 slightly to the left which is the opposite side of where the employee had his pain. He released the employee to return to work without restriction. In November, Dr. Gragnani noted a myelogram and post myelogram CT scan showed no significant abnormality and a minimal disc bulge at L5-S1. In December Dr. Gragnani rated the employee at 3-5% disability for subjective complaints to his back.

The employee was seen by Dr. Morrow in March of 1991. With regard to the January 30, 1990 accident, Dr. Morrow diagnosed a lumbosacral sprain with bulging lumbar disc at L5-S1 superimposed upon pre-existing chronic lumbosacral sprain. Dr. Morrow stated the employee had a 50% permanent partial disability of the body as a whole attributable to the low back with 10% pre-existing and 40% attributable to the work injury. Dr. Morrow recommended that the employee avoid work involving repeated bending at the waist; repeated squatting, pushing and pulling of objects without adequate rest intervals; repeated lifting of weights in excess of fifteen pounds; ascending and descending of steps; and all types of climbing. Dr. Morrow did not feel that the employee would be employable as a roofer.

In August of 1991, Dr. Gragnani re-examined the employee and due to substantial subjective complaints ordered a work capacity evaluation which showed that the employee was functioning in the moderate work category which is beneath the category of work required for a roofer. Moderate work category would indicate that his maximum single lifting limit would be no greater than fifty pounds with a more frequent lift and/or carry up to twenty-five pounds with the same weight restrictions for pushing and pulling. Dr. Gragnani did not think that there was any further treatment that would benefit him.

In August of 1992, Administrative Law Judge Wieland issued an award which stated that the employee had an overall permanent partial disability of 17.5% of the low back with 12.5% due to the January 30, 1990 work accident and 5% pre-existing. In October of 1992, the employee settled his case for 12.5% permanent partial disability to the body as a whole referable to the low back.

After the 1990 accident and injury, the employee stopped installing roofs. The employee could no longer do physical labor because he was in too much pain with heavy lifting. He started working as a consultant and inspector which was not as much physical labor. He went up on roofs to inspect and evaluate. Sometimes he would design a new roof and would inspect for quality control during production, and cut core samples. He later became a roofing estimator.

In 2001, the employee lifted something and felt a snap in his back. The employee saw Dr. Sides in April with a 5-6 week history of low back pain with no radiation. Dr. Sides diagnosed acute exacerbation of chronic back pain and recommended that the employee take off work and prescribed physical therapy. Dr. Sides continued Vioxx, Skelaxin and Lorcet Plus.

In May, Dr. Sides ordered an MRI which showed a large left paracentral disc protrusion at L5-S1 that caused definite mass effect upon the existing nerve root and the anterior lateral aspect of the thecal sac.

In May, the employee was seen by Dr. Chabot with lower lumbar back pain which radiated into the left buttock and left lower extremity to about the knee level. He had a 20 year history of a bad back. He had some left lower extremity weakness and numbness. An MRI revealed evidence of a focal disc herniation at L5-S1 on the left. Dr. Chabot ordered therapy.

In June, the employee had severe lower lumbar back pain with radiation into the buttocks. The employee had limited range of motion in the back and reduced left alkalis reflex with decreased sensation along the L5 nerve root distribution. On June 26, 2001, Dr. Chabot performed a lumbar laminectomy and excision of disc at L5-S1. The employee was returned to regular work on July 6. In August Dr. Chabot performed a left SI injection.

In December of 2001, the employee continued to have low back pain and some numbness and tingling down his left leg. As long as he takes two Ultram tablets twice a day, he can function, but if he doesn't the pain becomes very intense. Dr. Sides diagnosed chronic back pain secondary to degenerative disease and post surgical laminectomy. Dr. Chabot noted that the employee had lower back and hip pain which occasionally radiated into the lower extremities and occasional numbness in his left leg. Dr. Chabot recommended Vioxx, and released him to return on an as needed basis.

From 1990 to April of 2003, the employee did not install roofs because of his back. The last four or five years before April of 2003, he worked as a roofing estimator where he would get up on ladders, inspect roofs and prepare bids.

The employee testified about the problems he was having with his left ankle and low back prior to April 11, 2003. With regard to his left ankle, he had arthritis and was prescribed Vioxx and Bextra. When his ankle flared up, the more he walked the more problems he had. When he went up and down ladders, his ankle slowed him down. If he worked on a slant or slope, his ankle hurt more. With regard to his low back, if he did a lot of exertions, his back would bother him quite a bit but it was not excruciating. After the surgery in 2001, his back was better but he still had problems. Occasionally his back would flare up and he would take off work. He could walk without pain had trouble sitting for a real long period of time. He was able to lift up to 100 pounds and could lift 50-60 pounds on routine basis with pain.

