

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

Injury Nos.: 98-135078, 98-178503  
01-053092, & 99-180574

Employee: Garry Moore

Employers: 1) ASARCO, Inc.  
2) Doe Run Company

Insurers: 1) Self-Insured  
2) Pacific Employers Insurance Company

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

Dates of Accident: July 14, 1998; July 14, 1998; May 21, 2001; and October 13, 1999

Place and County of Accident: Reynolds County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the associate 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 associate administrative law judge dated November 24, 2004. The award and decision of Associate Administrative Law Judge Gary L. Robbins, issued November 24, 2004, 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 4<sup>th</sup> day of August 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
NOT SITTING

William F. Ringer, Chairman

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

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

\_\_\_\_\_  
Secretary

## **AWARD**

Employee: Garry Moore

Injury No. 98-135078, 98178503,  
99-180574 and 01-053092

Dependents: N/A

Employers: ASARCO, Inc., and Doe Run Company

Additional Party: Second Injury Fund

Insurer: ASARCO, Inc., Self-insured.  
Doe Run Company, Pacific Employers Insurance Company

Hearing Date: August 2, 2004

Checked by: GR:sm

## **SUMMARY OF FINDINGS**

CLAIMS #98-135078 & 98-178503 (Combined claims)

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 14, 1998
5. State location where accident occurred or occupational disease contracted: Reynolds County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes - ASARCO, Inc.
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of employment? Yes
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Employer was self-insured
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee injured his neck and body as a whole while driving an underground train over rough track which caused him to have a whiplash type injury (98-135078), and then later on the same day was lifting a bag of sand that caused further injury (98-178503).
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Neck and body as a whole.
14. Nature and extent of any permanent disability: Permanent and total disability against ASARCO, Inc. (See Award)
15. Compensation paid to date for temporary total disability: \$36,439.84

16. Value necessary medical aid paid to date by employer-insurer: \$107,122.00
17. Value necessary medical aid not furnished by employer-insurer: None
18. Employee's average weekly wage: \$803.82
19. Weekly compensation rate: \$535.88 per week for temporary total disability and permanent total disability. \$294.73 per week for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: \$535.88 per week by employer for life effective July 14, 1998 with the employer getting credit for all benefits paid between July 14, 1998 and July 28, 2001. (See Award)
22. Second Injury Fund liability: None (See Award)
23. Future requirements awarded: Future medical care (See Award)

SUMMARY OF FINDINGS  
CLAIM #99-180574

1. Are any benefits awarded herein? The employee entered into a compromise settlement with Doe Run. No (as to Second Injury Fund)
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease? October 13, 1999
5. State location where accident occurred or occupational disease contracted: Reynolds County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes - Doe Run Company
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of employment? Yes
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee injured both arms/wrist due to the repetitive gripping, etc., of the controls during the operation of an underground train.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Left and right arms
14. Nature and extent of any permanent disability: 15% PPD of left wrist & 7.5% PPD of right wrist (The settlement was entered into between the employee and Doe Run Company prior to trial).
15. Compensation paid to date for temporary total disability: None

16. Value necessary medical aid paid to date by employer-insurer: None
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$867.72
19. Weekly compensation rate: \$578.48 per week for temporary total disability and permanent total disability. \$303.01 per week for permanent partial disability.
20. Method wages computation: By agreement
21. Amount of compensation payable: See stipulation between Doe Run and the employee.
22. Second Injury Fund liability: None
23. Future requirements awarded: None

SUMMARY OF FINDINGS  
CLAIM #01-053092

1. Are any benefits awarded herein? The employee entered into a compromise settlement with Doe Run. No (as to Second Injury Fund)
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? May 21, 2001
5. State location where accident occurred or occupational disease contracted: Reynolds County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes - Doe Run Company
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of employment? Yes
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee injured his neck and body as a whole as he was using a pry bar attempting to dislodge a boulder.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Body as a whole and neck.
14. Nature and extent of any permanent disability: 16.5% PPD as to the body as a whole (The settlement was entered into between the employee and Doe Run Company prior to trial).
15. Compensation paid to date for temporary total disability: \$4,654.24
16. Value necessary medical aid paid to date by employer-insurer: \$1,439.29

17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$872.67
19. Weekly compensation rate: \$581.78 per week for temporary total disability and permanent total disability. \$314.26 per week for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See the stipulation entered into by the Doe Run Company and the employee.
22. Second Injury Fund liability: None
23. Future requirements awarded: None

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

The compensation awarded to the employee shall be subject to a lien in favor of Ronald L. Little for legal services rendered.

#### **FINDINGS OF FACT AND RULINGS OF LAW**

On August 2, 2004, the employee, Garry Moore, appeared in person and by his attorney, Mr. Ronald L. Little, for a hearing for a final award. The employer, ASARCO, Inc. (hereinafter, ASARCO) was represented by Mr. Robert W. Haeckel. The employer, Doe Run Company (hereinafter, Doe Run) was represented by Mr. Robin E. Fulton. The Second Injury Fund (hereinafter, the Fund or SIF) was represented by Assistant Attorney General, Mr. Frank A. Rodman. While the hearing dealt with multiple separate claims, claims #98-135078 and 98-178503 were consolidated for purposes of trial and combined as one claim of injury. The objections of Doe Run to consolidation are denied. At the time of the hearing, claims #98-178504 and #99-182695 were voluntarily dismissed with prejudice by the employee. It is agreed to by the parties that Doe Run purchased the mine where the employee worked from ASARCO. The parties agreed that the date of the purchase agreement was July 28, 1998, and the closing date for the transaction was September 1, 1998. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth as follows:

CLAIMS #98-135078 & 98-178503 (Combined claims)  
UNDISPUTED FACTS:

1. On or about July 14, 1998, ASARCO was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and was duly qualified as a self-insured employer.
2. On or about July 14, 1998, Garry Moore was an employee of ASARCO and was working under the provisions of the Missouri Workers' Compensation Act.
3. On or about July 14, 1998, Garry Moore sustained an accident(s) or occupational disease arising out of and in the course of his employment.
4. ASARCO had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$803.82 per week and his rate of compensation for temporary total disability and permanent total disability is \$535.88 per week. His rate of compensation for permanent partial disability is \$294.73 per week.
7. ASARCO furnished medical aid in the amount of \$107,122.00.
8. ASARCO paid temporary total disability benefits in the amount of \$36,439.84. These payments covered a total period of

68 weeks, covering the periods from July 29, 1998 to August 17, 1998; September 14, 1998 to November 2, 1998; April 23, 1999; April 27, 1999 to April 30, 1999; May 10, 1999 to August 15, 1999; September 15, 1999 to June 12, 2000; and July 31, 2000 to August 30, 2000.

