

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

Injury No.: 03-115591

Employee: Leo Mitterholzer  
Employer: A Plus Express, Inc.  
Insurer: Missouri Retailers Insurance  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: November 18, 2003  
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 17, 2006. The award and decision of Administrative Law Judge Matthew D. Vacca, issued August 17, 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 28<sup>th</sup> day of June 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

SEPARATE OPINION FILED

Alice A. Bartlett, Member

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

Attest:

\_\_\_\_\_  
Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may

exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge denying benefits.

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William F. Ringer, Chairman

SEPARATE OPINION  
CONCURRING IN PART AND DISSENTING IN PART

I join my fellow commissioners in awarding compensation in this claim. However, after a review of the entire record as a whole, I believe the decision of the administrative law judge should be modified.

I agree with the administrative law judge with regard to the award of permanent partial disability of 45% to left elbow and 5% permanent partial disability to his low back as a result of his motor vehicle accident in November 2003. I also agree that liability is imposed on the Second Injury Fund as employee is permanently and totally disabled as a result of all his injuries.

However, I disagree with the administrative law judge's finding that employee sustained a 25% permanent partial disability measured at the level of the cervical spine for the re-fusion based on the pseudo arthrosis which was substantially caused by and was medically and causally related to the motor vehicle accident on November 18, 2003.

I believe the evidence supports that the motor vehicle accident on November 18, 2003 did not cause the nonunion or pseudo arthrosis at the site of the prior cervical fusion at C4-5. Employee had significant pre-existing problems related to his neck that support a conclusion that employee's prior fusion never properly fused.

Dr. Mirkin performed an anterior cervical fusion at the C4-5 level on employee in June of 2002. The medical records indicate a history of neck and shoulder pain following the cervical fusion but pre-dating the 2003 motor vehicle accident. In November of 2002, employee sought evaluation from Dr. Gornet for neck and shoulder pain. Dr. Gornet reviewed a CT myelogram which was performed on November 6, 2002. At that time, Dr. Gornet was unsure whether employee's cervical fusion was solid.

Furthermore, Dr. Raskas testified that the motor vehicle accident in November 2003 was not a substantial factor in causing employee's pseudo arthrosis. He opined that employee's pseudo arthrosis was the result of his prior fusion not solidly fusing.

At most, the motor vehicle accident could have been a triggering event, but was not a substantial cause of employee's condition. Instead, his condition was a result of the failure of his initial fusion to completely heal.

For the foregoing reasons, I respectfully dissent from the portion of the majority's decision awarding employee 25 % permanent partial disability of the cervical spine.

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Alice A. Bartlett, Member

# AWARD

Employee: Leo Mitterholzer Injury No.: 03-115591  
Dependents: N/A Before the  
Employer: A Plus Express, Inc. **Division of Workers'**  
**Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri  
Insurer: Missouri Retailers Insurance  
Hearing Date: May 19, 2006 Checked by: MDV:tr

## 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: November 18, 2003
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:  
Driving truck when it jackknifed.
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: Left elbow, neck and back
14. Nature and extent of any permanent disability: 45% elbow, 25% neck, and 5% back
15. Compensation paid to-date for temporary disability: \$11,712.42
16. Value necessary medical aid paid to date by employer/insurer? \$69,785.66

Employee: Leo Mitterholzer Injury No.: 03-115591

17. Value necessary medical aid not furnished by employer/insurer? \$20,157.00
18. Employee's average weekly wages: \$447.41
19. Weekly compensation rate: \$298.27
20. Method wages computation: Agreed

## COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$20,157.00
14 2/7 weeks of temporary total disability (or temporary partial disability)	\$4,261.00
Underpaid temporary total disability	\$274.43
214.5 weeks of permanent partial disability from Employer	\$63,978.91

22. Second Injury Fund liability: Yes

\$298.27 payable by SIF beginning June 15, 2009 for Claimant's lifetime \*

(use of an asterisk (\*) denotes an indeterminate lifetime benefit)

TOTAL: \$88,671.34 \*

23. Future requirements awarded: See Award

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Matt Padberg

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Leo Mitterholzer	Injury No.: 03-115591
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	A Plus Express, Inc.	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Missouri Retailers Insurance	Checked by: MDV:tr

### PREFACE

Claimant is a truck driver. He has a history of serious injuries and significant invasive surgeries prior to the instant accident. The issues presented for resolution at this hearing are the nature and extent of any permanent disability, the nature and extent of temporary total disability, medical causation for complaints to the left elbow, low back and neck, past medical expenses, future medical expenses, and the liability of the Second Injury Fund, with the Second Injury Fund contending the primary injury is not compensable because of Claimant's failure to apportion causation between the accident and his primary injury and his prior injuries.

