

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

Injury No.: 01-085799

Employee: Daniel Mell  
Employer: Biebel Brothers, Inc.  
Insurer: Missouri Employers Mutual Insurance Co.  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: July 27, 2001  
Place and County of Accident: St. Louis County

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 3, 2006. The award and decision of Administrative Law Judge John K. Ottenad, issued August 3, 2006, 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 6<sup>th</sup> day of February 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Daniel Mell

Injury No.: 01-085799

Dependents: N/A  
Employer: Biebel Brothers, Inc.  
Additional Party: Second Injury Fund  
Insurer: Missouri Employers Mutual Insurance Co.  
Hearing Date: April 24, 2006

Before the  
Division of Workers'  
Compensation  
Department of Labor and  
Industrial Relations of Missouri  
Jefferson City, Missouri

Checked by: JKO

### 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: July 27, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was a roofer for Employer who developed low back pain when he was shoveling gravel and twisted his 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: Body as a Whole—Low Back
14. Nature and extent of any permanent disability: 20% of the BAW referable to the low back
15. Compensation paid to-date for temporary disability: \$9,135.35
16. Value necessary medical aid paid to date by employer/insurer? \$22,777.16

Employee: Daniel Mell Injury No.: 01-085799

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$872.04
19. Weekly compensation rate: \$581.36 for TTD/ \$329.42 for PPD
20. Method wages computation: By agreement (stipulation) of the parties

### COMPENSATION PAYABLE

21. Amount of compensation payable:

80 weeks of permanent partial disability from Employer \$26,353.60

22. Second Injury Fund liability:

20 weeks of permanent partial disability from Second Injury Fund \$6,588.40

TOTAL: **\$32,942.00**

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Jagadeesh (Bob) Mandava.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Daniel Mell	Injury No.:	01-085799
Dependents:	N/A		Before the
Employer:	Biebel Brothers, Inc.		<b>Division of Workers'</b>
Additional Party:	Second Injury Fund		<b>Compensation</b>
			Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	Missouri Employers Mutual Insurance Co.	Checked by:	JKO

On April 24, 2006, the employee, Daniel Mell, appeared in person and by his attorney, Mr. Jagadeesh (Bob) Mandava, for a hearing for a final award on his claim against the employer, Biebel Brothers, Inc., and its insurer, Missouri Employers Mutual Insurance Co., as well as the Second Injury Fund. The employer, Biebel Brothers, Inc., and its insurer, Missouri Employers Mutual Insurance Co., were represented at the hearing by their attorney, Mr. Timothy M. Tierney. The Second Injury Fund was represented at the hearing by Assistant Attorney General Tracey Cordia. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

### STIPULATIONS:

- 1) On or about July 27, 2001, Daniel Mell (Claimant), sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant.
- 2) Claimant was an employee of Biebel Brothers, Inc. (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.

- 6) At the relevant time, Claimant earned an average weekly wage of \$872.04, resulting in applicable rates of compensation of \$581.36 for total disability benefits and \$329.42 for permanent partial disability (PPD) benefits.
- 7) Employer paid temporary total disability (TTD) benefits in the amount of \$9,135.35, representing a period of time from July 30, 2001 to November 16, 2001, or 15 5/7 weeks.
- 8) Employer paid medical benefits totaling \$22,777.16.

#### **ISSUES:**

- 1) Is Claimant entitled to future medical care related to this injury?
- 2) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?
- 3) What is the liability of the Second Injury Fund?

#### **EXHIBITS:**

The following exhibits were admitted into evidence:

##### ***Employee Exhibits:***

- A—Compilation of medical treatment records pertaining to the low back injury of July 27, 2001 including records from BJC Corporate Health, Dr. Frank O. Petkovich, and ProRehab.
- B—Compilation of medical treatment records pertaining to the low back injury of January 9, 2002 including records from Dr. Frank O. Petkovich Dr. James Coyle, Dr. David Raskas, The Work Center, Dr. John Graham and Aquatic Fitness.
- C—Stipulation for Compromise Settlement for Injury Number 99-074795 and compilation of medical treatment records pertaining to the low back injury of June 3, 1999 including records from Dr. Frank O. Petkovich and Missouri Baptist Medical Center.
- D—Certified records from the Special School District of St. Louis County.
- E—Deposition of David T. Volarich, D.O., with attachments, dated March 6, 2006.
- F—Deposition of Mr. James M. England, Jr., with attachments, dated February 6, 2006.

##### ***Employer/Insurer Exhibits:***

- 1—Deposition of Frank O. Petkovich, M.D., with attachments, dated June 20, 2005.

**Note:** Exhibits E, F and I were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence.

#### **FINDINGS OF FACT:**

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and depositions, and the medical and educational records, as well as my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 30 year old, currently unemployed individual, who last worked for Biebel Brothers Roofing as a roofer in January 2002. Claimant currently receives both a monthly payment from Social Security Disability and from his union's pension fund. He also has been receiving Medicare benefits for the last year.
- 2) Claimant testified that he dropped out of school after the ninth grade in 1991 or 1992 because he just couldn't do it anymore. He said that he was not good in school and testified that he had a learning disability. He said that he

received special education services for language and spelling. He said that he tried to get a GED, but he could not do the reading and writing. He could not remember if he actually took the GED test or not.

- 3) Claimant's **certified school records from the Special School District of St. Louis County** (Exhibit D) document the evaluations performed by the District from 1985 until 1991. When Claimant was initially evaluated in 1985, as a nine year old third grader, his cognitive functioning was "found to be at the upper end of the Low Average range" based on the Wechsler Intelligence Scale for Children-Revised. His reading skills were two and a half years below his age expectancy but his math skills were his strongest academic area, measuring close to grade expectancy. He was found to be Learning Disabled and Language Impaired. Following this assessment, Claimant was enrolled in a Resource program for the Learning Disabled with Itinerant Language services.
- 4) When Claimant was next evaluated three years later, in 1988, Claimant was again found in the Low Average range for cognitive functioning on the Wechsler Scale. Math was not an area of concern, but Claimant's spelling skills were described as "poor." It was noted though that if he spent an adequate amount of time preparing for tests, he was able to pass, but there was no carryover to daily work. In this three-year period though, he showed improvement in his language skills, and it was felt that language services should be terminated. He was diagnostically found to be non-handicapped with regard to speech and language. It was also noted in this assessment that he needed monitoring to complete tasks because he would talk and play around with others around him in a group setting. Following this assessment, he was found to be Learning Disabled but no longer language impaired, and he continued to be enrolled in a Resource program.
- 5) Claimant's last evaluation from Special School District occurred three years later, in 1991, when Claimant was 15 years old. His grades were listed in the report ranging from a B+ to a D-. It was noted though that he would rather play in class and he seldom studied for tests. He would rather finish work at school and take nothing home. The evaluator believed Claimant would have much higher grades if he would use his time more wisely. Testing continued to reveal severe deficits in reading, spelling and written language skills. The student was found to continue to be Learning Disabled. Overall cognitive functioning was found to be in the average range. Additionally, the evaluators found that "this disability does not appear to be primarily caused by visual acuity deficits, auditory acuity deficits, motor deficits, emotional disturbance, language disability, mental retardation, dialectal differences or second language influence." (Exhibit D) Services at Special School District were terminated when Claimant dropped out of school on March 20, 1992.
- 6) After Claimant dropped out of school, he worked full time for Biebel Brothers Roofing from 1993 or 1994 until his last date of injury of January 9, 2002. His job as a roofer included tearing up and laying down roofing materials. The job required bending, twisting, lifting up to 135 pounds (a roll of roofing), physical labor, climbing and standing on his feet most of the day. Claimant admitted that he had a few other minor injuries for which he did not file claims, but had three low back injuries on the job for which he did file claims. Those injuries occurred on June 3, 1999, July 27, 2001 and January 9, 2002. He said that his employer made no modifications for his back complaints after these earlier injuries.
- 7) Claimant's injury on June 3, 1999, while working for Employer, occurred when he was moving a roll of roofing and injured his back. (Exhibit C) Claimant complained of back pain that was radiating to the left leg, associated with numbness. A Lumbar Spine MRI taken on June 10, 1999 revealed mild degenerative disc disease with a left lateral disc bulge at L3-4, moderate degenerative disc disease with a posterior annular tear and a moderate left paracentral disc herniation at L4-5 and moderate degenerative disc disease with a posterior annular tear and right paracentral disc protrusion at L5-S1.
- 8) Claimant treated with **Dr. Frank O. Petkovich**, (Exhibit C and 1) who performed a lumbar laminectomy and microdiscectomy of left L4-5 with lateral decompression, foraminotomy and decompression of L5 nerve root on July 1, 1999. He performed this surgery to treat the large lumbar disc herniation of left L4-5 with compression of the left L5 nerve root. Claimant showed steady improvement following surgery and denied any continued radicular complaints. Dr. Petkovich released him to go back to work as tolerated on October 29, 1999, and then placed him at maximum medical improvement and fully released him from care with no work restrictions on November 19, 1999. Dr. Petkovich rated Claimant as having 10% permanent partial disability to the body as a whole as a result of this lumbar disc herniation and subsequent surgery.
- 9) Claimant settled this **June 3, 1999 injury (Injury No. 99-074795) with Employer by Stipulation for Compromise Settlement** on April 20, 2000. (Exhibit C) The Stipulation reflects a settlement of \$23,578.40 based on approximate disability of 20% of the body as a whole referable to the low back.
- 10) While recovering from this injury and after he had been released back to work, the records documented a flare-up of symptoms in the low back that Claimant experienced in October 1999. (Exhibit 1) He apparently did some extremely physical work and developed a sudden pain in his low back. He was diagnosed as having an acute lumbosacral strain for which he was taken off work and given physical therapy and medications. When Claimant next saw the doctor on October 29, 1999 (nine days later), he was doing well and having no further pain in his lower back.