#### ISSUES:

1. Whether the employee's injuries were medically causally related to his accident or occupational disease (medical causation)?
2. Whether the employee needs future medical care as a result of his injuries (future medical care)?
3. Whether the employee accident has caused him to be either permanently partially disabled or permanently totally disabled (nature and extent of disability)?
4. Liability of the Second Injury Fund?

CLAIM #99-180574

#### UNDISPUTED FACTS:

1. On or about October 13, 1999, Doe Run was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and was fully insured by Pacific Employers Insurance Company.
2. On or about October 13, 1999, Garry Moore was an employee of Doe Run and was working under the provisions of the Missouri Workers' Compensation Act.
3. On or about October 13, 1999, Garry Moore sustained an accident or occupational disease arising out of and in the course of his employment.
4. Doe Run had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$867.72 per week and his rate of compensation for temporary total disability and permanent total disability is \$578.48 per week. His rate of compensation for permanent partial disability is \$303.01 per week.
7. The employee's injury was medically causally related to accident or occupational disease.
8. Doe Run furnished no medical aid.
9. Doe Run paid no temporary total disability benefits.

#### ISSUES:

1. Whether the employee needs future medical care as a result of his injuries (future medical care)?
2. Liability of the Second Injury Fund?

CLAIM #01-053092

#### UNDISPUTED FACTS:

1. On or about May 21, 2001, Doe Run was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and was insured by Pacific Employers Insurance Company.
2. On or about May 21, 2001, Garry Moore was an employee of Doe Run and was working under the provisions of the Missouri Workers' Compensation Act.
3. On or about May 21, 2001, Garry Moore sustained an accident or occupational disease arising out of and in the course of his employment.
4. Doe Run had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$872.67 per week and his rate of compensation for temporary total disability and permanent total disability is \$581.78 per week. His rate of compensation for permanent partial disability is \$314.26 per week.
7. The employee's injury was medically causally related to accident or occupational disease.
8. Doe Run furnished medical aid in the amount of \$1,439.29.
9. Doe Run paid temporary total disability benefits in the amount of \$4,654.24 for a period of eight weeks (the parties did not specify any time periods).

## ISSUES:

1. Whether the employee needs future medical care as a result of his injuries (future medical care)?
2. Liability of the Second Injury Fund?

## EXHIBITS:

The following exhibits were offered and admitted into evidence. Depositions were admitted subject to objections by counsel contained therein. The Court reviewed the parties' objections, overrules them and admits all of the following exhibits into evidence:

### Employee Exhibits:

- A. Medical records of St. Louis Spine Care Alliance (Dr. David Raskas)
- B. Medical records of Dr. Daniel Phillips
- C. Medical records of Silver Springs Surgery Center (Dr. Wai Chiu)
- D. Medical records of Dr. Shahid Choudhary
- E. Medical records of Dr. Shahid Choudhary
- F. Medical records of Brain & Neurospine Clinic (Dr. Scott Gibbs)
- G. Medical records of Neurological Consultants of Cape
- H. Medical records of Dr. John Graham
- I. Medical records of Tesson Heights Orthopaedic (Dr. Peter Mirkin)
- J. Medical records of Dr. Brett Barnes
- K. Medical records of Dr. Michael Chabot
- L. Medical records of Kneibert Clinic
- M. Medical records of Dr. Paul Rains
- N. Medical records of Dr. Shawn Hudson
- O. Medical records of Dr. Henry Steele
- P. Medical records of Three Rivers Healthcare North
- Q. Medical records of St. Anthony's Medical Center
- R. Medical records of Missouri Baptist Medical Center
- S. Medical records of Southeast Missouri Hospital
- T. Medical records of Three Rivers Healthcare South
- U. Medical records of Three Rivers Healthcare North
- V. Medical records of Open MRI of Jefferson County
- W. Medical records of Dr. Richard Still
- X. Medical records of St. Francis Medical Center
- Y. Medical records of Des Peres Hospital
- Z. Medical records of Dr. Henry Steele

(\*\* Note that Employee Exhibits AA through VV, ZZ, and DDD were withdrawn)

- WW. Medical rating report of Dr. Mark Lichtenfeld
- XX. Vocational report of Mr. James England
- YY. Deposition of Dr. Mark Lichtenfeld
- AAA. Deposition of Mr. James England
- BBB. Claimant's Medical History
- CCC. Claimant's Work History
- EEE. Attorney's Contingent Contract
- FFF. Attorney's Contingent Contract

### ASARCO Exhibits:

1. Withdrawn
2. Deposition of Dr. Raskas

## Second Injury Fund Exhibits:

1. Typewritten reports of Dr. David Raskas

## Doe Run Exhibits:

None

## **SUMMARY OF THE EVIDENCE**

Gary Moore personally testified at the hearing on August 2, 2004. He stated that he was 58 years old with an eighth grade education and no GED. He is married to Becky Moore. She also testified at the hearing.

Mr. Moore was shown a summary of his medical treatment history up to the July 14, 1998 work accident and resulting injury. He reviewed the summary and stated that it appeared to be an accurate and complete summary concerning his medical treatment prior to the work injuries that are the subject of this hearing.

He was also shown a summary of his work history. He reviewed the exhibit and testified that the dates of the various employments were essentially correct and that in addition to the employments listed, he may have held some additional small jobs that he was unable to remember. He also stated that he was employed on two occasions with Cotton Belt Railroad and that in the mid to late 1970's he worked with Kenco Construction and BXW Construction. Outside of the mining industry, the nature of his work through the years included factory work, operating heavy-duty equipment and construction.

Mr. Moore testified that he first worked in the mines with Ozark Lead Mining beginning in 1978 until they ceased operations. He later returned to the mine work with ASARCO in 1986 until some time in 1990, building track and operating the train. He again returned to the mines with ASARCO in 1991, initially working as a powder man loading dynamite, then driving a truck and finally driving the train from 1993 to September of 1998 when he had his first neck surgery following the July 14, 1998 work accident. The employee testified that following the July 14, 1998 accident, ASARCO sold the mine to The Doe Run Company who took over operations on September 1, 1998. From the time Doe Run took over up to the date of his first neck surgery on September 10, 1998, Mr. Moore testified that he was in training classes for his new employer.

The work accidents of July 14, 1998 include the incident of the train hitting a kink in the track that caused the employee's neck to be jerked in a whiplash fashion, and the subsequent lifting of ninety pound sand bags. By agreement of the parties, these incidents of July 14, 1998, are treated as a single work accident/injury. After the work accident of July 14, 1998, the employee testified that his neck and left arm started hurting. He reported the accident and pain to his supervisor. He was sent to Rains Clinic on July 16, 1998. At that time he was given some medications and was taken off work. The employee was seen again at Rains Clinic and thereafter referred for a CT scan of his neck. The CT scan was performed July 27, 1998 at Lucy Lee Hospital and revealed a "disc herniation at C5-6 posteriorly and slightly to the left of midline."

