

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

Injury No.: 02-057598

Employee: Thomas Novak  
Employer: LPAG – Pace Industries  
Insurer: Kemper Insurance Company  
Date of Accident: June 10, 2002  
Place and County of Accident: Hannibal, 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 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 January 19, 2006. The award and decision of Chief Administrative Law Judge Hannelore D. Fischer, issued January 19, 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 13<sup>th</sup> day of June 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Thomas Novak  
Dependents:  
Employer: LPAG - Pace Industries

Injury No. 02-057598

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial

Additional Party:

Relations of Missouri  
Jefferson City, Missouri

Insurer: Kemper Insurance Company

Hearing Date: November 21, 2005

Checked by: HDF/cs

### 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?
4. Date of accident or onset of occupational disease: June 10, 2002.
5. State location where accident occurred or occupational disease was contracted: Hannibal, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?  
Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment?  
Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Claimant injured his low back when repairing a die cast press.
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: Low back, body as a whole.
14. Nature and extent of any permanent disability: 17.5% ppd of the body as a whole.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$9,264.34.
17. Value necessary medical aid not furnished by employer/insurer? \$72,471.60.
18. Employee's average weekly wages:
19. Weekly compensation rate: \$434.37 ttd/\$329.42 ppd.
20. Method wages computation: By agreement.

### COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$72,471.60.

144 weeks of temporary total disability (or temporary partial disability) (144 x \$434.37 = \$62,549.28)

70 weeks of permanent partial disability from Employer (70 x \$329.42 = \$23,059.40)

22. Second Injury Fund liability: N/a.

TOTAL: \$158,080.28

23. Future requirements awarded:

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:

Joseph Brannon

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Thomas Novak

Injury No: 02-057598

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents:

Employer: LPAG - Pace Industries

Additional Party

Insurer: Kemper Insurance Company

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on November 21, 2005. Memoranda were presented by December 16, 2005.

The parties stipulated that on or about the 10<sup>th</sup> day of June, 2002, the claimant was in the employment of LPAG – Pace Industries; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was insured by Kemper Insurance Company; the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law; the rate of compensation on the date of accident was \$434.37 temporary total disability benefits, \$329.42 permanent partial disability benefits; no temporary disability benefits have been paid to the claimant to date; medical aid has been provided in the amount of \$9,264.34.

The issues to be resolved by hearing include 1) the occurrence of an accident, 2) the causation of the injuries alleged, 3) the liability for medical bills, including the reasonable and necessity of past medical treatment, 4) the liability for temporary total disability benefits from July 30, 2002, through May 19, 2005, 5) the nature and extent of permanent disability, and 6) the liability for mileage reimbursement at 35 cents per mile.

### FINDINGS OF FACT

The claimant, Thomas Novak, was 53 years old as of the date of the hearing. In March of 2002, Mr. Novak began employment at Pace Industries maintaining and repairing die cast molds. On June 10, 2002, Mr. Novak was leaning into a horizontal die cast press for about one-half hour trying to fix an ejector pin when he noticed his back pain. Mr. Novak described a "crushed" sensation in his lower back. Initially, Mr. Novak did not report his injury thinking that the soreness would resolve. When it did not, he saw his own physician, Dr. Zimmerman. When Mr. Novak reported his accident, he was sent to Dr. Abernathie and Dr. Kennedy by Pace Industries.

Mr. Novak continued to work at Pace Industries until July 30, 2002, stating that thereafter he was not able to continue working due to pain. Mr. Novak said that he did not feel he was employable from the time he left Pace Industries until May of 2005. Mr. Novak acknowledged that while he was unemployed he made prototypes of medical equipment for Dr. Abernathie and that Dr. Abernathie paid him about \$5,000.00 for his work.

Mr. Novak testified that his unreimbursed mileage from medical treatment is 11,473 miles.

Prior to June 10, 2002, Mr. Novak sustained an injury to his back in the spring of 1999, followed by back surgery by Dr. Abernathie in December of 2000. Mr. Novak convalesced from that surgery until he began working for Pace Industries in March of 2002.

Dr. David Kennedy, neurosurgeon, testified by deposition that he initially saw Mr. Novak on May 14, 2003. On that date, Mr. Novak had complaints of "ongoing pain in the lower lumbar area with radiating pain into the legs that had bothered him . . ." Dr. Kennedy ordered and reviewed a myelogram of Mr. Novak's back and concluded that Mr. Novak's previous inter-body fusion at L4-5 didn't completely fuse. Dr. Kennedy, in connection with Dr. Robson, operated on Mr. Novak on August 25, 2003. Dr. Kennedy described the operation as a decompression at L3-4 and L4-5 by removing lamina and bone impinging on the nerve roots and placing pedicle screws along with bone graft from L3 to 5 to effect a fusion at those levels.