The challenge in this claim is to determine whether the instant accident caused any further damage to Claimant's already severely disabled body, and if so, what parts of his body sustained additional injury. There is ample evidence to support almost any conclusion or combination of conclusions.

### **FINDINGS OF FACT**

Based on all the competent, substantial and credible evidence, and the reasonable inferences to be derived therefrom, I find the following facts:

1. Claimant is a 39-year-old truck driver with a wife and three children. Claimant graduated tenth grade in 1985 and got his GED in 1993. He has worked in the past in landscaping, painting, machine shops and in restaurants. Claimant went to truck driving school in 1994 and obtained his commercial license. He has worked in the past at Lowe's in the customer service department and the plumbing aisle and was fired from there in 1994. Claimant worked as a regional truck driver handling three states until 1998.
2. Regional trucking is more physically demanding than over-the-road trucking because regional truckers have to unload their own trucks. Over-the-road truck drivers get "lumpers" to unload their trucks.
3. On May 23, 1995, Claimant fell from a truck while working in Connecticut. He sustained a herniated nucleus pulposus and Dr. Becker performed a fusion at L4-5 on May 21, 1996 (first low back surgery). Dr. Becker performed another low back surgery on March 3, 1998. This procedure was an anterior interbody fusion at L4-5 with right iliac bone crest graft and threaded fusion cage (second low back surgery). Following the second surgery Claimant was better and returned to work but during the winter following the second surgery while bending over to pick up a newspaper he had an increase in symptoms and underwent a third low back surgery on July 13, 1999. This time Dr. Becker fused L5-S1 and placed a bone graft plug and again utilized ray threaded fusion cages (third low back surgery). From this accident on May 23, 1995 until maximum medical improvement involving the third surgery, Claimant was variously restricted from performing lifting of over ten pounds, no frequent bending or sitting for more than forty minutes, and only working four to six hours per day. Following each surgery the various times and weights with regard to these restrictions were increased or decreased.
4. Claimant also suffered from a neck sprain from the May 23, 1995 injury which Dr. Becker described as simply a muscle sprain.
5. Claimant settled this workers' compensation claim in Connecticut for \$125,000.00 based on a 25% permanent partial disability of the spine and a \$20,000.00 payment towards future medications.
6. Claimant was injured again on October 7, 1999 in a motor vehicle accident but this incident produced only a transient decreased range of motion and was described by Dr. Becker as a sprain.
7. From 1993 to 2003 Claimant returned to work driving a truck. He had difficulty performing his duties but he testified that he toughed it out and got into a groove where he was able to function in his duties. Dr. Becker's records indicate Claimant was disabled from December 1, 1993 to July 13, 1999 and continues to be disabled as of February 18, 2000. This conflicts with Claimant's testimony that he was working, but no elaboration was provided. He may have been working part time or transitioning into full-time employment.
8. On May 4, 2000 Claimant was hit in the head and sustained a concussion and a neck sprain.
9. On October 9, 2000 Claimant fell off a bumper onto his back and had a soft tissue back sprain. He was off work for two weeks.
10. On September 7, 2001 Claimant was driving a tractor-trailer in Des Moines, Iowa and was involved in a motor vehicle accident. His wife went to Des Moines and drove him to St. Louis and he was treated at St. Anthony's by Dr. Weiss who referred Claimant to Dr. Krettek who referred Claimant to Dr. Mirkin. Dr. Mirkin performed a discectomy and fusion at C4-5 with an allograft cage and plates.
11. Claimant settled this workers' compensation claim for 25% permanent partial disability referable to the thoracic spine.
12. In the summer of 2002 Claimant fell and was seen in the emergency room. He followed up with Dr. Mirkin on July 8, 2002 and the fusion previously performed by Dr. Mirkin was okay and determined by Dr. Mirkin to be still consolidating at that point.
13. On November 7, 2002 Claimant was seen by Dr. Gornet for neck and shoulder pain and Dr. Gornet questioned whether the cervical fusion was solid.