Alleged April 11, 2003 Accident:

The employee testified that on April 11, 2003, he was doing field work on a bank roof that had multiple elevations. He was doing core cuts and had to pull the extension ladder to different elevations. While moving the ladder, he twisted his back and felt low back pain.

On April 14 the employee saw Dr. Sides with an exacerbation of his chronic back pain. The employee takes Ultram for his back, had surgery in the past and it was sometimes very difficult for him to do his job. Dr. Sides noted the employee worked as a salesman for a roofing company and did a lot of climbing. The last time he was on a ladder and twisted, he felt acute pain in his back. He has been having severe pain since that time. He was unable to bend, sit, lie, or sleep. He has been having symptoms for about a week. The employee had marked paravertebral muscles spasms worse on the left than the right. Dr. Sides impression was acute exacerbation of chronic back pain and took the employee off work. The employee was to stop Ultram and begin Lorcet for pain; and take Zanaflex and Skelaxin.

The employee returned to see Dr. Sides on April 21. His discomfort was better because he had not been working or moving around. He continued to have sharp pain when he got up from sitting or lying. Dr. Sides scheduled an MRI and referred the employee to Dr. Chabot.

The April 23 MRI showed at L5-S1 protruding disc material to the left of midline which extruded posteriorly and created a ventral impression upon the left side of the thecal sac and in the region of the existing nerve root. There appeared to be a laminotomy on the left side. The impression was prominent left sided disc protrusion at L5-S1.

On April 28, Dr. Chabot noted that he had not seen the employee since December of 2001. The employee had lower lumbar back pain which has been present for three or four weeks. The employee was pulling on a ladder when he apparently strained and re-injured his low back. He developed sharp lower lumbar and lumbosacral back pain with occasional radiation into the right lower extremity with numbness and paresthesia involving the right leg. Dr. Chabot's impression was sacroiliitis, sciatica, back pain, disc degeneration, and lumbosacral sprain. Dr. Chabot performed a right SI injection.

In June Dr. Chabot stated that the employee had physical therapy, anti-inflammatory medication and SI

injections but the low back pain with right lower extremity radiation had increased in severity. Dr. Chabot noted that the employee had complaints of intractable back pain radiating into the left greater than the right lower extremity which had not responded to conservative measures. The employee underwent diagnostic studies which revealed evidence of a large recurrent disc herniation at L5-S1 with extruded fragments to the disc space extending into the spinal canal. On July 1, Dr. Chabot performed a laminectomy redo at L5-S1, a posterior lumbar interbody fusion at L5-S1, insertion of implants at L5-S1 and a iliac crest bone graft.

The employee testified that he was released to work in September of 2003, and tried to work but had lots of low back problems. He could not do core cuts, had trouble going up and down ladders, had trouble with steps, and had excruciating pain while on ladders.

On September 26, Dr. Chabot stated that the employee has returned to regular work duties and started experiencing right leg pain with radiation into the right foot over the last couple of weeks. He has numbness involving the right foot and denied any specific injury associated with the onset of the symptoms. Dr. Chabot performed a right SI injection and ordered an MRI.

On October 2, Dr. Chabot stated that the MRI revealed no evidence of recurrent disc herniation. The implant position of L5-S1 was anatomic and the fusion appeared to be complete. Dr. Chabot did not have good reason for the employee's complaints and recommend the employee undergo a lower extremity EMG and nerve conduction study to rule out neuropathy as the cause for his persisting complaints since there was no overt evidence of neural compression involving the lumbar spine.

The employee testified that on October 8, 2003, he was rear ended by a small car and was concerned about his fusion and went to the hospital as a precaution.

The employee was seen on October 8 at St. Anthony's Medical Center Emergency Room on a walk in basis. The employee was in a motor vehicle accident where he was at a complete stop and was rear ended by a vehicle. The employee hit his head on the head rest but had no loss of consciousness. The employee had a mild headache, neck pain, mid back pain and numbness to the right leg. The dull pain in the mid back was an eight to nine out of ten with no radiation. The employee had chronic right sciatica since his back surgery. There was positive straight leg raising on the right and pain in the mid back area. There was no deformity noted to the back. X-rays were taken of the right hip which showed no fracture. Lumbar spine x-rays were taken which showed post-operative changes of discectomy and interbody fusion at L5-S1 with two bone cages in place. There was no fracture, subluxation or spondylosis. An x-ray of the cervical spine showed no acute abnormality.