- 11) After Claimant recovered from this June 3, 1999 injury, he described continued weakness in the back, and a feeling like his back was going to snap. He said that he had to be careful with heavy lifting. He testified that he got rid of his boat because it was too bouncy for his back.
- 12) Claimant was next injured while working for Employer on July 27, 2001. He testified that he was scooping up some gravel from a roof and twisted his back, causing low back pain and pain into the right leg.
- 13) Claimant treated initially at **BJC Corporate Health** (Exhibit A and 1), where he presented with a consistent history of injury and complaints of pain and weakness from the low back into the right leg. The notes indicate he was dragging the right leg because of this injury. After an MRI on July 31, 2001 that showed disc protrusion at L5-S1 posteriorly and to the right, he was referred to Dr. Petkovich for further treatment and evaluation.
- 14) **Dr. Frank O. Petkovich** (Exhibit A and 1) first saw Claimant for this new injury on August 10, 2001. Claimant presented with a consistent history of injury at work and complaints of pain into the low back and right lower extremity. Dr. Petkovich performed surgery on August 30, 2001 to treat the very large lumbar disc herniation at right L5-S1 with large extruded fragment and severe compression of L5 and S1 nerve roots. The surgical procedure was a lumbar laminectomy and microdiscectomy, right L5-S1 with removal of disc herniation and lateral decompression and foraminotomy. Claimant continued to follow-up with Dr. Petkovich after surgery and indicated in the records that his low back and lower extremity pain and problems resolved. Dr. Petkovich believed that he had an excellent clinical recovery and result.
- 15) According to the physical therapy notes from **ProRehab** (Exhibit A and 1), Claimant worked his way back from a medium physical demand level to a heavy work physical demand level with the therapy he had following this injury. Those same notes indicate though that his work as a roofer was previously at the very heavy work physical demand level.
- 16) Dr. Petkovich released Claimant to return to his regular job as tolerated on November 16, 2001 and then released him back to work without restrictions and placed him at maximum medical improvement on December 21, 2001. He did not believe Claimant needed any further treatment for this injury. At that point, according to the records, he was working his regular job without any problems and had essentially no further pain in his lower back or either of his lower extremities. With the exception of the surgical scar, his physical examination was objectively normal.
- 17) Dr. Petkovich rated Claimant as having 10% permanent partial disability to the body as a whole as a result of the right lumbar disc herniation at L5-S1 and the subsequent surgical procedure.
- 18) Despite the notations in Dr. Petkovich's reports to the contrary, Claimant testified that after this injury and the subsequent treatment, he still had low back pain and numbness and tingling in the right leg. He testified that it was more difficult to lift, and the back pain was greater than it was before this injury. He said that he wore out more easily and his weakness increased. He admitted that he did not miss any more time from work until his next injury, and he was back working full time. He admitted though that he was only back to work a short period of time before the last injury in 2002.
- 19) The deposition of **Dr. Frank O. Petkovich** was taken by Employer on June 20, 2005 to make his opinions in this case admissible at trial. (Exhibit 1) Dr. Petkovich is a board certified orthopedic surgeon, who had the opportunity to treat Claimant for all three of his traumatic low back injuries, and performed all three surgeries on Claimant's low back. Dr. Petkovich agreed that Claimant had relatively advanced disc degeneration for his age even before this first injury in 1999. He confirmed in his deposition testimony that the injury and surgery in 1999 involved a disc herniation at L4-5, for which he rated Claimant as having 10% permanent partial disability. He also confirmed that Claimant was released back to work without restrictions following his treatment for this injury.
- 20) Dr. Petkovich testified further regarding the July 27, 2001 injury. He opined that the herniation or rupture of the already desiccated degenerative disc at the L5-S1 level was caused by the injury in 2001. He confirmed the surgery that he performed for the herniated disc and opined that Claimant had an additional 10% permanent partial disability related to this injury, over and above the 10% he previously attributed to the 1999 injury. He confirmed also that he released Claimant back to full duty without restrictions following this 2001 injury.
- 21) The deposition of **Dr. David T. Volarich** was taken by Claimant on March 6, 2006 to make his opinions in this case admissible at trial. (Exhibit E) Dr. Volarich is an osteopathic physician with a certification as an independent medical examiner. He examined Claimant on one occasion, January 5, 2004, at the request of Claimant's attorney. This single examination occurred after Claimant had sustained his third injury in 2002 and also underwent his fusion surgery as a result of that third injury.
- 22) On physical examination, Dr. Volarich found Claimant had restricted range of motion in the lumbar spine,

including 50% loss of flexion, 60% loss of extension and 20% loss each way of side bending. No spasm or trigger points were found. The neurologic examination revealed bilaterally weak quadriceps and calves. Pinprick sensation was diminished along the S1 nerve root in the right leg. Gait was normal except that Claimant moved slowly and cautiously. He was able to squat fully and stand back up, but complained of right lower extremity weakness.

- 23) Referable to the Claimant's back condition pre-existing the 2001 injury (including the 1999 injury), Dr. Volarich diagnosed herniated nucleus pulposus L4-5 to the left status post surgical treatment with additional L5-S1 disc protrusion and L3-4 disc bulge. He rated Claimant at 25% permanent partial disability of the body as a whole referable to the lumbosacral spine for these pre-existing diagnoses. He also confirmed that had he seen Claimant after the 1999 injury, he would have placed some permanent restrictions on Claimant's ability to work.
- 24) Referable to the July 27, 2001 injury, Dr. Volarich diagnosed progression of L5-S1 disc protrusion to herniation causing right leg radiculopathy and requiring surgical repair, as well as aggravation of prior lumbar syndrome at L3-4 and L4-5. He opined that the work injury of July 27, 2001 was the substantial factor in causing this diagnosis. He also rated Claimant at 30% permanent partial disability of the body as a whole referable to the lumbosacral spine for this July 27, 2001 injury. He again confirmed that had he seen Claimant after this injury, but before the third one, he would have placed more permanent restrictions on his ability to work.
- 25) Dr. Volarich further opined that the combination of the disabilities creates a substantially greater disability than the simple sum or total of each separate injury or illness and so a loading factor should be added. He explained that the July 27, 2001 injury was made worse by the pre-existing findings because the back was already in a weakened condition when Claimant had the 2001 injury. Because there were different levels of the back and different legs involved, he believed the combined disability was a lot more than the simple sum of the disabilities.

## **RULINGS OF LAW:**

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and medical records, as well as my personal observations of Claimant at hearing, I find: As a result of the July 27, 2001 accident, which arose out of and in the course of his employment, Claimant sustained a compensable low back injury, including a disc herniation at L5-S1 on the right. As a result of the injury to his low back, adequately described in the records and reports of Dr. Petkovich and Dr. Volarich, Claimant continued to have pain, stiffness and weakness in his low back.

### ***Issue 1: Is Claimant entitled to future medical care related to this injury?***

Pursuant to **Mo. Rev. Stat. § 287.140 (2000)**, Employer is required to furnish "such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Just as Claimant must prove all of the other material elements of her claim, the burden is also on him to prove entitlement to future medical treatment. ***Dean v. St. Luke's Hospital***, 936 S.W.2d 601, 603 (Mo.App. 1997) *overruled on other grounds*, ***Hampton***, 121 S.W.3d at 223. Claimant is entitled to an award of future medical treatment if he shows by a reasonable probability that future medical treatment is needed to cure and relieve the effects of the injury. ***Concepcion v. Lear Corporation***, 173 S.W.3d 368, 372 (Mo.App. 2005).

Based on the competent and substantial evidence described above, I find that Claimant is not entitled to any future medical care related to this injury at work on July 27, 2001.

After thoroughly reviewing the medical treatment records from Dr. Petkovich, as well as the examination report of Dr. Volarich, I can find no indication that any medical provider believed Claimant would need any further treatment for his low back related to this injury, after he was released from care and placed at maximum medical improvement by Dr. Petkovich on December 21, 2001.

Since there are no medical opinions indicating a need for treatment related to this injury, and since Claimant testified he was fully released from care at maximum medical improvement without any indication that future care would be needed, there is no evidence in the record upon which to base an award of future medical treatment. Therefore, the required burden of proof has not been met and Claimant is not entitled to any future medical care related to this July 27, 2001 injury.

### ***Issue 2: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?***

### ***Issue 3: What is the liability of the Second Injury Fund?***

Given that these two issues are so inter-related in this claim with primary and pre-existing disabilities to the same part of the body, I will address these two issues together.