On August 5, 1998, Mr. Moore was sent to Dr. Peter Mirkin in St. Louis. Dr. Mirkin ordered an MRI of the employee's neck. The MRI was performed at Lucy Lee Hospital on August 11, 1998. The MRI report suggested "disc osteophyte complex along the left posterior C5-6 level which results in mild left neural foraminal narrowing and mild deformity of the anterior cord." Dr. Mirkin ultimately recommended surgical intervention for Mr. Moore's neck injury.

On July 28, 1998, ASARCO entered into a sales agreement with Doe Run Company. Doe Run took over operations on September 1, 1998.

On September 10, 1998, Dr. Mirkin performed a microdissection; an anterior cervical discectomy with decompression of the spinal cord; and an anterior interbody fusion at the C5-6 level of the employee's neck which included the application of locking hardware. Dr. Mirkin discharged the employee on September 11, 1998 with a prescription for Percocet for pain. Mr. Moore saw Dr. Mirkin in follow-up and complained of neck pain.

On November 3, 1998, Dr. Mirkin released the employee to full duty without restrictions. On December 14, 1998, Dr. Mirkin reported that Mr. Moore has reached MMI and stated he could work without restrictions. Mr. Moore

testified that he asked Dr. Mirkin not to impose restrictions because his employer would not permit him to work with any restrictions. On January 15, 1999, less than one month after Dr. Mirkin released the employee, Dr. Mirkin's records reflect a letter from Crawford & Company indicating that Mr. Moore was having continued complaints of radiating pain following the September 10, 1998 surgery. On January 27, 1999, Dr. Mirkin again declared the employee at MMI and assessed a ten percent permanent partial disability of the body as a whole due to the work injury of July 14, 1998 and subsequent surgery.

Throughout this period, the employee continued to have pain in his neck and left shoulder. The employee testified that the surgery performed by Dr. Mirkin provided short-term relief but overall did not help his pain. The employer then referred Mr. Moore to Dr. David S. Raskas in St. Louis for a further medical consultation. On April 23, 1999, Dr. Raskas examined the employee and after some radiologic testing, determined that he was "developing a psuedoarthrosis and nonunion of the fusion." Further surgery was recommended and performed on May 11, 1999 by Dr. Raskas with the assistance of Dr. Barry Samson at Missouri Baptist Medical Center. Dr. Samson performed a C5-6 foraminotomy and microdissection and Dr. Raskas performed a C5-6 lateral mass fixation, posterior spinal fusion and iliac crest bone graft. The bone used for the fusion was harvested from Mr. Moore's hip. On May 13, 1999, while hospitalized at Missouri Baptist Medical Center, Mr. Moore complained of left hip pain. He testified that after this second surgery he developed some back pain that he had not had before this surgery. On August 16, 1999, Dr. Raskas released the employee to full duty work without restrictions. Mr. Moore testified that he requested a "no restriction" release from Dr. Raskas so that he would be able to return to work in accordance with the "no restriction" policy of his employer. Dr. Mirkin in his deposition testimony stated that this surgery was unnecessary.

During this period, Mr. Moore continued to complain of neck and back pain. He had been prescribed Darvocet and hydrocodone for pain. After approximately one month, the employee's pain in his neck and left shoulder/arm was no better than it had been prior to this second surgery. His initial improvement had deteriorated. On September 15, 1999, Mr. Moore again saw Dr. Raskas with pain complaints. Dr. Raskas imposed work restrictions including no shoveling and no lifting over fifty pounds. The record entry of October 8, 1999 from Dr. Raskas' medical records further details the work restrictions stating "no repetitive motion of his neck in flexion and extension, or rotation of his neck as part of his regular duties . . . no overhead work." Dr. Raskas declared the employee at maximum medical improvement, recommended pain management and classified the restrictions as "permanent." No rating was provided by Dr. Raskas at that time. Dr. Raskas later testified by deposition that Mr. Moore "had a twenty percent permanent partial disability of his neck . . . ten percent was due to the fusion and ten percent due to the chronic nerve root dysfunction." Dr. Raskas could give no explanation for the employee's continued pain and recommended chronic pain management in the form of medications.

The recommended pain management was provided by Dr. Wai E. Chiu at Silver Springs Pain Management in Cape Girardeau, Missouri. In October, November and December of 1999, Mr. Moore was treated with a series of injections in an effort to relieve his ongoing neck and upper extremity pain. In mid-December, 1999, the injection therapy was discontinued and narcotic pain medications were commenced. The employee was initially prescribed methadone but an allergic reaction developed and his medication was then changed to Oxycontin. Mr. Moore was also prescribed hydrocodone (a/k/a Vicodin) for break-through pain.

On October 7, 1999, Dr. Phillips conducted an EMG that revealed bilateral carpal tunnel syndrome (CTS). On October 13, 1999, the employee filed a claim for CTS. During this period of time, Mr. Moore made continued complaints of pain and was asking for stronger or more medications. His Oxycontin prescription was increased and he remained on hydrocodone among other medications. This process was continued into the next year.

In December of 1999, the employee sought medical advice independent of that provided by his employer and scheduled an appointment with S. K. Choudhary, M.D., in Poplar Bluff, Missouri. Dr. Choudhary took a history from the employee, examined him and recommended that he see another neurosurgeon. Mr. Moore reported Dr. Choudhary's recommendation to his employer and he was then scheduled for a consultation with Dr. Scott Gibbs in Cape Girardeau, Missouri.

Mr. Moore first saw Dr. Gibbs on February 2, 2000. He testified that he told Dr. Gibbs of the severe neck and left shoulder pain he was continuing to have and that the pain was running into his arm and that both his hands were hurting. Dr. Gibbs ran some preliminary tests on the employee and then recommended further neck surgery. On April 24, 2000, Dr. Gibbs performed a bilateral removal of posterior cervical plates and a left C5-6 facetectomy, adhesiolysis and microdiscectomy at Southeast Missouri Hospital in Cape Girardeau. This is the employee's third and last neck surgery since his initial accident of July 14, 1998. Mr. Moore testified that initially he thought that this

third surgery helped with his pain, but that after a while his pain returned to the same level as before - no better, no worse. Dr. Gibbs continued the employee on oxycontin after this surgery.

The employee testified that he was off work due to this third neck surgery for a few months. On June 13, 2000, Dr. Gibbs released Mr. Moore without restrictions, to full duty work, but indicated that Mr. Moore needed to continue with physical therapy and injection therapy. Mr. Moore testified that he had again requested a release without restrictions.