The employee testified that he had no worsening of his physical complaints after the October 8, 2003 motor vehicle accident.

The employee was referred to Dr. Creighton who performed 6 sacroiliac joint injections from November of 2003 through January of 2004.

On January 8, 2004 the employee saw Dr. Sides. After surgery in July he was off work for approximately nine weeks and he had a lot of improvement. After he returned to work, his severe back pain resumed and he is now being treated in a chronic pain management clinic. He is on narcotic medication and has undergone several different rounds of injections. Dr. Sides stated he had long discussions regarding the employee's activities, limitations and pain. Dr. Sides recommended that the employee pursue disability for his back. Dr. Sides referred the employee to Dr. Anderson at the Pain Management Center.

The employee saw Dr. Anderson on February 19 for low back, right hip and leg pain. The complaints have been present since the early 1980's. The employee underwent chiropractic care for a long period until his pain became severe and he had a lumbar discectomy in 2001 by Dr. Chabot. The employee re herniated his disc after pulling an extension ladder with a twisting type motion whereby he felt a popping and severe pain. He then underwent a second discectomy with a fusion in July of 2003. The fusion relieved his left leg pain symptoms but did not change his low

back and right leg pain. The employee had constant dull low back pain which was sharp with certain movements and radiated into the right low back, right buttock and posterior thigh with an intermittent aching and an occasional sharp pain. He also had intermittent numbness and tingling in the right foot and toes which has been present since his first surgery in 2001 and has frequent charley horses in his calves. He expected improvement since not working but has not noticed any significant change. The employee's pain worsened with moving from sitting to standing, twisting, prolonged standing, walking or bending. He does not sleep well at night due to pain. His current medications were Percocet, Tramadol and Vioxx. The employee has dramatically decreased range of motion of the lumbar spine and severe discomfort with flexion and extension. Dr. Anderson's impression was post laminectomy syndrome status post L5-S1 lumbar laminectomy with fusion; and depression, anxiety and insomnia secondary to the above. Neurontin was prescribed.

Dr. Anderson noted that the employee has been forced to withdraw from work as a roofing inspector due to severe pain. The employee was motivated to continue to work but has been unable to tolerate most all strenuous activity including climbing ladders, bending or lifting. He has controlled the symptoms largely with a decrease in activity and being on Ultram and Percocet. Dr. Anderson performed a lumbar epidural procedure over the right L5 nerve branch.

In March, Dr. Anderson performed a right L5-S1 epidural nerve root block. In April, the employee stated the nerve root block gave him good relief of symptoms until he increased his activity. The employee and Dr. Anderson discussed medication usage.

On April 30 at the Pain Management Center, the possibility of treatment with extended release narcotic therapy was discussed. The employee has used OxyContin with moderate to good improvement of his pain symptoms. The employee was able to be moderately physically active and has attempted turkey hunting however he is unable to sit for more than an hour or two at a time. He used Percocet for breakthrough pain.

On July 2, the Pain Management Center diagnosed post laminectomy syndrome, multi-segmental degenerative disc disease most noted at L5-S1, mild depression and insomnia. The employee had increased pain with increased activity and had to decrease his activity. His right posterior leg pain goes into the foot with numbness. A selective nerve root block improved his symptoms for a number of months but his pain has gradually returned. Neurontin was prescribed and OxyContin was refilled.

On July 23 Dr. Anderson performed a right L4 and L5 nerve root block. In August the employee told Dr. Anderson that after the nerve root block, he had significant reduction in his right buttock, hip and leg pain. He has resumed his normal day to day activities performing household chores. The OxyContin has been sufficient for his symptoms.

In October, the employee returned to the Pain Management Center for a refill of medication. The cold weather and increased activities specifically regarding bow hunting which required climbing up and down trees has made the employee unable to decrease his medication. The employee is able to stand for approximately one hour before he gets severe symptoms in the right foot and leg.

In December of 2004, the employee told Dr. Anderson over the past number of weeks he had increased pain with activity. Dr. Anderson performed a right L1 nerve block.