14. On February 22, 2003 Claimant was moving to a new apartment and was conveyed to St. Anthony's Hospital after what medical records describe as a fall down stairs. The record describes no significant changes to the neck or the back.
15. Dr. Volarich examined Claimant on April 7, 2003 with regard to the Des Moines accident on September 7, 2001. He restricted Claimant to limited bending, twisting, lifting, pulling, pushing, and carrying. He restricted Claimant to no lifting of weights greater than 25 pounds and only then occasionally, no weight held away from the body or across or on uneven terrain, no fixed position for 30 to 45 minutes, change positions frequently and to pursue aerobic activity. Dr. Volarich rated Claimant at that time 45% at the neck and 12.5% low back for the September 7, 2001 Des Moines accident and 40% low back for the prior Connecticut injuries.
16. On July 15, 2003 Claimant had a toe injury while working at Lowe's. This resulted in a 15% permanent partial disability of the great toe.
17. On November 18, 2003 Claimant was working for the Employer herein, A Plus Express. He had worked for A Plus for about one month performing a "drop and hook" operation for deliveries to Columbia, Missouri. Claimant was driving a tractor-trailer on November 18, 2003 when he skidded on wet pavement and the truck jackknifed. Claimant was wearing a seatbelt but he hit his left elbow on the driver side door and was forcibly restrained in the incident by his seatbelt. Claimant was seen at Crossroads Regional Hospital in Wentzville, Missouri and diagnosed with a neck and back muscle sprain and left elbow contusion. The records do not provide much detail but a graphic indicates left elbow tenderness on the back of the elbow (Exhibit H, p. 7) and tenderness on the back of the neck (Exhibit H, p. 6) and low back (Exhibit H, p. 7).
18. Claimant followed up with Dr. Metzler at Washington University with neck and right arm pain. Dr. Metzler questioned whether the cervical fusion from the previous accident (Des Moines) was solid.
19. Dr. Byler saw Claimant on November 21, 2003 and November 26, 2003 and ordered a CT scan and prescribed muscle relaxants and pain medication.
20. Claimant saw Dr. Wayne on December 5, 2003. Claimant had described only mild intermittent pain in the neck up until the November 18, 2003 motor vehicle accident. He denied pain going down his arms after the prior neck surgery (Des Moines). Dr. Wayne referred Claimant to his partner, Dr. Raskas, and Dr. Raskas believed Claimant was doing well while driving a truck prior to the November 18, 2003 motor vehicle accident. Based on this description of prior wellbeing, Dr. Raskas determined Claimant's pseudo arthrosis of the neck to be causally related to the November 18, 2003 motor vehicle accident. Pseudo arthrosis means movement where there is supposed to be a fusion.
21. On December 18, 2003 Dr. Riew saw Claimant and he also found nonunion or pseudo arthrosis at the site of the prior cervical fusion at C4-5.
22. On January 15, 2004 Dr. Raskas and Dr. Kennedy performed a C4-5 posterior cervical fusion with restraint plate and bone grafting.
23. Nevertheless, Dr. Volarich, who examined Claimant prior to the instant motor vehicle accident, documented that on April 7, 2003 Claimant was complaining of ongoing problems in the neck which radiated into both shoulders, both hands, that he had daily headaches and pain upon using his arms overhead. Claimant reported shaking in his arms and inability to sit or stand for more than thirty minutes.
24. As mentioned, Dr. Gornet had also seen Claimant for neck pain radiating into the both shoulders and into the arms one year prior to the instant motor vehicle accident and Dr. Gornet then questioned the solidity of the cervical fusion.
25. Dr. Lange saw Claimant sixty days prior to the November 18, 2003 motor vehicle accident. Claimant was then complaining of low back pain, aching in the hips, burning in the anterior thigh, and numbness in the left anterior thigh. This was related to working for Lowe's in Florida and related to doing some extensive driving.
26. Claimant also had neck and back complaints at St. Anthony's Medical Center when he was seen in the emergency room for an incident when he was moving from one apartment to another. He was brought to the emergency room via ambulance but denies falling or any serious injury. This visit occurred on February 22, 2003, nine months before the November 18, 2003 motor vehicle accident. The records indicate falling down several stairs on buttocks.
27. On May 7, 2004 Claimant saw Dr. Wright at Washington University for left elbow pain. Claimant attributed the left elbow pain to the November 18, 2003 motor vehicle accident and Dr. Wright diagnosed lateral epicondylitis and possible cubital tunnel syndrome versus a cervical etiology and prescribed physical therapy.