Mr. Moore testified that after this second surgery, wherein a bone graft was removed from his hip, he developed back/hip pain that he had not had before this surgery. The medical records from Missouri Baptist Medical Center reflect the complaints of hip pain immediately following the surgery of Dr. Raskas. Beginning with Mr. Moore's initial evaluation by Dr. Gibbs on February 2, 2000 and thereafter, Mr. Moore reported pain and aching in his back and lower extremities. Due to these continuing problems, in April of 2000, Dr. Gibbs diagnosed "back and left leg pain that seems to follow an L5 or S1 dermatomal pattern." In May of 2000, the employee discussed his continuing back/hip pain with Dr. Gibbs. He noted that he had no history of leg pain until his last neck surgery on May 11, 1999. He indicated that since the time of the bone graft he feels that the back and leg pain have been associated with that. He denies any back or leg pain prior to the May 11, 1999 surgery. Mr. Moore reported this same history to Dr. Raskas in August of 2003 at the time of his evaluation. It was during this period that Dr. Gibbs prescribed a tens unit for the employee's pain and continued him on narcotic medications.

The employee had an MRI of his lumbar spine performed at Saint Francis Medical Center on June 13, 2000. The report states "[t]he MRI examination demonstrates evidence of abnormally increased signal in the posterolateral disc margin on the left at L4-5 approximately at the level of the lateral recess and adjacent to the traversing L5 nerve root. If the patient's clinical symptoms relate to this nerve root distribution, this is the probable cause." The corresponding June 13, 2000 neurological evaluation record of Dr. Gibbs notes that Mr. Moore "continues to have some aching and burning pain in the left side of his low back that radiates to his posterior thigh, calf and lateral foot. He notes that this came on about three or four weeks after his 'bone graft harvest.' He does not recall any other precipitating event." Dr. Gibbs' report goes on to discuss his findings after considering that June 13, 2000 MRI scan and finds "no evidence of a lumbar disc herniation or any other apparent cause for his leg discomfort."

Following this third neck surgery, the employee was referred by Dr. Gibbs to Dr. Chiu at Silver Springs Pain Management for treatment of his low back and left hip pain. This was done in June of 2000. Mr. Moore testified that he was given some injections. At some point after these injections the employer refused to authorize further treatment of the employee's low back. The employee still made complaints of pain and still was being prescribed narcotic medications.

On July 25, 2000, Mr. Moore saw Dr. Gibbs and asked that he be continued on Oxycontin as the lesser medications were not working. The employee reported that he did not feel he could do his job as it was too hard on him. The employee reported that after he had returned to work for several weeks after the Gibbs surgery, he had lost all he had gained. The employee also reported to Dr. Gibbs that he felt his CTS problems were due to operating the train for fifteen years. Dr. Gibbs reported that the employee was a candidate for left CTS surgery. On August 11, 2000 Mr. Moore asked Dr. Gibbs for a release. Dr. Gibbs reported that the employee is limited by his pain and recommended chronic pain management. Dr. Gibbs indicated that the employee should be mindful of aggravating factors and should adjust his activities.

Following the release by Dr. Gibbs, Mr. Moore was continuing to have pain in his neck, left shoulder and low back. He was referred to Dr. John Graham for management of his continuing pain. Mr. Moore first saw Dr. Graham on August 21, 2000. Dr. Graham discontinued the employee's narcotic therapy and prescribed the following substitute medications: Neurontin, Ultram, Remeron, Elavil and Celebrex. Mr. Moore testified that he asked Dr. Graham to put him back on the Oxycontin but that he refused. The employee stated that he went back to Dr. Choudhary on his own who did return his prescription for the hydrocodone.

Mr. Moore testified that his regular job was running the train. He stated that ordinarily it takes two people to do the two "jobs" necessary to run the train and that he worked the train together with Eugene. He and Eugene would share the jobs so that for half of each day, one would "load the cars" while the other would "run the train" and they would switch jobs for the other half day. Loading the cars was the easier of the two jobs which consisted of pulling

a few levers every 15-20 minutes with the time in between to sit, rest and wait for the train to return. Running the cars included driving the train and necessarily required riding on the rough train track in and out of the mine. After the July 14, 1998 injury, Mr. Moore indicated that riding the train jarred him around and caused him a significant amount of neck and back pain.

Mr. Moore said that to drive or "run" the train, you use your hands constantly to release the brakes and to use the drive control. He described the drive control as requiring a constant pull against pressure to make the train move. If there is no pulling on the control, the train does not go. The employee said that the driver's seat spins around so that he faces in the direction of travel whether going in or out of the mine. He said that he would typically use his right hand driving into the mine and would use his left hand when exiting the mine.

The employee's October 13, 1999 claim for compensation was for the occupational injury of bilateral carpal tunnel that resulted from the repetitive pushing, pulling, gripping and holding required to run and drive the train at work.

Dr. Mark A. Lichtenfeld rated Mr. Moore's injury to both upper extremities in his report of December 9, 2002 as a thirty percent permanent partial disability (PPD) to the left wrist and twenty-five percent PPD of the right wrist. Dr. Lichtenfeld further recommended that the employee needed additional medical that included medications and possible right CTS surgery.

Although the authorized treating physicians diagnosed Mr. Moore's bilateral carpal tunnel syndrome, neither ASARCO nor Doe Run authorized treatment. Therefore Mr. Moore sought treatment on his own. Dr. Bret Barnes performed a left carpal tunnel release on July 25, 2002. Mr. Moore testified that the results of the surgery on his left wrist had provided him only minimal relief and that he was not continuing to wear the braces previously provided. He indicated that now his right hand is worse than the left and that when he uses his hands too much he has pain in both hands. He felt like the left carpal tunnel release stopped the tingling in the fingers but stated that he still has pain in the ball of his left thumb with some pain and numbness in his left elbow. At night he has numbness in both hands. Overall the right hand is now worse than the left.. However, despite these problems, Mr. Moore testified that he was not interested in further CTS surgery.

After the third neck surgery, Mr. Moore again returned to work and although he was released without restrictions, he was unable to perform the duties of his work without the benefit of the extraordinary accommodations and assistance from his co-worker, Eugene, and later from his supervisor. When the employee first returned to work following the third surgery, he said, they let me run the crusher and work in supplies. The "crusher" job was significantly easier than either of the jobs on the train. It amounted to pushing a button every one-half hour or so with no particular force required for the button.

Eventually he was put back on the train but when he started hurting too bad, he was permitted to lie down. He said that pretty regularly Eugene, his co-worker, would run the train all-day and let Mr. Moore do the loading (the easier of the two) all day. Other times Eugene would do both jobs - run the train and load the cars - leaving Mr. Moore in the "load" area to sit or stand or whatever because of his pain. After the May 21, 2001 work accident/injury, Mr. Moore's supervisor would accommodate his problems by allowing him to sit in the office when he was really hurting, which would leave Eugene to do both jobs on the train.

Mr. Moore stated that after the July 14, 1998 work injury, he would lie down at work on a picnic table during the morning and afternoon breaks and for at least thirty minutes during the lunch hour. Even with the extraordinary accommodations and his co-worker's assistance, the employee had great difficulty. Since the July 14, 1998 work accident, Mr. Moore testified that by the end of the work day he would be in severe pain and would go home, take his pain medication and lie down.