In May of 2005 the employee had increased right buttock, thigh, calf and foot pain and an aching numbness to his foot when walking less than 100 yards. He continued to take OxyContin and Percocet. Dr. Anderson performed a right L5 nerve root block. In mid August, Dr. Anderson performed a selective right L5 nerve root block. In late August, the employee had increased pain, was using more Percocet, his leg pain was a constant deep charley horse to his distal right thigh. In November, Dr. Anderson performed a right L5 nerve root block for severe low back, hip and leg pain.

Dr. Anderson performed right L5 nerve root blocks in February and March of 2006. The employee had severe low back and predominantly right leg pain symptoms and has experienced worsening left leg pain. Percocet was

increased. In May, Dr. Anderson performed a right L5-S1 nerve root block.

In July Dr. Anderson noted that the employee suffered from intractable low back pain and bilateral leg pain with right sided predominance. He had severe and ongoing symptoms with activities in daily living and has been treated with high dose narcotic analgesics with inadequate reduction of symptoms. Dr. Anderson diagnosed lumbar sacral nerve root injury with intractable pain and performed a placement of a trial spinal cord stimulator.

On August 3, Dr. Anderson diagnosed a lumbar sacral nerve root injury with intractable pain and post laminectomy syndrome. The employee had a 70-80% reduction in low back and right leg symptoms after a trial spinal cord stimulator. Dr. Anderson performed an implantation of a spinal cord stimulator.

In December, the employee noted that he had additional pain when going deer hunting which required an increase in Percocet. Dr. Anderson noted the employee continued to rely quite heavily on narcotic analgesics for pain relief and continued to use his spinal cord stimulator which provided adequate control of his leg symptoms but his back was the most problematic. Dr. Anderson continued OxyContin and increased his Percocet. Dr. Anderson discussed a narcotic holiday as an option for his progressive tolerance and initiated a trial of Lyrica.

The employee saw Dr. Anderson monthly in January through May of 2007. On May 2, 2007 Dr. Anderson's diagnosed post laminectomy syndrome, multi-segmental degenerative disc disease at L5-S1, mild depression and insomnia. The employee stated with the increase in OxyContin with Percocet he had a significant improvement in his baseline pain symptoms as well as improvement in his function. At the end of August, Dr. Anderson noted that the employee's spinal cord stimulator provided mild relief.

On February 7, 2008 the employee was seen by Dr. Anderson for low back and left foot pain. Dr. Anderson noted that the spinal stimulator generator was beginning to ulcerate through the skin. The employee's low back pain was moderately controlled and leg pain was well controlled with the use of his spinal cord stimulator. Dr. Anderson suggested a generator revision with placement of a third lead for stimulation. In February, Dr. Anderson performed a revision of implant and spinal cord stimulator leads for post-laminectomy syndrome. In March of 2008, Dr. Anderson performed a selective right L5 nerve root block due to post laminectomy syndrome and right L5 radiculopathy.

Dr. Berkin Report and Deposition:

The employee saw Dr. Berkin on March 10, 2005. In his physical examination there was palpable muscle spasms present over the paraspinal muscles. The employee had significant loss of motion in flexion and extension. The Achilles' reflexes were absent bilaterally which showed some compromise of the S1 nerve.

Dr. Berkin diagnosed the employee with a lumbar strain with a recurrent disc herniation at L5-S1 with lumbar laminectomy and discectomy at L5-S1 with posterior interbody fusion, with interbody implant insertion and posterior iliac crest bone graft. It was Dr. Berkin's opinion that the employee's accident in April of 2003, when the employee was lifting an extension ladder onto a roof, was a substantial factor in causing the lumbosacral strain with recurrent disc herniation at L5-S1. Dr. Berkin stated that the work incident caused his injury. It was Dr. Berkin's opinion that as a result of the April 2003 injury, the employee sustained a 45% permanent partial disability of the body as a whole at the lumbar spine.

Dr. Berkin stated that the employee had a pre-existing back condition from two prior injuries. The first occurred in 1990 and he received extensive treatment by Dr. Vanderlugt, an orthopedic surgeon and from Dr. Gragnani, a physiatrist. The employee had another injury in 2001 and was treated by Dr. Chabot who performed surgery in June of 2001 with a lumbar laminectomy and discectomy of the herniated L5-S1 disc. It was Dr. Berkin's opinion that the employee had an additional 45% permanent partial disability of the body as a whole due to the pre-existing low back condition. It was Dr. Berkin's opinion that the pre-existing disability was a hindrance or obstacle to employment. It would hinder his ability to be mobile, to move around, to be active, to do lifting, and to bend and twist. The pre-existing problem was a hindrance for the employee to do roofing work.