28. On July 14, 2004 Claimant saw Dr. MacKinnon who recommended a left ulnar nerve transfer.
29. Dr. Sudekum performed a cubital tunnel release approximately one month later on August 25, 2004.
30. On September 1, 2004 a myelogram of the low back was performed which revealed minimal bulging at L4-5.
31. On September 7, 2004 Dr. Metzler injected the L4 nerve root with steroids.
32. On September 9, 2004 Dr. Sudekum released Claimant from left elbow treatment.
33. On September 23, 2004 Dr. Metzler did another low back steroid injection.
34. On December 30, 2004 Dr. MacKinnon recommended left radial nerve release and left lateral epicondylectomy.
35. On January 6, 2005 Dr. Metzler performed another epidural injection.
36. On January 24, 2005 Dr. MacKinnon released the left radial nerve and repeats the left ulnar nerve transposition on February 28, 2005.
37. On April 7, 2005 Claimant received more steroid injections.
38. On April 29, 2005 Claimant had complaints to Dr. Metzler centering on the low back and more injections are prescribed for July 21, 2005.
39. On August 8, 2005 Dr. Metzler injected the right upper trapezius.
40. Claimant was seen complaining of neck pain in September of 2005 with Dr. Riew at Washington University.
41. On October 3, 2005 Dr. Metzler performed a C6 nerve root block.
42. Claimant was awarded social security disability in 1998 because of the low back injuries and three lumbar surgeries and appears to have continued to receive those benefits until the November 18, 2003 motor vehicle accident. This was not further explained and I assume Claimant was in the process of becoming re-employed.
43. Dr. Raskas opined that the Claimant's pseudo arthrosis of the neck was a result of his prior surgery not solidly fusing. Pseudo arthrosis is motion where the bones should be fused.
44. The experts disagree as to what caused Claimant's cervical pseudo arthrosis. Before the November 18, 2003 motor vehicle accident, Dr. Mirkin saw Claimant on July 8, 2002 and felt the fusion (Des Moines) was consolidating.
45. Dr. Mirkin found that Claimant was stable from the previous fusion and released Claimant to return to work on July 8, 2002.
46. Dr. Raskas originally thought Claimant's motor vehicle accident on November 18, 2003 caused the previously solid fusion to become mobile. Nevertheless, he changed this opinion when he found out Claimant had seen Dr. Gornet in November of 2002 with complaints of constant pain into both shoulders and into the arms and an MRI on September 12, 2002 revealed a disc herniation and protrusion at C5-6 and Dr. Gornet questioned whether Claimant had achieved a solid fusion.
47. Dr. Wayne reviewed diagnostic tests before and after the motor vehicle accident and concluded the nonunion was due to the motor vehicle accident because he felt Claimant had a solid cervical fusion mass prior to the accident on November 18, 2003.
48. The experts also disagree as to the extent of any damage caused to Claimant's left elbow as a result of the November 18, 2003 motor vehicle accident. The medical records on the date of the accident document a contusion to the left elbow.
49. Dr. Byler noted a left elbow contusion following that accident.
50. Dr. Wayne saw Claimant in December of 2003 and recorded pain and paresthesias into the left arm with tenderness and pain over the left ulnar groove and posterior olecranon. Dr. Wayne prescribed physical therapy and attributed the problems to the motor vehicle accident in November of 2003.