Under **Mo. Rev. Stat. § 287.190.6 (2000)**, “‘permanent partial disability’ means a disability that is permanent in nature and partial in degree...” The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. *Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697,703 (Mo.App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. *Fogelsong v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

The issue of nature and extent of permanent partial disability is further complicated in this case by the pre-existing settlement the Claimant had for permanent partial disability to the body as a whole referable to the low back in connection with his prior low back injury and surgery. **Mo. Rev. Stat. § 287.190.6 (2000)** also provides in pertinent part that,

when payment therefor has been made in accordance with a settlement approved either by an administrative law judge or by the labor and industrial relations commission,...the percentage of disability shall be conclusively presumed to continue undiminished whenever a subsequent injury to the same member or same part of the body also results in permanent partial disability for which compensation under this chapter may be due...

Case law in this area has stood for the proposition that since pre-existing permanent partial disability to the same part of the body is conclusively presumed to continue undiminished, it is appropriate for the total amount of permanent partial disability to be reduced by the prior amount, leaving the balance to be paid by the Employer in the instant case. *Helm v. SCF, Inc.*, 761 S.W.2d 199 (Mo.App. 1988).

These issues in this case are then also impacted by the allegation that there is Second Injury Fund liability based on the combination of his primary and pre-existing disabilities.

Pursuant to **Mo. Rev. Stat. § 287.220.1 (2000)**, if an employee has a pre-existing disability of such seriousness to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and if the pre-existing disability and the subsequent compensable injury each result in a minimum of 12.5% permanent partial disability of the body as a whole, and if the combined disability is substantially greater than that which would have resulted from the last injury alone, then Employer is only responsible for payment for the disability from the last injury, any amount of pre-existing disability is subtracted out, and the Second Injury Fund shall pay Claimant compensation based on the balance left (or greater combination).

The parties put at issue whether Claimant was permanently and totally disabled in connection with this injury. There is no evidence in the record to substantiate a finding of permanent and total disability in connection with this July 27, 2001 claim. Not only is there no medical evidence to that effect, but Claimant also went back to work, albeit for a brief time, for Employer doing his regular job without restrictions. Given the totality of the competent and substantial evidence in the record described above, I find that Claimant is not permanently and totally disabled in connection with this July 27, 2001 claim.

Based on a review of the medical records, and specifically the reports and depositions of Dr. Petkovich and Dr. Volarich, I find that both experts are in agreement with the diagnosis regarding the low back condition that is medically causally related to Claimant’s employment.

I further find that Claimant was generally credible when he testified about the continuing complaints of weakness, pain and increased fatigability in the low back. These same complaints are generally recorded in the report of Dr. Volarich. Although Dr. Petkovich’s reports suggest a complete resolution of all problems and complaints, the notes from ProRehab do show that Claimant was previously working as a roofer at a *very heavy* physical demand level before this injury and then after the injury was only able to get back to the *heavy* physical demand level. While Claimant’s complaints may have been decreased by the treatment following this injury, I do not think they were completely eliminated. Both Dr. Volarich and Dr. Petkovich also provided opinions on permanent partial disability specifically attributable to this injury, and acknowledged the impact this injury and the surgical treatment had on Claimant’s overall back condition.

In trying to assess the percentage of permanent partial disability related to this injury for which Employer would have responsibility, it is also necessary to take into account the pre-existing permanent partial disability for which Employer would receive a credit based on the settlement reached by Stipulation for Compromise Settlement in Injury No. 99-074795.

Claimant and Employer settled that case for 20% permanent partial disability of the body as a whole referable to the low back. According to statute, that amount of permanent partial disability is conclusively presumed to continue undiminished.

The final issue that impacts the nature and extent of permanent partial disability in this case is whether or not there is some greater (synergistic) combination of the low back disabilities above and beyond their simple sum when they are added together, thus bringing the Second Injury Fund into this equation.

I find that the pre-existing disability to the body as a whole referable to the low back at 20% meets the statutory threshold. Additionally, I find that the pre-existing disability to the low back was a hindrance or obstacle to employment since Claimant testified he continued to have weakness in the back and a need to be careful with heavy lifting.

I also find that the primary and pre-existing injuries to the back combine to create substantially greater disability than the simple sum of the disabilities added together. Although an argument could be made that there is no greater combination of disabilities in this case because both injuries are to the same part of the body, I do not believe that argument is persuasive here. Not only are there two different levels of the low back involved in the primary and pre-existing injuries, but more importantly, there were complaints running down opposite lower extremities in each of these injuries. Since the 1999 injury involved a herniation at left L4-5 with left leg radiculopathy, and the 2001 injury involved a herniation at right L5-S1 with right leg radiculopathy, I do believe there is some greater (synergistic) combination when the two disabilities are combined. Dr. Volarich also opined that the disabilities combined to form a greater disability than the simple sum and so a loading factor should be added.

Based upon all of these findings, as well as based on Claimant's testimony and the medical evidence, I find that Claimant has a total of 45% permanent partial disability of the body as a whole referable to the low back. I further find that Claimant previously settled Injury No. 99-074795 for 20% of the body as a whole referable to the low back. I find that an administrative law judge properly approved that settlement on April 20, 2000, and so that prior percentage of disability continues undiminished. I further find that Employer is responsible for 20% permanent partial disability of the body as a whole referable to the low back pursuant to this award (which meets the statutory threshold for Fund purposes). Subtracting then the primary and pre-existing disabilities from the total amount of disability found, leaves the Second Injury Fund responsible for the payment of 5% permanent partial disability of the body as whole referable to the low back for the greater (synergistic) combination of the low back disabilities.

Though Claimant also requests an award against the Second Injury Fund based on the combination of his low back condition and alleged pre-existing learning disability, that part of the Fund claim is denied. As noted above, Claimant bears the burden of proving each element of his case, including the nature and extent of any pre-existing disability and that any pre-existing disability is permanent. Having thoroughly reviewed the evidence in the record, I do not believe Claimant has met his burden of proof in that regard on the alleged learning disability.

Claimant did not submit any medical or other expert evidence at the hearing that addressed whether the learning disability was permanent, nor regarding the extent of any disability that may be attributable to that condition. Although Claimant did submit the records from the Special School District to document that Claimant was evaluated to have a learning disability while he was in school, those same records show that he was also initially evaluated to have a language impairment that he overcame with extra help he received from the District. The records further document that any learning disability was not "primarily caused by visual acuity deficits, auditory acuity deficits, motor deficits, emotional disturbance, language disability, mental retardation, dialectal differences or second language influence." His cognitive functioning was found to be in the Average to Low Average range. There were regular comments in the records though regarding Claimant applying himself and staying on task, playing around in class, and not wanting to take work home. One comment noted that if Claimant would only use his time more wisely, his grades would improve. Even at that, the grades listed in the record were not failing grades, but were between a B+ and a D-.

In short, I found, after reviewing the records, that Claimant's alleged learning disability seemed to be more functional, and based on his failure to work and apply himself, rather than based on a cognitive deficit or some other permanent, unchanging condition that would get no better with time. This belief was bolstered by the fact that Claimant was able to overcome his language impairment diagnosis with his work in school, causing that diagnosis to ultimately be dropped. Since Claimant dropped out of school on his own, it is unclear if with more time and help the learning disability would have ultimately been overcome as well.

While it is true that extent and percentage of disability are findings within the special province of the fact finding body, proof must be made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs* at 703. In a case such as this which involves issues (extent of permanency for a learning disability condition and whether that condition is permanent in nature) outside of ordinary, lay understanding, then medical or expert testimony should be provided to meet this burden of proof. Given these findings based on my review of the Special School District records and given the lack of any medical or expert testimony to the contrary to assess the permanency or the extent of that alleged pre-existing disability, I do not believe Claimant has met his burden of proof on this part of the claim, and so it is denied.

Accordingly, Employer is responsible for 20% permanent partial disability of the body as whole referable to the low back, and the Second Injury Fund is responsible for payment of 5% permanent partial disability pursuant to this award.

**CONCLUSION:**

Claimant has a compensable injury to the low back due to a herniation at right L5-S1 with right leg radiculopathy on July 27, 2001. Claimant is not in need of any future medical care related to this injury and so none is awarded. Employer/Insurer is to pay 80 weeks of permanent partial disability benefits. The Second Injury Fund is to pay 20 weeks of permanent partial disability benefits. Compensation awarded is subject to a lien in the amount of 20% of all payments in favor of Jagadeesh (Bob) Mandava, for necessary legal services.

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

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

JOHN K. OTTENAD  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-003482

Employee: Daniel Mell  
Employer: Biebel Brothers, Inc.  
Insurer: Missouri Employers Mutual Insurance Co.  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: January 9, 2002  
Place and County of Accident: St. Louis City

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. We have reviewed the evidence, read the briefs of the parties, and considered the entire record. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated August 3, 2006.

The Commission affirms all findings and conclusions of law made by the administrative law judge, but for the

determination concerning the issue of future medical care and treatment. The administrative law judge concluded that the employee failed to meet his burden of proof with regard to the need for future medical treatment. The administrative law judge found that the employee was not entitled to future medical treatment because: 1) there was no expert opinion in the record to indicate any more surgery or other invasive treatment was necessary to treat the employee's work injury; and 2) the employee was neither following up with his pain management specialist nor taking pain medications initially prescribed.