Dr. Berkin stated that the employee should use analgesics under the direction of his pain management

physician for control of his chronic lower back symptoms, participate in a home exercise program, have a fifteen to twenty pound lifting restriction from the floor to the waist as a single event and a ten pound lifting restriction from the waist to the level of the shoulder. The employee should avoid lifting or working with his arms above shoulder level; and should avoid excessive squatting, kneeling, stooping, turning, twisting, pulling and climbing.

It was Dr. Berkin's opinion that the pre-existing disability and the disability associated with the April 11, 2003 incident combined to create a greater overall disability than the simple arithmetic sum. The primary injury and disability and the pre-existing condition and disability synergistically react to make his overall disability greater than adding the two together.

Dr. Berkin did not think that the employee is employable in the open labor market. It was Dr. Berkin's opinion that the employee is permanently and totally disabled from work. Dr. Berkin stated considering the nature and extent of disability, symptoms and limitation in the lower back, he did not think the employee was going to be able to attain employment and if the employee were to become employed he did not think the employee would be able to maintain employment. It was his opinion that the employee is not employable in the open labor market from a combination of his disability from the pre-existing back and the back injury that occurred on April 11, 2003.

Dr. Berkin did not perform any vocational testing and did not do any research of job availability within the open labor market. As a doctor, he has given opinions as to whether people can work. While in the military, he imposed limitations on activities and restricted them from working. Occasionally in his evaluations he will defer to a vocational expert as to a person's employability. In the employee's case, he felt comfortable offering his opinion due to the fact the employee has had a long history of back problems including two surgeries.

Report and Deposition of Susan Shea:

The employee saw Susan Shea on December 7, 2006 for a vocational assessment. The employee stated that he could sit for fifteen to twenty minutes without an increase in pain. He reported poor sleep due to his back pain. He can walk about a half of a mile. He does not lift much at all but even when lifting groceries that weigh 8-10 pounds he felt an increase in pain.

The employee has been doing roofing work since he was eighteen years old. That is the only type of work that he has performed other than working at a factory for about six months. The employee left school in tenth grade and obtained a GED. Ms. Shea did a transferable skills analysis to see if there were types of work that might be available to the employee if he were able to work within his limitations.

Ms. Shea stated the employee is a 55-year-old man and had work related injuries to his back in the 1990's and in 2001. He was restricted to medium work. He was able to continue in the roofing business by acting as an estimator and consultant. In 2003 he had a work related injury which resulted in an additional surgery and left him at a degree of pain which he has been unable to continue to work. It was Ms. Shea's opinion that Mr. McMunn is unemployable in the regular open labor job market of the national economy. The factors adding to the decision include:

- The employee expressed a level of pain with activity which precludes all work.
- The employee takes prescribed narcotic medication which has side effects of drowsiness and attest to his pain level.
- The employee cannot return to past work.
- The employee's skills do not transfer to lighter work.
- The employee's physical limitations do not allow him to even act as a consultant or estimator in the roofing business.
- The employee's age is prohibitive toward learning new skilled work.
- The employee's physical limitations are prohibitive toward him learning new work.
- The employee has been determined disabled by the Social Security Administration which indicates that that agency considers him totally disabled from substantial work.

- The employee has several medical issues that affect his ability to work.
- The employee's numerous medical issues are a disincentive to any prospective employer.

Ms. Shea testified that based upon his limitations he cannot do roofing work and cannot be an estimator due to the work being very physical and stressful. He cannot be a roofing supervisor because they would have to do the same physical work as a roofer.

Ms. Shea stated the employee is unemployable in the national regular workforce and it is highly unlikely that any typical employer would consider the employee as a candidate for hire. She was not aware of any employment that the employee could have in the open labor market. When asked whether his unemployability would be the result of a combination of his disability in the low back that occurred on or about April 11, 2003 and his pre-existing disabilities, Ms. Shea testified that the fact that he had prior back injuries including the surgery would have an effect on his employability. Ms. Shea testified that the employee became a roof estimator due to certain restrictions he had as a result of his previous disability. An estimator would be between a light and medium work level since a medium work level is no greater than fifty pounds.

She did not do any educational testing on the employee but did not have any reason to believe that he had difficulties with reading, writing or math. Mentally he would have no issues in being retrained in another field. Both the employee's age of 55 and the same type of physical work that he had done for many years would make it more difficult to be trained in a different area. Age is one of the factors in determining whether someone is employable because generally speaking the older they are the less employable they are particularly with physically active or unskilled work. Ms. Shea testified that someone with chronic pain disorder is not necessarily unemployable as long as the pain can be controlled to an acceptable degree.