51. Dr. Wright examined Claimant regarding ongoing symptoms in the left elbow and diagnosed epicondylitis and possible cubital tunnel syndrome. He prescribed cortisone injections, physical therapy and anti-inflammatory drugs. Claimant failed to improve and Dr. Wright sent Claimant to Dr. MacKinnon and she diagnosed left cubital tunnel syndrome and left medial epicondylitis. She prescribed a left ulnar nerve transposition and related the problem to the motor vehicle accident.
52. The Employer sent Claimant to Dr. Sudekum who performed a left ulnar nerve transposition and left cubital tunnel release on August 25, 2004. Claimant complained following this surgery that his elbow was worse and was sent back to Dr. MacKinnon who performed surgery on January 5 and repeat surgery on February 28, 2005 finding "a point of marked compression where the tendinous bands from within the flexor pronator muscle origin were tremendously compressing the ulnar nerve so that there was a dent in it and it took a right angled turn". The note mentions that the nerve actually took three right-angled turns. Claimant testified he never had any left elbow problems before the November 18, 2003 motor vehicle accident.
53. Dr. Doll pointed to the motor vehicle accident as the source of Claimant's left elbow injuries and the need for the left elbow treatment and surgeries. Dr. Doll assessed an 8% permanent partial disability of the elbow and 1% to the body as a whole for the injuries sustained in the motor vehicle accident.
54. Dr. Volarich evaluated Claimant on July 20, 2005 with respect to the November 2003 accident. He believes Claimant is permanently and totally disabled as a result of all of his injuries finding a 25% permanent partial disability at the level of the neck, 15% at the level of the back, and 65% of the left elbow arising out of the November 18, 2003 motor vehicle accident.
55. Employer asserts in its proposed award that Dr. MacKinnon never related the need for the left elbow surgery to the November 18, 2003 motor vehicle accident, but this is not completely accurate. On page 2 of her July 20, 2002 letter to Dr. Wright, Dr. MacKinnon says, "It would appear from his history today that his ulnar nerve problem relates to the motor vehicle accident that he has described above". Dr. MacKinnon's bills total \$11,848.00. Claimant was off work and unable to work from January 24, 2005 until May 2, 2005 for elbow surgeries with Dr. MacKinnon.
56. Mr. Israel, a vocational expert, testified Claimant is not employable in the open labor market due to all of his injuries.
57. Dr. Metzler's treatments for the low back and neck total \$7,559.00 which includes \$2,633.00 contained in the exhibit supplement submitted post-hearing.
58. Prescription costs associated with the treatments are \$660.00 plus \$90.00 in the supplement documented for a total of \$750.00 (some prescriptions in Exhibit U are unrelated to the claim and the parties agreed the relevant prescription total is \$750.00).
59. Claimant can coach Little League baseball, but bats one-handed with his uninjured right arm, crouch down to adjust catcher's equipment and stand for an entire game. He does appear stiff at times but is mobile. He can also rake mulch off the back of a truck. He credibly testified that these activities cause increased pain and require prescription medication and bed rest.

### **RULINGS OF LAW**

1. I find that Claimant sustained a 25% permanent partial disability measured at the level of the cervical spine for the re-fusion based on the pseudo arthrosis which was substantially caused by and was medically and causally related to the motor vehicle accident on November 18, 2003.
2. I also find that Claimant's three surgeries to his left elbow including the two surgeries performed by Dr. MacKinnon were medically and causally related to and were reasonable and necessary to cure and relieve him of left elbow injuries sustained in that accident as well.
3. Claimant is entitled to \$4,926.00 plus \$2,633.00 (Exhibit U) for Dr. Metzler's bills for treatment and \$660.00 plus \$90.00 (Exhibit U) for out of pocket prescription expenses and Dr. MacKinnon's bill for \$11,848.00 (\$20,157.00) all which are medically and causally related to this accident.
4. Claimant also sustained a 45% permanent partial disability to the left elbow and sustained a 5% additional permanent partial disability to his low back as a result of the injuries in the motor vehicle accident in November 2003.
5. While money for future medical is accounted for in Claimant's Connecticut compromise lump sum settlement, I am certain that much additional medical treatment was required by the motor vehicle accident which is the subject of this instant claim. Nevertheless, after the conditions caused by the November 2003 accident began

to subside and healing had progressed as a result of this incident, the apportionment for continuing medical care becomes more difficult. The instant accident couldn't have tremendously upped the ante with respect to a need for ongoing pain management. As the video demonstrates, Claimant does have residual function and is certainly not inert. Much of the pain he complained of post-hearing he also complained of pre-hearing when he saw Dr. Gornet, Dr. Volarich, and Dr. Lange. Based on my review of the evidence I cannot find where any doctor is able to credibly and precisely separate out the future need for ongoing medical necessitated as a result of this injury from the injury on September 7, 2001 in Des Moines, Iowa requiring a cervical fusion and the 1995 injury in Connecticut requiring three lumbar fusions. Future medical care is denied. The medical care to date is awarded.