The Commission disagrees with that determination as employee has demonstrated a need for future medical care associated with his January 9, 2002 work injury. Therefore, we award employee future medical care and treatment to cure and relieve employee from the effects of his back injury.

The need for future medical care need not be established as a certainty, but it must be established as being reasonably probable through competent, medical testimony. *Bowers v. Highland Dairy Company*, 132 S.W.3d 260 (Mo. App. 2004).

In summary fashion, employee testified that he continued to suffer stiffness and pain in his low back, as well as pain in his right leg. Employee testified that he ceased taking prescription pain medications due to their side effects, but did take over the counter medications for his pain. The principal medical opinions concerning the issue of future medical care and treatment were rendered by Dr. Petkovich and Dr. Volarich.

After releasing employee from care, Dr. Petkovich opined that pain management would be beneficial to somebody with the types of symptoms employee was experiencing. Dr. Petkovich referred employee to a pain management specialist to treat Employee's ongoing symptoms. Furthermore, Dr. Petkovich testified that the removal of hardware is sometimes necessary if someone has persistent or recurring back pain over the hardware.

Dr. Volarich was of the medical opinion that employee would require ongoing care for his pain syndrome including, but not limited to, narcotic and non-narcotic pain medications, muscle relaxants, physical therapy and similar treatments as directed by the current standard of medical practice for symptomatic relief of his complaints. Dr. Volarich found that at the time of his examination on January 5, 2004, additional surgery was not indicated; however, noted that hardware placed in the low back could become infected, loosen or fail which would require that it be removed or replaced.

The Commission concludes that the competent and substantial evidence supports a finding that employee is entitled to receive future medical care and treatment reasonable and necessary to cure and relieve him from the effects of his back injury, and this benefit is awarded. As stated above, all remaining findings of fact and conclusions of law are affirmed.

The award and decision of Administrative Law Judge John K. Ottenad issued August 3, 2006, as modified, 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 6<sup>th</sup> day of February 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee:	Daniel Mell	Injury No.:	02-003482
Dependents:	N/A		Before the
Employer:	Biebel Brothers, Inc.		Division of Workers' Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial Relations of Missouri
Insurer:	Missouri Employers Mutual Insurance Co.		Jefferson City, Missouri
Hearing Date:	April 24, 2006	Checked by:	JKO

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
3. 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
6. Date of accident or onset of occupational disease: January 9, 2002
7. State location where accident occurred or occupational disease was contracted: St. Louis City
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
10. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was a roofer for Employer who developed low back pain when he was pushing carts across a roof, and had to lift them over a hump on the roof, injuring his back again.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Body as a Whole—Low Back
15. Nature and extent of any permanent disability: 27.5% of the BAW referable to the low back
15. Compensation paid to-date for temporary disability: \$38,991.80
16. Value necessary medical aid paid to date by employer/insurer? \$58,737.51

Employee:	Daniel Mell	Injury No.:	02-003482
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17. Value necessary medical aid not furnished by employer/insurer? N/A
19. Employee's average weekly wages: \$971.15

19. Weekly compensation rate: \$628.90 for TTD/ \$329.42 for PPD
20. Method wages computation: By agreement (stipulation) of the parties

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

110 weeks of permanent partial disability from Employer	\$36,236.20
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22. Second Injury Fund liability:

40 weeks of permanent partial disability from Second Injury Fund	\$13,176.80
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TOTAL:	<b><u>\$49,413.00</u></b>
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23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Jagadeesh (Bob) Mandava.

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

Employee:	Daniel Mell	Injury No.:	02-003482
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>	
Employer:	Biebel Brothers, Inc.	Department of Labor and Industrial	
Additional Party:	Second Injury Fund	Relations of Missouri Jefferson City, Missouri	
Insurer:	Missouri Employers Mutual Insurance Co.	Checked by:	JKO

On April 24, 2006, the employee, Daniel Mell, appeared in person and by his attorney, Mr. Jagadeesh (Bob) Mandava, for a hearing for a final award on his claim against the employer, Biebel Brothers, Inc., and its insurer, Missouri Employers Mutual Insurance Co., as well as the Second Injury Fund. The employer, Biebel Brothers, Inc., and its insurer, Missouri Employers Mutual Insurance Co., were represented at the hearing by their attorney, Mr. Timothy M. Tierney. The Second Injury Fund was represented at the hearing by Assistant Attorney General Tracey Cordia. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

**STIPULATIONS:**

- 9) On or about January 9, 2002, Daniel Mell (Claimant) sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant.
- 10) Claimant was an employee of Biebel Brothers, Inc. (Employer).
- 11) Venue is proper in the City of St. Louis.
- 12) Employer received proper notice.
- 13) The Claim was filed within the time prescribed by the law.
- 14) At the relevant time, Claimant earned an average weekly wage of \$971.15, resulting in applicable rates of compensation of \$628.90 for total disability benefits and \$329.42 for permanent partial disability (PPD) benefits.
- 15) Employer paid temporary total disability (TTD) benefits in the amount of \$38,991.80, representing a period of time from January 9, 2002 to March 19, 2003, or 62 weeks.
- 16) Employer paid medical benefits totaling \$58,737.51.

**ISSUES:**

- 4) Is Claimant entitled to future medical care related to this injury?
- 5) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?
- 6) What is the liability of the Second Injury Fund?

**EXHIBITS:**

The following exhibits were admitted into evidence:

***Employee Exhibits:***

- A—Compilation of medical treatment records pertaining to the low back injury of July 27, 2001 including records from BJC Corporate Health, Dr. Frank O. Petkovich, and ProRehab.
- B—Compilation of medical treatment records pertaining to the low back injury of January 9, 2002 including records from Dr. Frank O. Petkovich, Dr. James Coyle, Dr. David Raskas, The Work Center, Dr. John Graham and Aquatic Fitness.
- C—Stipulation for Compromise Settlement for Injury Number 99-074795 and compilation of medical treatment records pertaining to the low back injury of June 3, 1999 including records from Dr. Frank O. Petkovich and Missouri Baptist Medical Center.
- D—Certified records from the Special School District of St. Louis County.
- E—Deposition of David T. Volarich, D.O., with attachments, dated March 6, 2006.
- F—Deposition of Mr. James M. England, Jr., with attachments, dated February 6, 2006.

***Employer/Insurer Exhibits:***

- 1—Deposition of Frank O. Petkovich, M.D., with attachments, dated June 20, 2005.

***Note:*** Exhibits E, F and I were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence.

## FINDINGS OF FACT:

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational opinion and deposition, and the medical and educational records, as well as my personal observations of Claimant at hearing, I find:

- 26) **Claimant** is a 30 year old, currently unemployed individual, who last worked for Biebel Brothers Roofing as a roofer in January 2002. Claimant currently receives both a monthly payment from Social Security Disability and from his union's pension fund. He also has been receiving Medicare benefits for the last year.
- 27) Claimant testified that he dropped out of school after the ninth grade in 1991 or 1992 because he just couldn't do it anymore. He said that he was not good in school and testified that he had a learning disability. He said that he received special education services for language and spelling. He said that he tried to get a GED, but he could not do the reading and writing. He could not remember if he actually took the GED test or not.
- 28) Claimant's **certified school records from the Special School District of St. Louis County** (Exhibit D) document the evaluations performed by the District from 1985 until 1991. When Claimant was initially evaluated in 1985, as a nine year old third grader, his cognitive functioning was "found to be at the upper end of the Low Average range" based on the Wechsler Intelligence Scale for Children-Revised. His reading skills were two and a half years below his age expectancy but his math skills were his strongest academic area, measuring close to grade expectancy. He was found to be Learning Disabled and Language Impaired. Following this assessment, Claimant was enrolled in a Resource program for the Learning Disabled with Itinerant Language services.
- 29) When Claimant was next evaluated three years later, in 1988, Claimant was again found in the Low Average range for cognitive functioning on the Wechsler Scale. Math was not an area of concern, but Claimant's spelling skills were described as "poor." It was noted though that if he spent an adequate amount of time preparing for tests, he was able to pass, but there was no carryover to daily work. In this three-year period though, he showed improvement in his language skills, and it was felt that language services should be terminated. He was diagnostically found to be non-handicapped with regard to speech and language. It was also noted in this assessment that he needed monitoring to complete tasks because he would talk and play around with others around him in a group setting. Following this assessment, he was found to be Learning Disabled but no longer language impaired, and he continued to be enrolled in a Resource program.
- 30) Claimant's last evaluation from Special School District occurred three years later, in 1991, when Claimant was 15 years old. His grades were listed in the report ranging from a B+ to a D-. It was noted though that he would rather play in class and he seldom studied for tests. He would rather finish work at school and take nothing home. The evaluator believed Claimant would have much higher grades if he would use his time more wisely. Testing continued to reveal severe deficits in reading, spelling and written language skills. The student was found to continue to be Learning Disabled. Overall cognitive functioning was found to be in the average range. Additionally, the evaluators found that "this disability does not appear to be primarily caused by visual acuity deficits, auditory acuity deficits, motor deficits, emotional disturbance, language disability, mental retardation, dialectal differences or second language influence." (Exhibit D) Services at Special School District were terminated when Claimant dropped out of school on March 20, 1992.
- 31) After Claimant dropped out of school, he worked full time for Biebel Brothers Roofing from 1993 or 1994 until his last date of injury of January 9, 2002. His job as a roofer included tearing up and laying down roofing materials. The job required bending, twisting, lifting up to 135 pounds (a roll of roofing), physical labor, climbing and standing on his feet most of the day. Claimant admitted that he had a few other minor injuries for which he did not file claims, but had three low back injuries on the job for which he did file claims. Those injuries occurred on June 3, 1999, July 27, 2001 and January 9, 2002. He said that his employer made no modifications for his back complaints after these earlier injuries.
- 32) Claimant's injury on June 3, 1999, while working for Employer, occurred when he was moving a roll of roofing and injured his back. (Exhibit C) Claimant complained of back pain that was radiating to the left leg, associated with numbness. A Lumbar Spine MRI taken on June 10, 1999 revealed mild degenerative disc disease with a left lateral disc bulge at L3-4, moderate degenerative disc disease with a posterior annular tear and a moderate left paracentral disc herniation at L4-5 and moderate degenerative disc disease with a posterior annular tear and right paracentral disc protrusion at L5-S1.
- 33) Claimant treated with **Dr. Frank O. Petkovich**, (Exhibit C and 1) who performed a lumbar laminectomy and microdiscectomy of left L4-5 with lateral decompression, foraminotomy and decompression of L5 nerve root on July 1, 1999. He performed this surgery to treat the large lumbar disc herniation of left L4-5 with compression of the left L5 nerve root. Claimant showed steady improvement following surgery and denied any continued radicular complaints. Dr. Petkovich released him to go back to work as tolerated on October 29, 1999, and then placed him at maximum medical improvement and fully released him from care with no work restrictions on