On May 21, 2001, Mr. Moore suffered another injury while working. He again injured his neck. On this occasion he was prying a boulder loose that was stuck in a crusher. No surgery resulted from this last accident. Mr. Moore testified that he had an immediate onset of pain, but his pain went back to pre-injury levels. He testified that he is not any worse as a result of this accident.

He stated that in the last couple of months before the May 21, 2001 work accident he felt drained and it seemed that he had to always lie down and rest. He testified that he continued to try to work for a couple of months after the May 21, 2001 work accident/injury and that his last day at work was July 27, 2001.

Mr. Moore settled his CTS case with Doe Run for 15% PPD of the left wrist and 7½% PPD of the right wrist. He settled his May 21, 2001 case for 16½% PPD of his neck. The issue of future medical care was left open in both cases.

On November 19, 2002, Mr. Moore was interviewed and examined by Dr. Mark A. Lichtenfeld at the request of his attorney, Ronald L. Little. On December 9, 2002, Dr. Lichtenfeld produced a written report of his evaluation. Dr. Lichtenfeld's provided an extensive list of his conclusions concerning the employee's injuries and disabilities that he said were a direct result of the injuries that occurred at work on July 14, 1998 or from complications resulting from his surgeries. Those findings among other things documents problems with the neck, back and hip.

On August 28, 2003, Mr. Moore was interviewed and evaluated by James M. England, Jr., vocational rehabilitation counselor at the request of his attorney. On September 16, 2003, Mr. England produced a written report of his evaluation. In his deposition testimony taken on September 25, 2003, Mr. England testified that after Mr. Moore's original accident in July 1998 to approximately July 23, 2001, Mr. Moore "would go back to work off and on; he would go back and then would end up back out and then he would go back; that he kept trying to do that until he told me he couldn't take the pain anymore." Mr. England testified that due to his problems, Mr. Moore is permanently and totally disabled. He could not go out and get a job or perform any job and sustain it on a constant basis. Mr. England's opinion was that no employer would hire him. In response to questioning, Mr. England stated "all I can say...is that unlike a lot of people...he just didn't get hurt and give up. He did keep trying to go back over and over and over again. It looked to me like...he wanted to say there as long as he could."

As a result of the neck, left upper extremity and low back injury he sustained at work on July 14, 1998, the employee stated that he is currently taking Oxycontin, hydrocodone, and amytryptaline (for pain, break-through pain, and depression/sleep respectively). Mr. Moore is also taking other medications. He indicated that he was first prescribed hydrocodone after the first surgery by Dr. Mirkin. The medical records in evidence show that his authorized treating physicians for the July 14, 1998 work injuries, Dr. Raskas, Dr. Gibbs and Dr. Chiu all prescribed hydrocodone for pain. The medical records also reveal that Mr. Moore was first prescribed Oxycontin by Dr. Chiu in December 1999 following the Raskas neck surgery. In 2000, before and after the third neck surgery, Dr. Gibbs also prescribed Oxycontin for the employee's continued neck and back pain.

The employee stated that before the May 21, 2001 work accident/injury, his medications were essentially the same as they are now except that when he returned to work following the third surgery, he was taken off the Oxycontin because his employer had a drug use policy that prohibited him from working and taking it. Mr. Moore also stated that he has also had problems sleeping since the July 14, 1998 work accident and that his sleep problems are because of his constant neck pain. Before May 21, 2001 he had been prescribed Ambien to help with his sleep problems and that he now takes amytryptaline. Mr. Moore stated that his neck pain is the primary reason he takes pain medication but acknowledged that it also helps to relieve his left hip/low back pain.

Mr. Moore testified that since the July 1998 work injuries, his neck pain has never completely gone away and that he still has the same pain as before the first surgery. He would get some initial success after the surgeries but always regressed. He indicated that over the period of the surgeries, his symptoms were essentially the same: neck and shoulder pain with pain and stinging in his left arm. Currently he does not want any further surgery on his neck and that in retrospect he wished he had not had the three surgeries that were performed since he says they have really not provided him any relief. He characterized his current neck pain as essentially the same as before the May 21, 2001 work injury, stating at different times that it was "pretty much the same" or "about the same" or "still the same." Mr. Moore testified that the only medicine he's been given that ever helped with his pain was the Oxycontin and he was asking to have that continued.

Mr. Moore also testified that he continues to use the TENS unit prescribed by Dr. Gibbs following the third neck surgery. He stated that he typically uses the unit two or three times each week for a couple of hours to help reduce his neck pain. During a break in his testimony at the hearing, he put his TENS unit on for the remainder of the day. Mr. Moore appeared to be uncomfortable and in pain during his trial.

As for his current activities, the employee stated that he no longer works on his automobiles, hunts or fishes; that he has not gone fishing in over two years; and that the reason he has quit these activities is because of his pain, neck more than back pain. He stated that he can mow a portion of his property he referred to as the "ditch line."

He described this area to be approximately 40 feet by 300 feet and indicated that he mows this particular area because it is smooth and flat and gives him something to do. He stated that he walks every day whether he hurts or feels pretty good; that he tries to stay awake most of every day even though he does have to lie down in the afternoons for a couple of hours to get some relief. He stated that he is no longer able to stay up all day, primarily because of his neck. He stated that he could probably sit for most of a day, but not without significant pain.

Mr. Moore's wife, Becky, testified that she and Garry were married at the time of his July 14, 1998 injury and that before that injury he was able to perform all the duties of his job. Ms. Moore stated that presently Garry still drives "some" and that he will mow the "ditchline" maybe once a week. She testified that she went with him to all of the doctor appointments over the years. She stated that after each of the neck surgeries he went back to work. She testified that after the July 14, 1998 work accident, her husband was never pain free; that after the last surgery he thought he was better but then his pain returned to how it was before. Ms. Moore testified that when Garry returned to work following the third neck surgery, she would be home when he came in from work and she could see that he was always in a great deal of pain, sometimes even with tears. She said he would immediately take his pain medication and just try to relax.

Mr. Moore has continued to take narcotics and other medications up to the trial date of August 2, 2004. Dr. Steele is currently prescribing maintenance medications for Mr. Moore.

## **FINDINGS OF FACT AND RULINGS OF LAW-98-135078 and 98-175503**

### **1. Medical Causation**

The issue is undisputed and the evidence is clear that Mr. Moore sustained injuries to his neck on July 14, 1998. The employer however, questions whether these injuries are medically causally related to the two accidents that occurred on that date.

The testimony of the employee at trial was found to be entirely credible. Additionally, the Court carefully watched the demeanor and actions of the employee throughout trial. His facial expressions, shifting of his body and general indications of discomfort and or pain were found by the Court to support his oral testimony and were further supported by the medical records. Any reading of the evidence documents that the employee initially injured his neck while operating the train at ASARCO on July 14, 1998, and subsequently on the same day further injured his neck while lifting sand bags.