Employee's Current Condition:

The employee testified that he has constant low back pain. The prescription medication takes the sharp pain off but he cannot get comfortable. After standing, sitting or lying for a while, his back hurts. He cannot stoop or bend without stiffness and pain. He has muscle spasms.

His pain affects his ability to sleep. He typically gets up around 3:30 or 4 a.m. and takes a pain pill. He sometimes dozes back to sleep. At 6:30 a.m. he takes an OxyContin, and is able to doze for a couple of hours. The employee gets stiff and has to move around every hour or two. He has trouble finding a comfortable place to sit. Even if he is on a recliner with a heating pad he still has trouble getting comfortable. He has feelings of despair due to the pain and sometimes thinks about suicide.

His back was hurting during the hearing and he took two Percocets. The employee did not think that he would employ himself due to all of his back injuries and how uncomfortable he is. He can do the restrictions prescribed by Dr. Berkin but he is very uncomfortable. He tries to walk $\frac{1}{2}$ to $\frac{3}{4}$ of a mile each day but does not. He is taking OxyContin and Percocet. He drove 25 minutes for the hearing and was uncomfortable.

The employee is currently under Dr. Anderson for pain management. He is wearing a brace that was prescribed last week by Dr. Anderson which he wears most of the time. The employee is on narcotics which include OxyContin two times a day, and Percocet two to four times a day. He has a spinal cord stimulator which he never turns off. Since the April 4, 2003, accident, he has not been able to go back to any job in the roofing industry and cannot think of any job that he could do. The employee can read and write and handle math; and was required to do paperwork as an inspector. He is not aware of any job he could do because of trouble sitting and concentrating.

RULINGS OF LAW:

Issue 1. Accident

The Second Injury Fund is disputing that the employee sustained an accident arising out of and in the course of his employment. The credible testimony of the employee and the medical records including the April 14 note from Dr. Sides and the April 28 note from Dr. Chabot clearly establish that the employee suffered a work related accident while moving a ladder on or about April 11, 2003. I find that on or about April 11, 2003, the employee sustained an accident that arose out of and the course of his employment with Complete Roofing, Inc.

Issue 2. Medical causation

The Second Injury Fund is disputing that the employee's injury was medically causally related to the April 11, 2003 accident.

Dr. Berkin diagnosed the employee with a lumbar strain and recurrent disc herniation at L5-S1 with laminectomy, discectomy and fusion. It was Dr. Berkin's opinion that the employee's April 2003 accident when the employee was lifting an extension ladder onto a roof, was a substantial factor in causing the lumbosacral strain with recurrent disc herniation at L5-S1. Dr. Berkin stated that the work incident caused the employee's injury. Dr. Berkin's opinion on medical causation is corroborated by the employee's testimony and the medical records

The employee was involved in an automobile accident on October 8, 2003. The employee's credible testimony was that he went to the hospital as a precaution since he had recently had the fusion; and that he had had no worsening of his low back or leg symptoms after the motor vehicle accident. The medical records corroborate his testimony. After attempting to return to work and prior to the motor vehicle accident, the employee had an increase in his low back and right lower extremity symptoms; had a lumbar MRI and an injection in his SI joint. In addition an EMG and nerve conduction study of the lower extremity was recommended. The October 8, 2003 hospital records show no increase in low back or leg symptoms, and no traumatic injury shown on x-ray. The subsequent medical records did not mention the motor vehicle accident. I find that the motor vehicle accident did not aggravate the employee's work-related condition and did not make it more symptomatic.

Based upon a review of the evidence, I find that the employee's work related accident on or about April 11, 2003, was a substantial factor in causing the injuries to his low back and resulting medical condition including the lumbar strain and recurrent disc herniation at L5-S1, and the need for the subsequent medical treatment including the laminectomy, discectomy, and fusion at L5-S1. I further find that the injury to his low back and resulting medical condition including the lumbar strain and recurrent disc herniation at L5-S1, and the subsequent medical treatment including the laminectomy, discectomy, and fusion at L5-S1 were medically causally related to the employee's work accident on or about April 11, 2003.

Issue 3. Liability of the Second Injury Fund for permanent total disability or permanent partial disability

The employee is claiming that he is permanently and totally disabled. The term "total disability" in Section 287.020.7 RSMo, means inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. The phrase "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. See 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. See 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." An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of State of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990).