November 19, 1999. Dr. Petkovich rated Claimant as having 10% permanent partial disability to the body as a whole as a result of this lumbar disc herniation and subsequent surgery.

- 34) Claimant settled this **June 3, 1999 injury (Injury No. 99-074795) with Employer by Stipulation for Compromise Settlement** on April 20, 2000. (Exhibit C) The Stipulation reflects a settlement of \$23,578.40 based on approximate disability of 20% of the body as a whole referable to the low back.
- 35) While recovering from this injury and after he had been released back to work, the records documented a flare-up of symptoms in the low back that Claimant experienced in October 1999. (Exhibit 1) He apparently did some extremely physical work and developed a sudden pain in his low back. He was diagnosed as having an acute lumbosacral strain for which he was taken off work and given physical therapy and medications. When Claimant next saw the doctor on October 29, 1999 (nine days later), he was doing well and having no further pain in his lower back.
- 36) After Claimant recovered from this June 3, 1999 injury, he described continued weakness in the back, and a feeling like his back was going to snap. He said that he had to be careful with heavy lifting. He testified that he got rid of his boat because it was too bouncy for his back.
- 37) Claimant was next injured while working for Employer on July 27, 2001. He testified that he was scooping up some gravel from a roof and twisted his back, causing low back pain and pain into the right leg.
- 38) Claimant treated initially at **BJC Corporate Health** (Exhibit A and 1), where he presented with a consistent history of injury and complaints of pain and weakness from the low back into the right leg. The notes indicate he was dragging the right leg because of this injury. After an MRI on July 31, 2001 that showed disc protrusion at L5-S1 posteriorly and to the right, he was referred to Dr. Petkovich for further treatment and evaluation.
- 39) **Dr. Frank O. Petkovich** (Exhibit A and 1) first saw Claimant for this new injury on August 10, 2001. Claimant presented with a consistent history of injury at work and complaints of pain into the low back and right lower extremity. Dr. Petkovich performed surgery on August 30, 2001 to treat the very large lumbar disc herniation at right L5-S1 with large extruded fragment and severe compression of L5 and S1 nerve roots. The surgical procedure was a lumbar laminectomy and microdiscectomy, right L5-S1 with removal of disc herniation and lateral decompression and foraminotomy. Claimant continued to follow-up with Dr. Petkovich after surgery and indicated in the records that his low back and lower extremity pain and problems resolved. Dr. Petkovich believed that he had an excellent clinical recovery and result.
- 40) According to the physical therapy notes from **ProRehab** (Exhibit A and 1), Claimant worked his way back from a medium physical demand level to a heavy work physical demand level with the therapy he had following this injury. Those same notes indicate though that his work as a roofer was previously at the very heavy work physical demand level.
- 41) Dr. Petkovich released Claimant to return to his regular job as tolerated on November 16, 2001 and then released him back to work without restrictions and placed him at maximum medical improvement on December 21, 2001. He did not believe Claimant needed any further treatment for this injury. At that point, according to the records, he was working his regular job without any problems and had essentially no further pain in his lower back or either of his lower extremities. With the exception of the surgical scar, his physical examination was objectively normal.
- 42) Dr. Petkovich rated Claimant as having 10% permanent partial disability to the body as a whole as a result of the right lumbar disc herniation at L5-S1 and the subsequent surgical procedure.
- 43) Despite the notations in Dr. Petkovich's reports to the contrary, Claimant testified that after this injury and the subsequent treatment, he still had low back pain and numbness and tingling in the right leg. He testified that it was more difficult to lift, and the back pain was greater than it was before this injury. He said that he wore out more easily and his weakness increased. He admitted that he did not miss any more time from work until his next injury, and he was back working full time. He admitted though that he was only back to work a short period of time before the last injury in 2002.
- 44) Claimant injured his low back for the final time at work on January 9, 2002, when he was pushing carts across a roof, and lifting them over a hump on the roof. He developed pain again in the low back and into the left leg.
- 45) Claimant again came under the care of **Dr. Frank O. Petkovich**, who first saw Claimant following this injury on January 14, 2002. (Exhibit B and 1) Claimant provided a consistent history of the injury and described his complaints in the low back and left leg. Dr. Petkovich noted that he had been essentially pain free for the past two months working his regular job. In order to further evaluate the situation, Dr. Petkovich ordered an MRI with and without contrast, which was taken on January 17, 2002. The MRI showed a recurrent disc herniation at L4-5 on the left.

- 46) After a CT and Myelogram of the lumbar spine confirmed the presence of the left sided disc herniation at L4-5, Dr. Petkovich recommended a revision lumbar laminectomy and discectomy at L4-5 and a spinal fusion surgery with instrumentation using screws and interbody fusion cages at L4-5 and L5-S1 to prevent any further deterioration of the lumbar spine.
- 47) Before authorizing any such surgery, Employer sent Claimant for a second opinion examination to **Dr. James J. Coyle**, who saw Claimant on February 18, 2002. (Exhibit B and 1) Dr. Coyle agreed that the current herniation at L4-5 was related to the accident on January 9, 2002 and further agreed that the treatment plan and surgery recommended by Dr. Petkovich was appropriate. He further opined that it was unlikely that Claimant would be able to return to the heavy demand capacity of roofing work following this lumbar fusion procedure.
- 48) Prior to surgery, Claimant was also examined by **Dr. David Raskas** on March 8, 2002. (Exhibit B and 1) Dr. Raskas also agreed with the diagnosis and the type of surgery that was proposed by Dr. Petkovich.
- 49) On March 19, 2002, Dr. Petkovich and Dr. Raskas performed a lumbosacral fusion from L4 to the sacrum with right iliac bone graft and instrumentation with pedicle screws, rods and cages, as well as a decompressive lumbar laminectomy at L4-5 and L5-S1. This surgery was performed to treat the recurrent disc herniation at L4-5 and the lumbar spine instability.
- 50) Claimant continued to follow-up with Dr. Petkovich after surgery and appeared to show steady improvement in his complaints, based on a description of less back pain and no radicular complaints in the legs, according to the notes dated July 17, 2002 and August 14, 2002. Claimant also participated in a course of physical therapy at Aquatic Fitness, Inc. The notes from that facility do note continued low back and left lower extremity complaints.
- 51) When Claimant continued to report left leg complaints seven months after surgery, Dr. Petkovich ordered repeat CT and myelogram tests to see whether or not the fusion was solid. When the CT results came back suggesting an incomplete fusion at either level, Dr. Petkovich suggested that perhaps an additional surgery would be necessary to re-explore the fusion mass. Claimant again saw Dr. Raskas on February 14, 2003 for a second opinion on this potential need for more surgery. Dr. Raskas thought the fusion looked solid and did not believe more surgery was necessary. He recommended continued rehabilitation and restrictions on physical activity.
- 52) Dr. Petkovich examined Claimant on March 5, 2003. Claimant complained of intermittent low back and lower extremity pain, but had finished his physical therapy. He believed Claimant could return to light duty work but ordered an FCE to establish the limits of his restrictions. He released Claimant from his care at that time. He then sent Claimant for a Functional Capacity Evaluation on March 10, 2003, which revealed Claimant was able to function in the Medium work demand level (up to 30 lbs.). Claimant was found to be extremely guarded with all activities and he stopped all tasks due to subjective complaints. His range of motion of his upper and lower extremities was within functional limits and he could reach completely overhead and squat fully to the floor.
- 53) Following the FCE, Dr. Petkovich generated his final report on March 15, 2003. Dr. Petkovich opined that Claimant was at maximum medical improvement as of March 5, 2003 and no further specific treatment for his lumbosacral spine was indicated. He placed restrictions on Claimant's ability to work based on the FCE of no lifting more than 35-40 pounds, and no repetitive bending, stooping, kneeling or squatting. He also thought Claimant should be able to change positions (sit down or stand up) every two hours as necessary. Finally, he rated Claimant at 23% permanent partial disability to the body as a whole referable to the lumbar spine as a result of this injury and the subsequent surgery.
- 54) The records also showed that **Dr. John Graham** had seen Claimant for pain management. (Exhibit B) The report of Dr. Graham dated April 7, 2003 indicated that objectively Claimant had a good outcome from his fusion. Dr. Graham continued Claimant on medications for his pain complaints for "an indefinite period of time."
- 55) Following this last injury and the fusion surgery, Claimant testified that he lost bending and twisting motion in his low back. He described pain in the right leg and pain and stiffness in the low back. He said the surgery did not help his complaints. She testified that he has not gone back to work, because he does not believe his back could handle it. He said he cannot lift more than 10-15 pounds, and cannot do any bending, twisting, squatting or kneeling. He said the pain makes it hard to concentrate. He is able to dress and clean himself, but not as quick as before the injuries. He admitted that he can do some household chores, but his girlfriend does most of them. He said that he is stiff in the morning and he has to lay down at least three times per day for an hour at a time to take the pressure off the back. He said that he is able to wash his car or truck and cut the grass, but he has to space these activities out. He is capable of maintaining his checking account. He estimated that he could sit for about an hour, getting up now and then. He can stand and walk for about an hour with breaks. Lifting from the floor causes sharp low back pain, but lifting table to table is OK. He can also drive for about a half an hour.
- 56) Claimant was observed to be squirming and shifting in his seat while testifying at trial within about 15 minutes of