As a result of these injuries, the employee underwent three neck surgeries with Dr. Mirkin, Dr. Raskas and Dr. Gibbs respectively. The evidence confirms that the employee did not sustain any further injuries to his neck between his first surgery on September 10, 1998, his second surgery on May 11, 1999, and his last surgery on April 24, 2000. It is clear that the employee did not sustain another injury to his neck until May 21, 2001. The evidence confirms that each of the employee's three neck surgeries were undertaken at the same disc level in an attempt to alleviate pain and instability.

The Court is abundantly aware that after each of the surgeries, Mr. Moore attempted to return to work despite the discomfort and pain that he was undergoing in order to complete his job duties. The Court is also aware that Mr. Moore was taking substantial amounts of narcotic medications essentially throughout his attempts to return to gainful employment; and that to their credit, ASARCO and Mr. Moore's co-employees allowed Mr. Moore substantial accommodations to assist him in performing his duties. The accommodations were so generous that other workers either performed the strenuous and/or demanding portions of the employee's duties, or essentially did them altogether while the employee rested. Mr. England's testimony was very poignant when he stated that Mr. Moore "kept trying to go back over and over." "He would go back, and the he'd end up back out, and he'd go back. And he kept trying to do that until he told me he just couldn't take the pain anymore."

There is essentially no dispute between the treating doctors (Mirkin, Raskas and Gibbs) that the work accidents of July 14, 1998 were substantial factors causing the need for medical care to the employee's neck an upper extremity. The Court finds that the evidence taken as a whole, including both the credible medical evidence that was presented and the testimony of the employee, supports a finding of a medical causal relationship between the accidents of July 14, 1998, and the subsequent medical care and surgeries that the employee received.

The employee testified that after each surgical procedure he received some initial relief, but that after a short time, the pain and symptoms he was suffering from returned to presurgical levels. The medical records supports his testimony in that Mr. Moore continued to receive narcotic pain medication at ever increasing levels after each post-surgical release. According to the employee and the medical records, Mr. Moore was never pain or symptom free after July 14, 1998. The medical records reflect that the employee was under going medical care including pain management constantly and continuously from at least one medical provider from July 14, 1998 until the date of the hearing.

The evidence can be somewhat separated as to the causal connection and the need for care when comparing the neck and the

back. The pathway regarding medical causation as to the neck is clear and unchallenged, whereas the employee never sustained a specific debilitating work injury to the back per se. According to the evidence, Mr. Moore never suffered from any significant back problems prior to the second neck surgery with Dr. Raskas on May 11, 1999. He testified that after the second surgery by Dr. Raskas he developed back and hip pain that he never had before and did not have as a result of his prior injury. Mr. Moore reported the back pain while he was still hospitalized and before being discharged by Dr. Raskas. The medical records also document the fact that Mr. Moore has complained about back/hip problems continuously from the time of the surgery up to his trial. The treatment records and medical histories taken by the medical providers since the May 11, 1999 surgery show a continuous pattern of complaints with the back and hip. Dr. Gibbs referred the employee for an MRI concerning the problems with the hip and diagnosed back and left-sided pain that follows an L5-S1 dermatomal pattern.

Dr. Raskas concluded that the back/hip problem was not related to work. Dr. Lichtenfeld opined that the substantial cause of the employee's low back pain and injury was the accident of July 14, 1998, as well as the complications resulting from the treatment for that injury. He specifically opined that the harvest of the left iliac crest cortical bone graft for the fusion surgery of May 11, 1999, is what caused the employee's back and/or hip pain. Dr. Lichtenfeld described the bone harvest procedure as involving a tremendous amount of force where you "gouge the bone." He further opined that the bone harvest procedure requires a significant amount of force sufficient to cause the back and radicular pain the employee now has.

The Court finds that the opinions of Dr. Lichtenfeld on this matter are the most credible. The employee and his wife's testimony and the medical records supports this opinion. The Court therefore finds that the evidence taken as a whole supports the position that the need for medical care to the employee's back/hip is medically causally related to his accident or subsequent surgeries and care resultant from the employee's accident of July 14, 1998.

The Court finds that the employee has met his burden of proof and has shown by competent evidence the his need for medical care to his neck, back/hip and body as a whole is related to his work related accidents of July 14, 1998.

## 2. Future Medical

The medical records are replete with information documenting the employee's needs for future medical care to include but not be limited to such things as tens units and narcotic medications. There is no credible evidence that disputes this matter. At trial Mr. Moore testified that he is currently taking medications such as Oxycontin, hydrocodone and others to deal with pain. Again the medical records are replete showing doctor after doctor prescribing such medications. Mr. Moore was first prescribed hydrocodone after his first surgery with Dr. Mirkin. Doctors Raskas, Gibbs, Chiu and others have prescribed narcotic medication to include Oxycontin since the employee's first surgery. These medications have been prescribed to deal mainly with the pain that the employee has incurred as a result of his injuries and subsequent medical care. The records reveal a continuing request by Mr. Moore for more effective pain medications. The only period where the employee discontinued the use of Oxycontin was in order to try to work and be in compliance with ASARCO's rules re the use of narcotic medication. Mr. Moore's primary care physician, Dr. Steele, has maintained him on pain medications since July 2001. The overwhelming opinions of treating physicians is that Mr. Moore has an indefinite and ongoing need for pain management, and in addition the use of a tens unit.

The employee testified that since the July 14, 1998 work injuries, his neck pain has never completely gone away on a permanent basis and that he still has the same pain as before the first surgery. Medical records support this testimony. He testified that before the May 21, 2001 work accident, his medications were essentially the same as they were at the time of trial except for the period he was taken off Oxycontin in an effort to return to work. Mr. Moore testified that his neck pain is the primary but not the only reason he takes pain medication. He further testified that over the period of his surgeries, his symptoms remained essentially the same with some short periods where symptoms were temporarily alleviated only to return to their original post injury, pre surgery levels. Again the records of the medical providers substantiate the employee's testimony concerning his complaints and pain levels. At the time of trial, Mr. Moore testified that he does not want any further neck surgeries or any other surgeries and in fact wishes he had not had the three surgeries that he has had as he has received no relief. He indicated that the only medication that has helped him deal with his pain has been Oxycontin and he asked that it be continued. He also testified that he gets some relief from the tens unit and asked that it be continued.

Dr. Lichtenfeld testified that the employee also needs further medical treatment for his low back to include surgery, however the employee stated that he is not inclined to undergo further surgery.

The Court specifically finds that the employee has met his burden of proof and has offered credible testimony and medical opinion that supports his claim for future medical care. As a direct result of his injuries sustained on July 14, 1998, the Court finds that the employee is entitled to future medical care. Based on this finding, ASARCO is ordered to provide all medical treatment that is necessary to cure and relieve the employee from the effects of his injuries for the remainder of his life. Without otherwise limiting the award for future medical care, the Court intends such care to include pain management, prescriptions for narcotic medications, the use of a tens unit and other such care as may be reasonably necessary to either cure or relieve the employee from the effects of his work-related injuries.