The key question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she entered. See

Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo. App. 1993), and Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995). The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo.

The first question that must be addressed is whether the employee is permanently and totally disabled. If the employee is permanently and totally disabled, then the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the preexisting injuries and conditions and the employee's last injury of April 11, 2003. Under Section 287.220.1, the preexisting injuries must also have constituted a hindrance or obstacle to the employee's employment or reemployment.

There is both medical and vocational evidence that addresses whether the employee is permanently and totally disabled.

Dr. Sides noted that the employee was being treated in a chronic pain management clinic, was on narcotic medication and had undergone several different rounds of injections. Dr. Sides recommended that the employee pursue disability for his back. Dr. Anderson noted that employee had been forced to withdraw from work as a roofing inspector due to severe pain. He diagnosed the employee with lumbosacral nerve root injury with intractable pain, lumbar post laminectomy syndrome which the employee has to rely on narcotics and a spinal cord stimulator.

Dr. Berkin stated that the employee should use appropriate analgesics under the direction of his pain management physician for control of his chronic lower back symptoms, should have a fifteen to twenty pound lifting restriction from the floor to the waist as a single event and a ten pound lifting restriction from the waist to the level of the shoulder. The employee should avoid lifting or working with his arms above the level of the shoulder; and should avoid excessive squatting, kneeling, stooping, turning, twisting, pulling and climbing. It was Dr. Berkin's opinion that the employee is not employable in the open labor market and is permanently and totally disabled. Based upon his symptoms and the limitation in his lower back, Dr. Berkin did not think the employee would be able to attain employment and if he were to become employed he did not think he would be able to maintain the employment.

It was Ms. Shea's opinion that employee is unemployable in the regular open labor market and is unemployable in the regular workforce. Ms. Shea was not aware of any employment that the employee could do in the open labor market and it was highly unlikely that any typical employer would consider the employee as a candidate for hire.

Based on a review of all the evidence, I find that the opinions of Dr. Sides, Dr. Anderson, Dr. Berkin, and Ms. Shea are credible regarding whether the employee is permanently and totally disabled.

In addition to both the medical and vocational evidence, I find that the employee was a very credible and persuasive witness on the issue of permanent total disability. The employee offered detailed testimony concerning the impact his condition has had on his daily ability to function at home or in the work place. His testimony supports a conclusion that the employee will not be able to compete in the open labor market. The employee was observed during the hearing. He was wearing a back brace and exhibited behavior and physical patterns including moving around in his chair numerous times and standing up which support a finding that the employee is suffering from a significant level of pain and discomfort. The testimony and observed behavior of the employee were important on the issue of permanent total disability.

Based on the credible testimony of the employee and the supporting medical and vocational rehabilitation evidence, I find that no employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition and reasonably expect the employee to perform the work for which he is hired. I find that the employee is unable to compete in the open labor market and is permanently and totally disabled.

The Second Injury Fund's position is that if the employee is permanent and totally disabled it is from the last injury alone. There is no credible evidence that the last injury alone caused the employee to be permanently and totally disabled. It was Dr. Berkin's opinion that as a result of the April 2003 injury, the employee sustained a 45% permanent partial disability of the body as a whole at the lumbar sacral spine. A Stipulation for Compromise

Settlement was entered into by the employee and the employer-insurer and approved by the Division. The amount was \$30,000.00 which was based upon an approximate disability of 22% of the body as a whole referable to the low back. I find that as a result of the last injury, the employee sustained permanent partial disability. Based upon the evidence I find that as a direct result of the last injury the employee sustained a permanent partial disability of 22% of the body as a whole referable to his lumbar spine. I find that the employee's last injury alone did not cause the employee to be permanently and totally disabled.

The next issue to be addressed is whether the employee's pre-existing conditions were a hindrance or obstacle to his employment or reemployment.

As a result of the 1990 low back injury, Dr. Gragnani rated the employee at 3-5%. Based upon a work capacity evaluation, the employee was in the moderate work category which is below the requirements of a roofer. He had maximum single lift of 50 pounds and more frequent lifting, pushing or pulling maximum of 25 pounds. Dr. Morrow diagnosed a lumbosacral sprain with bulging lumbar disc at L5-S1 superimposed upon pre-existing chronic lumbosacral sprain. Dr. Morrow stated the employee had a 50% permanent partial disability of the body as a whole attributable to the low back with 10% pre-existing and 40% attributable to the work injury. Dr. Morrow recommended that the employee avoid work involving repeated bending at the waist; repeated squatting, pushing and pulling of objects of light weight without adequate rest intervals; repeated lifting of weights in excessive of fifteen pounds; ascending and descending of steps; and all types of climbing. Dr. Morrow did not feel that the employee would be employable in his normal occupation as a roofer. In August of 1992, Administrative Law Judge Wieland issued an award which stated that the employee had an overall permanent partial disability of 17.5% of the low back of which 12.5% was due to the January 30, 1990 work accident. The remaining 5% was pre-existing. In October of 1992, the employee settled his January 30, 1990 case for 12.5% disability to the body as a whole referable to the low back.