Dr. Kennedy described Mr. Novak's first surgery with Dr. Abernathie as a decompressive laminectomy from L4 to S1.

With regard to the effect of the June 10, 2002 injury on Mr. Novak, Dr. Kennedy stated that "he sustained significant aggravation of nerve root. In other words, nerve root injury at the L4-5 and L3-4 level" necessitating the surgery described previously.

Dr. Kennedy also opined with regard to Mr. Novak's likely need for pain and anti-inflammatory medication, as well as possible surgical intervention. Dr. Kennedy opined to a permanent partial disability of 25 percent of the body attributable to the June 10, 2002 issue.

On cross-examination, Dr. Kennedy acknowledged that in May of 2003, he wrote a letter to a nurse assigned to Mr. Novak's case by the employer/insurer stating that Mr. Novak's 2000 surgery never resulted in a complete fusion. Dr. Kennedy went on to state that his reference to Mr. Novak's pain being the result of his original injury was a reference to the 2002 injury rather than the 2000 injury.

Dr. Dennis Abernathie, orthopedic surgeon, testified by deposition that he has treated Mr. Novak since the year 2000 and that he is familiar with Mr. Novak's June 10, 2002 injury at Pace Industries. Prior to June 10, 2002, on December 4, 2000, Dr. Abernathie operated on Mr. Novak taking out a ruptured disk above Mr. Novak's transitional vertebra, then fusing the levels together at L4-T1 with ray cages. Dr. Abernathie released Mr. Novak from treatment following that surgery in January of 2002.

In 2003, Mr. Novak had a fusion of L3-4 and L4-T1 performed by a physician other than Dr. Abernathie (Dr. Kennedy). Dr. Abernathie described the surgery as justified, saying it was "a thinking man's approach to solving Tom's problem."

On February 24, 2005, Dr. Abernathie again operated on Mr. Novak's back performing surgery

described as “a decompressant laminectomy L5-T1 with posterior fusion at L4-5, L5-T1 and T1-S1.” Dr. Abernathie described his surgery as necessitated by the June 10, 2002 injury and to a different part of the body than his first, pre-June 2002, surgery.

Dr. Abernathie again opined that Mr. Novak sustained a work-related injury at Pace Industries on June 10, 2002, separate and distinct from his previous back injury. Dr. Abernathie also opined to a 20-percent permanent partial disability as the result of the June 10, 2002 injury.

When questioned about the consistency of his May 31, 2005 opinion and his previous opinion, Dr. Abernathie stated that his opinions were consistent in that the joints at T1-S1 and the T ilium and the S ilium were strained and sprained, not the muscles.

Dr. Abernathie also described his business relationship with Mr. Novak as involving the payment of \$5,000.00 over the period of several years for his work on medical equipment.

Dr. Abernathie opined generally that Mr. Novak was not employable as a machinist from the time of his injury on June 10, 2002, through and concluding with the 12-week healing period following his February 24, 2005 surgery.

Dr. Abernathie identified a history of medical charges paid by Mr. Novak’s private health insurer since June of 2002, and designated the following charges as directly related to and necessitated by Mr. Novak’s June 10, 2002 injury and as reasonable in amount:

Broadway Internal	2-22-05	\$117.22
	2-25-05	136.34
	2-27-05	42.59
Columbia Orthopaedic	2-02-05	65.57
	2-24-05	452.59
		463.20
		911.26
		1861.01
		2038.82
		2046.80
	03-09-05	43.63
	04-22-05	65.57
Columbia Radiology	08-04-04	91.11
	09-22-04	91.11
	01-18-05	271.69
Columbia Regional	09-22-04	202.30
	01-18-05	1320.14
	02-22-04	61263.00
Regional Medical	12-22-04	<u>107.62</u>
		\$72,471.60

Dr. Tom Reinsel, board certified orthopedic surgeon, testified by deposition that he examined Mr. Novak on September 15, 2005. Dr. Reinsel diagnosed Mr. Novak with chronic lower back pain and a lumbar strain. Dr. Reinsel commented on Mr. Novak’s surgeries stating that the second surgery (performed by Dr. Kennedy after June 10, 2002) was not “medically or causally related to the work incident” because the surgery did not help his pain and because he diagnosed a strain. Similarly, Dr. Reinsel did not believe Dr. Abernathie’s most recent surgery was causally related to the work incident.