## 3. Nature and extent of disability and 4. Liability of the Second Injury Fund

Mr. Moore alleges that he is permanently and totally disabled. Section 287.020.7 RSMo. provides that "[t]he term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." When Mr. Moore's circumstances are looked at as a whole, there does not seem to be any credible evidence to argue that he is not permanently and totally disabled. He argues in the alternative that he is permanently and totally disabled either as of a result of the July 14, 1998 accidents and resultant disability or from a combination of the May 21, 2001 accident and the resultant disability with preexisting disabilities. Obviously the position of the respective employers is that if the employee is permanently and totally disabled, it is not from an accident for which they are responsible, but from the cumulative effect of all accidents and disabilities. The Second Injury Fund, on the other hand, argues that if the employee is permanently and totally disabled it is from a singular and not cumulative accidents.

The primary purpose of Workers' Compensation law is to place responsibility on employers to cover losses suffered by their employees resulting from injuries arising out of and in the course of employment. *Cochran v. Indus. Fuels & Resources, Inc.*, 995 S.W. 2d 489, 492 (Mo. App. S.D. 1999).

Each of the treating surgical doctors seems to believe that the surgical procedure they performed on the employee's neck was a success. Dr. Mirkin released the employee from his care and apparently believed that there was a solid union. The evidence confirms that he was wrong. Dr. Mirkin suggested that the employer should not authorize any further treatment for the employee and rated his condition at ten percent permanent partial disability. Two additional neck surgeries, one to fix a nonunion, prove that conclusion to be incorrect. Dr. Raskas obviously disagreed with Dr. Mirkin and proceeded with surgery. Dr. Raskas in turn argued that no further surgery was appropriate after his May 11, 1999 surgery. Dr. Gibbs then disagreed with Dr. Raskas and determined the need for additional surgery. Then after the surgery that Dr. Gibbs performed, he minimized the severity of Mr. Moore's medical problems. One could argue that he essentially disregarded the employee's continuing complaints.

Dr. Lichtenfeld opined that Mr. Moore is permanently and totally disabled "as he is unable to compete on the open labor market." The Court finds this opinion to be entirely credible and supported by a totality of all of the evidence. He attributes the employee's permanent and total disability to the combined effect of the May 21, 2001 injury and his preexisting conditions. James M. England, Jr., a vocational specialist, assessed Mr. Moore and determined that he would not "be hired by an employer in the normal course of business" and considering "his combination of impairments he would not be able to sustain even sedentary work activity." He further stated that Mr. Moore was "likely to remain totally disabled from a vocational standpoint." The testimony and opinions of Dr. Lichtenfeld and Jim England in combination with all of the other evidence presented by the parties at trial provides competent evidence to find that Mr. Moore is permanent and totally disabled.

ASARCO argues that their opinions should be construed to support a finding that ASARCO has no responsibility for permanent and total disability resulting from the accident of July 14, 1998, alone. While Dr. Lichtenfeld and Mr. England addressed the concept of permanent and total disability from a standpoint of cumulative injuries and disabilities, including disabilities preexisting the accident of May 21, 2001, neither specifically address whether the impact of the July 14, 1998 injury alone caused Mr. Moore to be permanently and totally disabled, and thereby preclude him from being employable in the open labor market. Therefore, the Court has considered all of the evidence to determine whether the employee is permanently and totally disabled resulting solely from the July 14, 1998 injury, its subsequent surgeries and resultant disabilities with liability against ASARCO.

In addition to the testimony of the medical and vocational expert, the Court is also permitted to consider the other evidence in this case including the treatment records, the testimony of Mr. Moore and his wife. The determination of the degree of disability is not solely a medical question. *Sellers v. Trans World Airlines, Inc.*, 776 S.W. 2d 502, 505 (Mo. App. W.D. 1989). The nature and permanence of the injury is a medical question, however, "the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature." *Quinlan v. Incarnate Word Hosp.*, 714 S.W.2d 237, 238 (Mo. App. E.D. 1986). In *Pavia v. Smitty's Supermarket*, 118 S.W. 3d 228 (Mo. App. S.D. 2003), although there was no expert testimony that the employee was permanently and totally disabled, the Court upheld a determination of permanent total disability based on the entire evidence.

In this case, Mr. Moore had a total of three neck surgeries by three different surgeons at three different hospitals over a period of eighteen months. All of these surgeries stemmed from the accidents of July 14, 1998. After each surgery, the

employee initially improved, but then reverted to his presurgical conditions especially as to pain considerations. It is clear that following the July 14, 1998, work injury, Mr. Moore underwent three surgical procedures that did not fully alleviate his pain and other symptomatology. He was off work for extended periods of time from July 1998 to August 2000. At every opportunity, the employee made a valiant effort to return to work. Following each surgery he prevailed upon his then treating physician to return him to work without restrictions because his employer would not allow him to attempt to return to work if restrictions were in place. During the periods that he did return to work, he was either under temporary or permanent work restrictions. Mr. Moore indicated that the light duty work he was provided during the various work returns involved the pulling of chutes about every one-half hour which meant that the employee would sit in a booth operating levers and buttons that would open and close loading chutes. Mr. Moore testified that this was about the lightest duty that could be done. After the third surgery, Mr. Moore again returned to work and although he was released without restrictions, he was unable to perform the duties of his work without the benefit of the extraordinary accommodations and assistance from his coworker and supervisor. Mr. Moore indicated that his coworker took on most of the work for two of them and quite often made multiple loading and unloading runs while the Mr. Moore rested. Eventually he was put back on the train, but when he began hurting too bad, his supervisor permitted him to lie down. He said that pretty regularly his coworker would run the train all day and let Mr. Moore do the loading all day. At other times the coworker would do both jobs - run the train and load the cars - leaving Mr. Moore to sit or stand or whatever because of his pain.

Mr. Moore stated after the July 14, 1998 work injury, he would lie down at work on a picnic table during the morning and afternoon breaks and for at least 30 minutes during the lunch hour. Even with the extraordinary accommodations and his coworker's assistance, Mr. Moore had great difficulty. His continuing use of significant narcotic medications substantiates the employee's continuous pain. Since the July, 1998 work accident, Mr. Moore testified that by the end of the work day he would be in severe pain and would go home, take his pain medication and lie down.

The employee's wife, Becky Moore, testified that since the July 14, 1998 work accident, her husband has never been pain free; that after the last surgery he thought he was better but then his pain returned to how it was before. She testified that her husband returned to work after each of the three surgeries. She said that she would be there when he came home from work and you could see he was in great pain, sometimes with tears. She said he would immediately take his pain medication and try to relax.

To his credit, Mr. Moore tried to continue working despite the difficulty in performing his job duties and the continuing pain he endured. Mr. England summarized the employee's efforts and attitude very succinctly when he said, "all I can say...is that unlike a lot of the people that I see, he didn't just get hurt and give up. He did keep trying to go back over and over again...he kept trying to do that until...he just couldn't take the pain anymore."