After the 1990 accident and injury, the employee stopped installing roofs due to low back pain when lifting and installing roofing. He started working as a consultant and inspector which was not as much physical labor. In 2001, the employee lifted something and felt a snap in his back. Dr. Sides diagnosed an acute exacerbation of chronic back pain and recommended that the employee take off work and prescribed physical therapy. Dr. Chabot diagnosed a large disc herniation at L5-S1 on the left and performed a laminectomy and discectomy. In December of 2001, the employee was taking two Ultram a day and Dr. Sides diagnosed chronic back pain.

From 1990 to April of 2003, the employee did not install roofs due to his low back condition. Prior to April of 2003, if he did a lot of exertions his low back would bother him quite a bit. After the 2001 surgery, he still had low back problems and occasionally would take off work. He had trouble sitting for a long period of time.

It was Dr. Berkin's opinion that the employee had a 45% permanent partial disability of the body as a whole due to the pre-existing low back condition. It was his opinion that the employee's pre-existing low back condition hindered his ability to be mobile, move around, be active, and to lift, bend and twist, and was a hindrance to do roofing type of work. It was Dr. Berkin's opinion that the pre-existing disability to the employee's low back was a hindrance or obstacle to employment

Based on a review of the evidence, I find that the employee's pre-existing disability and conditions regarding his low back including surgery constituted a hindrance or obstacle to his employment or to obtaining reemployment.

It was Dr. Berkin's opinion that the pre-existing disability and the disability associated with the April 11, 2003 incident combined to create a greater overall disability than the simple arithmetic sum. The primary injury and disability and the pre-existing condition and disability, synergistically react to make his overall disability greater than adding the two together. It was his opinion that the employee is not employable in the open labor market from a combination of his disability from the pre-existing back and the April 11, 2003 back injury. The employee's credible testimony is that the reason is unable to work is due to all of his back injuries. When asked whether his unemployability was the result of a combination of his low back disability from the April 11, 2003 injury and the pre-existing condition, Ms. Shea testified that his prior back injuries would have an effect on his employability.

I find that the prior injuries to the employee's low back combined synergistically with the primary injury to the low back to cause the employee's overall condition and symptoms. Based on the supporting medical evidence including Dr. Berkin's credible and uncontradicted testimony, I find that the employee is permanently and totally disabled as a result of the combination of his pre-existing injuries and condition and the April 11, 2003 injury and condition.

On August 3, 2006, the employee had a permanent spinal cord stimulator implanted. I find that the employee was in his healing period and had not reached the point where further progress was not expected until August 3, 2006.

Notwithstanding the fact that the employee settled his claim against the employer-insurer for a lump sum, I find that for the purpose of determining liability of the Second Injury Fund, the 22% permanent partial disability would have been payable in 88 weekly installments commencing on August 4, 2006, the end of the healing period, and continuing through April 11, 2008. Since the compensation rate for permanent partial disability is less than the amount payable for permanent total disability under Section 287.200, RSMo, the Second Injury Fund is liable for the difference between what the employee is receiving for permanent partial disability from the employer-insurer and what he is entitled to receive for permanent total disability under Section 287.220.1 RSMo. The difference between the permanent total disability rate of \$513.59 per week and the permanent partial disability rate of \$340.12 per week is \$173.47 per week. The Second Injury Fund is therefore ordered to pay to the employee the sum of \$173.47 per week for 88 weeks commencing on August 4, 2006 and ending on April 11, 2008. Commencing on April 12, 2008, the Second Injury Fund is responsible for paying the full permanent total disability benefit to the employee at the rate of \$513.59 per week.

These payments for permanent total disability shall continue for the remainder of the employee's lifetime or until suspended if the employee is restored to his regular work or its equivalent as provided in Section 287.200 RSMO.

ATTORNEY'S FEE:

Gary Matheny, 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:

Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Jeff Buker

Division Director
Division of Workers' Compensation