Dr. Reinsel opined that Mr. Novak would be capable of light duty or sedentary employment and that he sustained a five-percent permanent partial disability as the result of the June 2002 accident.

Dr. Reinsel agreed with Dr. Abernathie that the 2005 surgery on Mr. Novak was to a different part of the back than the surgery prior to June 10, 2002. Dr. Reinsel opined to a five-percent permanent disability for Mr. Novak as the result of the June 10, 2002 injury, stating that he believed a five-percent disability is consistent with sedentary employment. Dr. Reinsel also felt that Mr. Novak’s pain was not properly addressed by a surgical procedure until February of 2005.

Dr. Reinsel opined that had Mr. Novak's first surgery been successful, he would not have needed his subsequent surgery, but also stated that he did not know whether the first surgery resulted in a pseudarthrosis or failure of fusion of the vertebrae.

#### APPLICABLE LAW

Section 287.020.2 provides as follows: The word "accident" as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work-related. An injury is clearly work-related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

The employee has the burden of proving a causal connection between the accident and the claimed injuries. *Davies v. Carter Carburetor Division*, 429 S.W. 2d 738 (Mo. 1968); *Griggs v. A. B. Chance Co.*, 503 S.W. 2d 697, 703 (Mo. Ct. App. 1974). The quantum of proof of the cause of injury is reasonable probability. *Davies* at 749; *Downing v. Willamette Industries, Inc.*, 895 S.W. 2d 650, 655 (Mo. Ct. App. 1995); *White* at 577. Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs* at 704. Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W. 2d, 463, 466 (Mo. Ct. App. 993); *Griggs* at 704; *Downs v. A. C. F. Industries, Inc.*, 460 S.W. 2d 293, 295-296 (Mo. Ct. App. 1970). Expert testimony is required where the cause and effect relationship between a claimed injury or condition and the alleged cause is not within the realm of common knowledge. *McGrath v. Satellite Sprinkler Systems*, 877 S.W. 2d 704, 708 (Mo. Ct. App. 1994); *Brundige v. Boehringer Ingelheim*, 812 S.W. 2d 200, 202 (Mo. Ct. App. 1991). Pre-existing but non-disabling condition does not bar recovery of workers' compensation benefits if job-related injury causes condition to level of disability, *Chatmon v. St. Charles County Ambulance District*, 55 S. W. 3d 451 (Mo. App. E. D. 2001).

#### AWARD

The claimant, Thomas Novak, has sustained his burden of proof that he sustained an injury to his low back by accident on June 10, 2002, when he was repairing a die cast press. Mr. Novak testified credibly with regard to the circumstances of the accident. Dr. Abernathie and Dr. Kennedy testified credibly with regard to the June 10, 2000 accident as the cause of the injury to the low back. Mr. Novak's pre-June 2002 surgery was at the L4-T1 levels while his post-June 2002 surgeries were above and below the levels operated on prior to June of 2002, as well as to the same levels operated on prior to June of 2002. In other words, the subsequent to June 2002 surgeries encompassed the disks above and below the L4-T1 levels. Dr. Reinsel was the only physician who opined that Mr. Novak's post-June 2002 surgeries resulted from the failure of his pre-June 2002 surgery, yet Dr. Reinsel contradicted himself with regard to whether Mr. Novak's first surgery resulted in a successful fusion or a non-fusion.

The claimant, Thomas Novak, has sustained his burden of proof that the bills associated with Dr. Abernathie's treatment in the amount of \$72,471.57 were the result of reasonable and necessary medical treatment. Mr. Novak experienced relief of his post June 10, 2002 pain as the result of Dr. Abernathie's treatment. Moreover, Dr. Abernathie testified with regard to the reasonableness of the charges identified with his treatment and associated services. Mr. Novak's out-of-pocket expenses were not identified and are thus not recuperated in this award.

The claimant, Thomas Novak, has sustained his burden of proof that he is entitled to temporary total disability benefits from July 30, 2002, through May 10, 2005, a period of 144 weeks. Mr. Novak testified with regard to his inability to return to employment as a machinist throughout the course of his treatment. Dr. Abernathie confirmed Mr. Novak's testimony regarding his inability to return to work until 12 weeks after his surgery on February 24, 2005, or May 19, 2005.

The claimant, Thomas Novak, has failed to sustain his burden of proof that he is entitled to mileage reimbursement where the testimony pertaining to mileage traveled for medical treatment is vague and inconclusive.

Date: January 19, 2006

Made by: /s/Hannelore D. Fischer  
HANNELORE D. FISCHER  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ Patricia "Pat" Secret  
**Patricia "Pat" Secret**, *Director*  
*Division of Workers' Compensation*