starting his testimony. In that respect, he did seem to be credibly presenting his complaints with regard to his ability to sit.

- 57) Claimant testified he would work if he could, but he does not believe that he can. He admitted that he has not looked for any work since this injury because he does not know how to do anything but roofing, and he does not think he could fill out an application. He also admitted that he has never contacted the Missouri Division of Vocational Rehabilitation about help with finding a new job within his restrictions. He has made no attempt at retraining.
- 58) Claimant admitted that he saw Dr. Graham a couple of times and Dr. Graham did prescribe some medications for him, but he did not like the way the medications made him feel. He said the medications made him feel worse than just dealing with the back pain. He admitted that he decided on his own not to go back to Dr. Graham and not to take any more medications for his back. He only takes Advil or Tylenol now and has not seen anyone else for his back.
- 59) The deposition of **Dr. Frank O. Petkovich** was taken by Employer on June 20, 2005 to make his opinions in this case admissible at trial. (Exhibit 1) Dr. Petkovich is a board certified orthopedic surgeon, who had the opportunity to treat Claimant for all three of his traumatic low back injuries, and performed all three surgeries on Claimant's low back. Dr. Petkovich agreed that Claimant had relatively advanced disc degeneration for his age even before this first injury in 1999. He confirmed in his deposition testimony that the injury and surgery in 1999 involved a disc herniation at L4-5, for which he rated Claimant as having 10% permanent partial disability. He also confirmed that Claimant was released back to work without restrictions following his treatment for this injury.
- 60) Dr. Petkovich testified further regarding the July 27, 2001 injury. He opined that the herniation or rupture of the already desiccated degenerative disc at the L5-S1 level was caused by the injury in 2001. He confirmed the surgery that he performed for the herniated disc and opined that Claimant had an additional 10% permanent partial disability related to this injury, over and above the 10% he previously attributed to the 1999 injury. He confirmed also that he released Claimant back to full duty without restrictions following this 2001 injury.
- 61) Dr. Petkovich confirmed the surgical procedure performed as a result of the January 9, 2002 injury (the lumbar fusion at L4-5 and L5-S1) and further noted that absent the prior events, this fusion would not have been necessary for this new L4-5 disc herniation. He rated 23% permanent partial disability of the body as a whole referable to the low back as a result of this 2002 injury, over and above the prior disability that he rated. He confirmed that Claimant could return to light duty work, but not his prior employment as a roofer. He confirmed the restrictions listed above from his March 15, 2003 report. He also confirmed that no further treatment was needed for Claimant's lumbosacral spine
- 62) The deposition of **Dr. David T. Volarich** was taken by Claimant on March 6, 2006 to make his opinions in this case admissible at trial. (Exhibit E) Dr. Volarich is an osteopathic physician with a certification as an independent medical examiner. He examined Claimant on one occasion, January 5, 2004, at the request of Claimant's attorney. This single examination occurred after Claimant had sustained his third injury in 2002 and also underwent his fusion surgery as a result of that third injury.
- 63) On physical examination, Dr. Volarich found Claimant had restricted range of motion in the lumbar spine, including 50% loss of flexion, 60% loss of extension and 20% loss each way of side bending. No spasm or trigger points were found. The neurologic examination revealed bilaterally weak quadriceps and calves. Pinprick sensation was diminished along the S1 nerve root in the right leg. Gait was normal except that Claimant moved slowly and cautiously. He was able to squat fully and stand back up, but complained of right lower extremity weakness.
- 64) Referable to the Claimant's back condition pre-existing the 2001 injury (including the 1999 injury), Dr. Volarich diagnosed herniated nucleus pulposus L4-5 to the left status post surgical treatment with additional L5-S1 disc protrusion and L3-4 disc bulge. He rated Claimant at 25% permanent partial disability of the body as a whole referable to the lumbosacral spine for these pre-existing diagnoses. He also confirmed that had he seen Claimant after the 1999 injury, he would have placed some permanent restrictions on Claimant's ability to work.
- 65) Referable to the July 27, 2001 injury, Dr. Volarich diagnosed progression of L5-S1 disc protrusion to herniation causing right leg radiculopathy and requiring surgical repair, as well as aggravation of prior lumbar syndrome at L3-4 and L4-5. He opined that the work injury of July 27, 2001 was the substantial factor in causing this diagnosis. He also rated Claimant at 30% permanent partial disability of the body as a whole referable to the lumbosacral spine for this July 27, 2001 injury. He again confirmed that had he seen Claimant after this injury, but before the third one, he would have placed more permanent restrictions on his ability to work.
- 66) Referable to the January 9, 2002 injury, Dr. Volarich diagnosed recurrent disk herniation at L4-5 to the left causing left leg L5 radiculopathy and aggravation of lumbar syndrome resulting in need for a two level fusion.

He also diagnosed failed back syndrome. He believed the injury at work on January 9, 2002 was the substantial contributing factor to this diagnosis and the need for the treatment. He rated Claimant at 45% permanent partial disability of the body as a whole referable to the lumbosacral spine for this January 9, 2002 injury. He did not believe Claimant was in need of any further surgery for the low back. He did suggest though perhaps a pain management regimen including medications for symptomatic relief of his complaints.

- 67) Dr. Volarich further opined that the combination of the disabilities creates a substantially greater disability than the simple sum or total of each separate injury or illness and so a loading factor should be added. He explained that the July 27, 2001 injury was made worse by the pre-existing findings because the back was already in a weakened condition when Claimant had the 2001 injury. Because there were different levels of the back and different legs involved, he believed the combined disability was a lot more than the simple sum of the disabilities. That was also true of the January 9, 2002 injury and all of the pre-existing injuries to the low back.
- 68) With regard to Claimant's employability, Dr. Volarich recommended a vocational assessment to determine whether or not he would be able to return to any employment in the open labor market. He hoped because of his young age, that there would be some work he could do. Although he did not outright opine whether or not Claimant was permanently and totally disabled, he did believe that if no employment could be found then that would be based on the combination of all of his injuries to the low back and not the last injury alone. He did place restrictions on Claimant of no lifting over 20-25 pounds, no, lifting overhead or away from the body, no sitting or standing in a fixed position for more than 30 to 45 minutes, and the ability to change positions to maximize comfort including lying down periodically. He admitted there was no indication in his report that Claimant told him he had to lay down throughout the day because of difficulties with his back.
- 69) The deposition of **Mr. James M. England, Jr.** was taken by Claimant on February 6, 2006 to make his opinions in this case admissible at trial. (Exhibit F) Mr. England is a certified rehabilitation counselor, who saw Claimant at the request of his attorney on July 7, 2004. He believed Claimant was functioning at a mid grade school level academically which would limit jobs open to him in the market place when that is combined with his physical problems. He categorized Claimant as a younger worker based on his age. Taking these factors into account and based on the doctors' restrictions, he did not think Claimant could go back to his prior employment.
- 70) Given his age and education, and based on Dr. Petkovich's restrictions (light to medium level), he did believe there were some kinds of assembly and packing type work that Claimant could pursue. Given these same things and Dr. Raskas' restrictions (sedentary level), Claimant would be further limited in job choice, but Mr. England still thought there were some packing and assembly jobs available at this sedentary level. It was Dr. Volarich's restriction of lying down periodically throughout the day that Mr. England suggested would take Claimant out of the work force. Mr. England noted that unless he could sit, stand and move around without lying down during the day, vocational rehabilitation would not be any help for him. He opined Claimant was unemployable due to a combination of his pre-existing injuries, academic deficiencies and his last date of accident.
- 71) On cross-examination by the Second Injury Fund, Mr. England admitted that Claimant was a foreman at his last job and so he had some supervisory responsibilities. He also admitted that Claimant's young age was a positive factor he had going for him. He admitted that he did not know whether additional training could improve Claimant's math and reading scores, which in turn would help his employability. He also admitted that absent the restriction on the need to lie down during the day, the rest of Dr. Volarich's restrictions would still place Claimant in the sedentary level of work, for which there would potentially be some jobs in the open labor market. It was this sole restriction of lying down that caused Claimant the most problems with pursuing light or sedentary work.