6. Claimant is permanently and totally disabled by reason of all of his injuries and liability therefore should be imposed upon the Second Injury Fund. Claimant reached maximum medical improvement on May 2, 2005.
7. Claimant has requested temporary total disability from January 24, 2005 until May 2, 2005 when released by Dr. MacKinnon. Claimant is entitled to temporary total disability from January 24, 2005 until May 2, 2005 (14 2/7 weeks or \$4,261.00). It is awarded.
8. Claimant was paid temporary total disability benefits in the amount of \$11,712.42 from November 19, 2003 to October 5, 2004 with benefits paid at the rate of \$291.78. The parties agreed to a rate of \$298.27 and so there is an adjustment of \$6.49 for 47 2/7 weeks or \$274.43 in Claimant's favor. The Second Injury Fund benefits shall begin 214.5 weeks after May 2, 2005.

### DISCUSSION

There is no absolutely clear-cut path for deciding what new injuries Claimant sustained in the November 18, 2003 accident. The experts' opinions go in a variety of different directions. He had prior major surgeries including three lumbar fusions and one cervical fusion which had been producing ongoing symptoms when the last accident occurred. While I acknowledge some symptoms existing to the neck, back and elbow prior to the accident, I do believe the last accident substantially hastened the need for the additional surgical and pain treatments and caused the additional disabilities. Nevertheless, I also believe the need for future ongoing medical care and pain management is caused in large part by the prior injuries.

Following this last injury and the period of healing, Claimant has additional functional disability. Nevertheless, I also believe he has returned to his pre-2003 accident baseline status with regard to his pain level and his need for ongoing future medical care. In any event, there is not substantial credible evidence to separate the future need for medical caused by prior accidents from this one.

Likewise, I believe it is very clear that Claimant is permanently and totally disabled as a result of the three lumbar fusions, two cervical fusions and three left elbow surgeries. The video suggests an ability to coach Little League and push mulch off a truck with a rake, but Claimant credibly testified these activities cause him pain, a need for prescription pain medication and bed rest. I don't think they provide evidence of or an inference of an ability to engage in sustained remunerative employment.

#### Liability of the Second Injury Fund

The liability of the Second Injury Fund is set out in Section 287.220 RSMo (1994). See Leutinger v. Treasurer, 895 S.W.2d 591 (Mo. App. 1995). A previous disability need only be a "hindrance or obstacle to employment or obtaining employment." Id. Section 287.220.1 RSMo (1994). Claimant certainly has sustained preexisting disability with his prior three lumbar fusions and one neck fusion.

Section 287.020.7 RSMo (1986) defines total disability as the "inability to return to any employment and not merely...[the] inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment" mean "that the employee is unable to perform the usual duties of employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1983). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition." Id. At 922; Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (mo. App. 1990); Crum v. Sachs Elec., 769 S.W.2d 131, 133 (Mo. App. 1989).

Consistent with these cases, it is not reasonable to suggest any employer would employ Claimant in his present physical and mental condition. Claimant has only a GED and no training other than as a truck driver and clerk at Lowe's. He has worked in the past as a landscaper, painter and restaurant worker. I don't think he could

perform any of these jobs on a sustained basis. The Vocational expert, James Israel, concludes claimant's inability to perform sustained and repetitive bending, twisting, lifting, pushing, pulling, carrying, climbing and handling weights of over 25 pounds, the inability to perform prolonged sitting in a truck and the necessity he change positions frequently render him unable to compete in the open labor market. When these exertional and physical limitations are coupled with claimant's need to use narcotics and the medrol dose pack to control pain, Claimant cannot be reasonably expected to perform regular hours in any line of work on a full-time basis.

I don't think Claimant can realistically compete for employment in the open labor market. The injuries are simply too severe and pervasive. He might be able to coach Little League but he shouldn't be on the road behind a tractor-trailer again and I doubt he could stand all day on concrete floors at Lowe's, day in and day out.

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

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

Matthew D. Vacca  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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

Employee: Leo Mitterholzer

Injury No.: 03-115591