The Court found the testimony of both Mr. Garry Moore and his wife to be very credible. Based on the evidence, the Court believes the employee's short returns to work from July 1998 through May 2001 were nothing more than valiant but unsuccessful work attempts. The only reason the employee was able to try to keep working was due to his work ethic, the extensive accommodations provided by his coworkers and his supervisor, and in large part due to the quantities of narcotic medications that he was taking. The medical records show that Mr. Moore continuously sought stronger pain medication due to ongoing pain.

The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Gordon* 908 S.W. 2d. at 853; [citing *Reiner v. Treasurer of State of Mo.*, 837 S.W. 2d 363, 367 (Mo. App. E.D. 1992)]. Total disability means the "inability to return to any reasonable or normal employment." *Brown v. Treasurer of State of Mo.*, 795 S.W. 2d. 479, 483 (Mo. App. E.D. 1990). The determination of this issue is complicated by the fact that after the third neck surgery following the July 14, 1998 injury, the employee returned to work. Subsequently, the employee sustained an additional injury to his neck as the result of a May 21, 2001 work accident (Injury No. 01-053092). For that reason an analysis must be made and a determination made as to whether or not the employee was permanently and totally disabled without consideration of that additional injury.

The employee testified that following the May 21, 2001 injury, his neck pain decreased for a short time. He did not undergo additional surgery. The extent of medical expense following the 2001 injury was minimal compared to the extensive medical costs from the three previous surgeries. The employee testified that the initial pain from the 2001 injury receded to a baseline level commensurate with the pain he felt after the original July 14, 1998, work injury and before any surgery. Additionally, the employee testified that the other pre 1998 conditions did not result in any medical or self-imposed work

restrictions.

For a finding of permanent total disability, an injured employee is not required to be completely inactive or inert. *Gordon*, 908 S.W. 2d at 853. (citing *Brown*, 795 S.W. 2d at 483). "To do so would tend to encourage idleness on the part of injured employees and discourage them from making efforts to help themselves for fear that any activity on their part might furnish evidence against their right to the compensation which the law has provided for them." *Pavia*, 118 S.W. 3d at 243 (citing *Grgic v. P & G. Const.*, 904 S.W. 2d 464, 466 (Mo. App. E.D. 1995)(quoting *Kinyon v. Kinyon*, 71 S.W. 2d 78, 82 (Mo. App. E.D. 1934)). The pivotal question in determining whether a workers' compensation claimant is permanently and totally disabled is whether an employer can reasonably be expected to hire this claimant, given his present physical condition, and reasonably expect him to successfully perform the work. *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo.App. E.D. 2000).

Mr. Moore turned fifty-nine the week of the hearing in this matter. He testified that he quit school after the eighth grade and never obtained a GED. During his lifetime, he earned a living in labor-intensive jobs, specifically in construction and the mines. He was apparently a hard worker and took pride in his work and in his ability to earn a decent living for himself and his family. While he was at times able to perform at least some of the physical requirements of his job in the mines and some physical undertakings at home following the July 14, 1998 injury, it is undoubted that all of these physical activities caused him extreme pain even when performed for only short periods. The only medication found to alleviate some of his constant neck, shoulder and back pain is a high-strength narcotic, Oxycontin that he takes on a regular and daily basis.

Despite the testimony of Dr. Lichtenfeld and Mr. England regarding combination disability, the more compelling evidence and testimony in this matter persuades the Court that Mr. Moore was permanently and totally disabled even before his work accident of May 21, 2001 and that his attempts at continued employment were bound to fail. I find that given the employee's age, education, physical condition, pain and disability after the July 14, 1998 work accident and before the May 2001 injury, no employer could be expected to employ him 'and reasonably expect him to successfully perform the work'; that he was and is unemployable; and that he is permanently and totally disabled.

The Court finds that the employee's permanent and total disability is attributable to the injury from the July 14, 1998 accident alone. Mr. Moore is awarded permanent and total disability benefits against ASARCO of \$535.88 per week beginning July 14, 1998. The Court is aware that the last day that the employee worked is July 27, 2001. The employer is entitled to a credit for any benefits that were paid for any period in which the employee worked, had earnings or was paid temporary total disability benefits.

The Court finds no liability for the Second Injury Fund, as it is the injury of July 14, 1998, that rendered the employee permanently and totally disabled. For the Second Injury Fund to be liable for permanent and total liability, that disability must result from a combination of preexisting disabilities and the disability caused by the primary disability. That is not the case. There is no question that the employee is permanently and totally disabled as a result of his work accidents and their surgical aftermath. The Court has assessed the liability against ASARCO as the totality of the evidence conclusively proves that the permanent and total liability stemmed from the 1998 injury and disabilities from the subsequent surgeries.

## Findings of Fact and Rulings of Law-99-180574

### 1. Future medical care

On July 25, 2002, Dr. Barnes performed left a left carpal surgery on the employee. Doe Run never provided any medical benefits for the employee. The employee sought and received medical care on his own. Doe Run and the employee entered into a compromise settlement on August 2, 2004, wherein the employee was paid benefits for permanent partial disability.

Dr. Lichtenfeld suggested additional medical procedures that could be performed including right carpal tunnel surgery. Mr. Moore testified that while he has some remaining problems, he does not want additional medical care.

No benefits are ordered for future medical care in this case.

### 2. Liability of the Second Injury Fund

The Court has previously found the employee to be permanently and totally disabled as a result of accidents that occurred on July 14, 1998.

The Court finds and orders that the Second Injury Fund has no liability in this case.

**Findings of Fact and Rulings of Law-01-053092**

1. Future medical care

The Court believes that the injury of May 21, 2001, resulted is a temporary exacerbation of the employee's neck pain. The employee testified that after an initial improvement, his neck pain returned to pre-injury levels. Mr. Moore is taking narcotic medications and using a tens unit as a result of the July 14, 1998 injuries. The medications that the employee is taking for the May 21, 2001 injury are generally the same that he is taking as a result of the July 14, 1998 injuries.

No benefits for future medical care are ordered in this case.

2. Liability of the Second Injury Fund

The injury of May 21, 2001, resulted in a temporary exacerbation of the employee's neck pain. He did not incur any additional disability in this case as he was permanently and totally disabled as a result of the injuries occurring on July 14, 1998. Due to the factual sequence of events, which included the employee's unsuccessful attempts to return to full time gainful employment, the chronology of events, and that this last injury did not increase the employee's overall disability, the Court finds that the Second Injury Fund has no liability in this case.

**ATTORNEY'S FEE:**

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

**INTEREST:**

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

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

Made by:

\_\_\_\_\_  
Gary L. Robbins  
Associate Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

\_\_\_\_\_  
Mr. Gary Estenson  
Acting Director  
Division of Workers' Compensation