## **RULINGS OF LAW:**

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and medical records, as well as my personal observations of Claimant at hearing, I find: As a result of the January 9, 2002 accident, which arose out of and in the course of his employment, Claimant sustained a compensable low back injury, including a recurrent disc herniation at L4-5 on the left. As a result of the injury to his low back, adequately described in the records and reports of Dr. Petkovich, Dr. Coyle, Dr. Raskas and Dr. Volarich, Claimant continued to have pain, severely limited motion and weakness in his low back.

### ***Issue 1: Is Claimant entitled to future medical care related to this injury?***

Pursuant to **Mo. Rev. Stat. § 287.140 (2000)**, Employer is required to furnish "such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Just as Claimant must prove all of the other material elements of her claim, the burden is also on him to prove entitlement to future medical treatment. **Dean v. St. Luke's Hospital**, 936 S.W.2d 601, 603 (Mo.App. 1997) *overruled on other grounds*, **Hampton**, 121 S.W.3d at 223.

Claimant is entitled to an award of future medical treatment if he shows by a reasonable probability that future medical treatment is needed to cure and relieve the effects of the injury. *Concepcion v. Lear Corporation*, 173 S.W.3d 368, 372 (Mo.App. 2005).

Based on the competent and substantial evidence described above, I find that Claimant is not entitled to any future medical care related to this injury at work on January 9, 2002.

Dr. Petkovich very clearly testified that Claimant was at maximum medical improvement for this injury on March 5, 2003 and no further specific treatment for his lumbosacral spine was indicated.

Dr. Petkovich, Dr. Raskas, and Dr. Volarich all agreed that no more surgery was necessary for Claimant's back as a result of this injury. In fact, there is no expert opinion in the record to indicate any more surgery or other invasive treatment is necessary or related to this injury at work to cure and relieve Claimant of the effects of it.

Although Dr. Volarich does suggest that perhaps some pain management for symptomatic relief of Claimant's complaints may be necessary, Employer initially provided Claimant with such care with Dr. John Graham, and Claimant terminated that care on his own, by refusing to follow-up with Dr. Graham and further refusing to take the pain medications that were initially prescribed. Claimant admitted at hearing that the medications made him feel worse than just dealing with the back pain. He admitted that he decided on his own not to go back to Dr. Graham and not to take any more medications for his back. In that respect then, Claimant voluntarily terminated his medical treatment for the low back and gave no indication at hearing that he had any desire to obtain any further care or treatment for the low back related to this injury. Given the way he said the medications made him feel, he was pretty clear that he wanted no more such treatment.

In addition to Claimant's decision to terminate pain management treatment on his own, I find Dr. Petkovich is in the best position to provide the most competent and persuasive opinion on the need for future treatment. Dr. Petkovich has examined Claimant numerous times over almost four years and followed his progress over those years, while Dr. Volarich has only seen Claimant once. Dr. Petkovich is a board certified orthopedic surgeon, while Dr. Volarich is a certified independent medical examiner. Given his expertise and familiarity with Claimant's back condition, Dr. Petkovich's opinion that Claimant needs no further specific treatment for his lumbosacral spine is more credible and persuasive than the opinion of Dr. Volarich.

Therefore, for all these reasons, Claimant is not entitled to any future medical care related to this January 9, 2002 injury.

***Issue 2: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?***

***Issue 3: What is the liability of the Second Injury Fund?***

Given that these two issues are so inter-related in this claim with primary and pre-existing disabilities to the same part of the body, and further given Claimant's allegation that he is permanently and totally disabled, I will address these two issues together.

Under **Mo. Rev. Stat. § 287.020.7**, "total disability" is defined as "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 test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo.App. E.D. 1995)

In cases such as this one where the Second Injury Fund is involved and there is an allegation of permanent total disability, we must also look to **Mo.Rev.Stat. § 287.220** for the appropriate apportionment of benefits under the statute. The analysis of the case essentially takes on a three-step process:

First, is Claimant permanently and totally disabled?;

Second, what is the extent of Employer's liability for that disability from the last injury alone?; and

Finally, is the permanent total disability caused by a combination of the disability from the last injury and any pre-existing disabilities?

In determining this case, I will follow this three-step approach to award all appropriate benefits under the Statute.

Based on the competent and substantial evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational expert, as well as based on my personal observations of Claimant at hearing, I find that Claimant is not permanently and totally disabled under the statute.

While there can be no doubt that Claimant has significant permanent partial disability referable to the low back as a

result of his three injuries and surgeries, and while I believe Claimant was generally credible when he described the extent of the complaints that he continues to have as a result of his back condition, I do not believe that Claimant provided competent and substantial evidence to sustain a finding that he is completely unable to compete in the open labor market. Thus, I do not believe he has proved he is permanently and totally disabled.

First, there is no medical opinion in the record that outright indicates Claimant is permanently and totally disabled. Dr. Petkovich clearly indicates that Claimant is able to do light duty work and he places restrictions on him of no lifting more than 35-40 pounds, and no repetitive bending, stooping, kneeling or squatting. He also thought Claimant should be able to change positions (sit down or stand up) every two hours as necessary. Dr. Raskas suggested restrictions that would place Claimant in the sedentary level of work. Even Dr. Volarich defers to a vocational expert and does not outright say that Claimant is permanently and totally disabled.

Arguably, Dr. Volarich's restrictions along with Mr. England's vocational evaluation could support an award of permanent and total disability, but there are two fatal flaws in Mr. England's analysis that prevent his ultimate opinion from being considered competent and substantial evidence in this case. First, Mr. England admits that based on the restrictions provided by Dr. Petkovich, or even Dr. Raskas, there would be some kinds of work available in the open labor market that Claimant could pursue, including packing and assembly type jobs. Mr. England even admits that based on all of Dr. Volarich's restrictions, except the need to periodically lay down, Claimant would be capable of sedentary work in the open labor market.

Though Dr. Volarich imposed this restriction of having to periodically lay down over the course of the day, he admitted on cross-examination that there was no indication in his report that Claimant said he needed to actually lay down during the day. In that respect then, it is unclear where that restriction came from. What is clear is that it did not come from the functional capacity evaluation or the restrictions placed on Claimant by the other physicians.

For the same reasons listed above when weighing the expert opinions on the need for future medical, I find that Dr. Petkovich's opinions on appropriate restrictions and regarding Claimant's ability to work are more competent and persuasive than the opinions in that regard from Dr. Volarich. Dr. Petkovich examined Claimant numerous times over almost four years and followed his progress over those years, while Dr. Volarich only saw Claimant one time at the request of his attorney. Dr. Petkovich is a board certified orthopedic surgeon, while Dr. Volarich is a certified independent medical examiner. Additionally, Dr. Petkovich's restrictions are based on a Functional Capacity Evaluation, while there is no real indication what Dr. Volarich used as a basis for his restrictions.

Finding then that Dr. Petkovich's restrictions and opinion on employability is more persuasive than Dr. Volarich's, I also then find that based on those restrictions and Claimant's young age, Mr. England opines that there is work available in the open labor market that Claimant could pursue. Therefore, Claimant is not permanently and totally disabled.

Second, Mr. England's ultimate opinion that Claimant is not employable is flawed because he believed it was the combination of all of his back disability along with his alleged pre-existing learning disability that kept him from being employable. Claimant, however, has provided no competent and substantial proof that the alleged learning disability is permanent, nor regarding the extent of that alleged pre-existing disability. Since there is no proof that the learning disability is a permanent condition, Claimant failed in his burden of proof that it is a pre-existing permanent disability to be combined with the back disability.

Claimant did not submit any medical or other expert evidence at the hearing that addressed whether the learning disability was permanent, nor regarding the extent of any disability that may be attributable to that condition. Although Claimant did submit the records from the Special School District to document that Claimant was evaluated to have a learning disability while he was in school, those same records show that he was also initially evaluated to have a language impairment that he overcame with extra help he received from the District. The records further document that any learning disability was not "primarily caused by visual acuity deficits, auditory acuity deficits, motor deficits, emotional disturbance, language disability, mental retardation, dialectal differences or second language influence." His cognitive functioning was found to be in the Average to Low Average range. There were regular comments in the records though regarding Claimant applying himself and staying on task, playing around in class, and not wanting to take work home. One comment noted that if Claimant would only use his time more wisely, his grades would improve. Even at that, the grades listed in the record were not failing grades, but were between a B+ and a D-.

In short, I found, after reviewing the records, that Claimant's alleged learning disability seemed to be more functional, and based on his failure to work and apply himself, rather than based on a cognitive deficit or some other permanent, unchanging condition that would get no better with time. This belief was bolstered by the fact that Claimant was able to overcome his language impairment diagnosis with his work in school, causing that diagnosis to ultimately be dropped. Since Claimant dropped out of school on his own, it is unclear if with more time and help the learning disability would have ultimately been overcome as well. Even Mr. England admitted that he did not know whether additional training could improve Claimant's math and reading scores, which in turn would help his employability.

Since Claimant has not met his burden of proof on the permanency of the alleged learning disability and based on finding Dr. Petkovich's restrictions more competent and persuasive than the restrictions of Dr. Volarich, Claimant has failed

to meet the required burden of proof that he is unable to compete in the open labor market and so he is not found to be permanently and totally disabled under the statute.

The next finding then must be the nature and extent of permanent partial disability Claimant has attributable to the body as a whole referable to the low back from this last injury and also based on any greater (synergistic) combination of his disabilities.

Under **Mo. Rev. Stat. § 287.190.6 (2000)**, “‘permanent partial disability’ means a disability that is permanent in nature and partial in degree...” The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. *Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697,703 (Mo.App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. *Fogelsong v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

The issue of nature and extent of permanent partial disability is further complicated in this case by the pre-existing settlement and award the Claimant had for permanent partial disability to the body as a whole referable to the low back in connection with his prior low back injuries and surgeries. **Mo. Rev. Stat. § 287.190.6 (2000)** also provides in pertinent part that,

when payment therefor has been made in accordance with a settlement approved either by an administrative law judge or by the labor and industrial relations commission,...the percentage of disability shall be conclusively presumed to continue undiminished whenever a subsequent injury to the same member or same part of the body also results in permanent partial disability for which compensation under this chapter may be due...

Case law in this area has stood for the proposition that since pre-existing permanent partial disability to the same part of the body is conclusively presumed to continue undiminished, it is appropriate for the total amount of permanent partial disability to be reduced by the prior amount, leaving the balance to be paid by the Employer in the instant case. *Helm v. SCF, Inc.*, 761 S.W.2d 199 (Mo.App. 1988).

These issues in this case are then also impacted by the allegation that there is Second Injury Fund liability based on the combination of his primary and pre-existing disabilities.

Pursuant to **Mo. Rev. Stat. § 287.220.1 (2000)**, if an employee has a pre-existing disability of such seriousness to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and if the pre-existing disability and the subsequent compensable injury each result in a minimum of 12.5% permanent partial disability of the body as a whole, and if the combined disability is substantially greater than that which would have resulted from the last injury alone, then Employer is only responsible for payment for the disability from the last injury, any amount of pre-existing disability is subtracted out, and the Second Injury Fund shall pay Claimant compensation based on the balance left (or greater combination).

Based on a review of the medical records, and specifically the reports and depositions of Dr. Petkovich and Dr. Volarich, I find that both experts are in agreement with the diagnosis regarding the low back condition that is medically causally related to Claimant’s employment.

I further find that Claimant was generally credible when he testified about the continuing complaints of pain, severely limited range of motion and weakness in the low back. These same complaints are generally recorded in the report of Dr. Volarich. Although Dr. Petkovich’s reports suggest a better resolution of his problems and complaints, even his notes contain references to continued pain and problems in the back and left leg. I should note that I was somewhat confused and concerned that the medical records from the last injury reference left leg complaints before and after surgery, but the report of Dr. Volarich and Claimant’s testimony at hearing centered around complaints to the right leg. Although this could be seen as an inconsistency that would impact Claimant’s credibility with reporting his complaints accurately, I concluded instead that because of the severity of the problems with his back and the number of procedures done, it is certainly possible that he has complaints in both legs at times related to the back condition. While I do believe Claimant’s complaints were decreased by the treatment following this injury, I do not think they were completely eliminated. Both Dr. Volarich and Dr. Petkovich also provided opinions on permanent partial disability specifically attributable to this injury, and acknowledged the impact this injury and the surgical treatment had on Claimant’s overall back condition.

In arriving at a conclusion on the overall disability Claimant has in his low back, I did also take into account the restrictions placed on Claimant by the physicians and how much residual physical capacity Claimant retained, in terms of functioning in the open labor market. All of the doctors involved in this case severely restricted Claimant’s ability to work to levels ranging from light to sedentary employment. Given that he had previously only done very heavy work, these restrictions were certainly relevant toward determining the overall disability Claimant has following this last injury.

In trying to assess the percentage of permanent partial disability related to this injury for which Employer would have responsibility, it is also necessary to take into account the pre-existing permanent partial disability for which Employer would get a credit based on the settlement reached by Stipulation for Compromise Settlement in Injury No. 99-074795 and the award issued in Injury No. 01-085799. The award contained a finding, incorporating the pre-existing disability prior to that injury, that Claimant had 45% permanent partial disability referable to the low back at that time. According to statute, that amount of permanent partial disability is conclusively presumed to continue undiminished.

The final issue that impacts the nature and extent of permanent partial disability in this case is whether or not there is some greater (synergistic) combination of the low back disabilities above and beyond their simple sum when they are added together, thus bringing the Second Injury Fund into this equation.

I find that the pre-existing disability to the body as a whole referable to the low back at 45% meets the statutory threshold. Additionally, I find that the pre-existing disability to the low back was a hindrance or obstacle to employment since Claimant testified he continued to have pain and weakness in the back, and a need to be careful with heavy lifting.

I also find that the primary and pre-existing injuries to the back combine to create substantially greater disability than the simple sum of the disabilities added together. Although an argument could be made that there is no greater combination of disabilities in this case because all injuries are to the same part of the body, I do not believe that argument is persuasive here. Not only are there two different levels of the low back involved in the primary and pre-existing injuries, but more importantly, there were complaints running down opposite lower extremities in these injuries. Since the 2001 injury involved a herniation at right L5-S1 with right leg radiculopathy and the 2002 injury involved a recurrent herniation at left L4-5 with left leg radiculopathy, I do believe there is some greater (synergistic) combination when the disabilities are combined. Dr. Volarich also opined that the disabilities combined to form a greater disability than the simple sum and so a loading factor should be added.

Based upon all of these findings, as well as based on Claimant's testimony and the medical evidence, I find that Claimant has a total of 82.5% permanent partial disability of the body as a whole referable to the low back. I further find that Claimant has prior assessed disability of 45% of the body as a whole referable to the low back as found in the award from Injury No. 01-085799, and so that prior percentage of disability continues undiminished. I further find that Employer is responsible for 27.5% permanent partial disability of the body as a whole referable to the low back pursuant to this award (which meets the statutory threshold for Fund purposes). Subtracting then the primary and pre-existing disabilities from the total amount of disability found, leaves the Second Injury Fund responsible for the payment of 10% permanent partial disability of the body as whole referable to the low back for the greater (synergistic) combination of the low back disabilities.

Though Claimant also requests an award against the Second Injury Fund based on the combination of his low back condition and alleged pre-existing learning disability, that part of the Fund claim is denied for the same reasons discussed above in the section of the award discussing the findings on permanent total disability. As noted above, Claimant bears the burden of proving each element of his case, including the nature and extent of any pre-existing disability and that any pre-existing disability is permanent. Having thoroughly reviewed the evidence in the record, I do not believe Claimant has met his burden of proof in that regard on the alleged learning disability.

While it is true that extent and percentage of disability are findings within the special province of the fact finding body, proof must be made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs* at 703. In a case such as this which involves issues (extent of permanency for a learning disability condition and whether that condition is permanent in nature) outside of ordinary, lay understanding, then medical or expert testimony should be provided to meet this burden of proof. Given these findings based on my review of the Special School District records and given the lack of any medical or expert testimony to the contrary to assess the permanency or the extent of that alleged pre-existing disability, I do not believe Claimant has met his burden of proof on this part of the claim, and so it is denied.

Accordingly, Employer is responsible for 27.5% permanent partial disability of the body as whole referable to the low back, and the Second Injury Fund is responsible for payment of 10% permanent partial disability pursuant to this award.

## **CONCLUSION:**

Claimant has a compensable injury to the low back due to a recurrent herniation at left L4-5 with radiculopathy on January 9, 2002. Claimant is not entitled to any future medical care related to this injury and so none is awarded. Claimant has failed to prove that he is permanently and totally disabled under the statute and so that part of the claim is denied. Employer/Insurer is to pay 110 weeks of permanent partial disability benefits. The Second Injury Fund is to pay 40 weeks of permanent partial disability benefits. Compensation awarded is subject to a lien in the amount of 20% of all payments in favor of Jagadeesh (Bob) Mandava, for necessary legal services.

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

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

JOHN K. OTTENAD  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*