Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-041727

Employee: Alvin Penn

Employer: ANC Rental Corporation
Alamo Rent-A-Car

Insurer: Insurance Company of the State of Pennsylvania

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

Date of Accident: April 17, 2002

Place and County of Accident: Kansas City, 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 June 9, 2005. The award and decision of Administrative Law Judge Lisa Meiners, issued June 9, 2005, 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 1st day of March 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

_____
Alice A. Bartlett, Member

SEPARATE OPINION FILED
John J. Hickey, Member

Attest:

_____
Secretary

SEPARATE OPINION
CONCURRING IN PART AND DISSENTING IN PART

I join my fellow commissioners in awarding compensation in this claim. However, I must respectfully dissent from

the portions of the award and decision of the majority of the Commission denying past medical expenses, future medical care, and permanent total disability benefits. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified.

The administrative law judge summarily denied employee's claim for many past medical expenses by the following statement: "I do not find these bills were authorized and therefore deny Claimant's request." The expenses for which employee seeks payment are primarily related to pain management treatment. Dr. Alexander recommended pain management for employee. Dr. Varghese recommended that employee continue on his course of pain medications as directed by the pain management specialists. The administrative law judge's summary rejection of employee's claim for past medical expenses is in error.

The administrative law judge also denies employee's request for future medical care based upon her apparent belief that Dr. Hanson asserted that employee did not need further treatment including narcotic prescriptions. The problem with this conclusion is Dr. Hanson did not offer such an opinion.

> Section 287.140.1 "entitles the worker to medical treatment as may reasonably be required to cure and relieve from the effects of the injury." *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). This includes "treatment 'which gives comfort [relieves] even though restoration to soundness [cure] is beyond avail.'" Id., quoting *Williams v. A.B. Chance Co.*, 676 S.W.2d 1, 4 (Mo.App. 1984). Accordingly, a finding of MMI is "not inconsistent with the need for future medical treatment." *Id.* at 278. The Commission may not deny future medical treatment to relieve a claimant's pain because a claimant may have achieved MMI. *Kaderly v. Race Brothers Farm Supply*, 993 S.W.2d 512, 517 (Mo.App. 1999).

Ford v. Wal-Mart Assocs., 155 S.W.3d 824, 828-829 (Mo. App. 2005).

> It is not necessary that a claimant seeking future medical benefits produce conclusive evidence to support that claim. Rather, it is sufficient to show that the need for additional medical treatment by reason of the compensable accident is a "reasonable probability." "'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt."

Mathia v. Contract Freighters, 929 S.W.2d 271, 277 (Mo. App. 1996)(citations omitted).

Dr. Varghese's medical notes reveal he believed that the pain medications were relieving some of employee's pain and he believed the prescription of the pain medications to be reasonable. Dr. Schroeder testified that employee needed narcotic pain medication to manage his pain. The pain experts at the pain management clinic prescribed narcotic pain medications to manage employee's chronic radicular pain. Although Dr. Hanson testified that further treatment would not improve employee's functional capacity, he testified he would not second-guess the doctors at the pain clinic regarding their treatment of employee's pain with narcotic pain medications.

The specialists at the pain clinic are the most qualified to determine whether employee will benefit from pain medication and pain management. Before the 2002 injury, employee managed his back pain and discomfort with a mild analgesic. After the 2002 injury, the pain specialists prescribed narcotic medications to relieve employee's pain and discomfort. Employee has shown by a reasonable probability that he will need future medical treatment in the form of pain medication and pain management.

The administrative law judge found that the employee suffered a preexisting condition that was a hindrance or obstacle to employment and that the condition combined synergistically with the primary injury to cause a greater overall disability than the simple sum of the disabilities. Accordingly, the administrative law judge awarded permanent partial disability against the Second Injury Fund. The administrative law judge erred in not finding that employee was permanently and totally disabled.

> [T]he term "total disability" is "defined 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." "It does not require that the claimant be completely inactive or inert."

> "To determine if claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition."

Pavia v. Smitty's Supermarket, 118 S.W.3d 228, 234 (Mo. App. 2003)(citations omitted).

> 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. Total disability means the "inability to return to any reasonable or normal employment."

Gordon v. Tri-State Motor Transit Co., 908 S.W.2d 849, 853 (Mo. App. 1995)(citations omitted), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

> The determination of whether plaintiff was totally and permanently disabled was a question of fact for the Commission. The Commission does not have to make its decision only upon testimony from physicians; it can make its findings from the entire evidence.

Cochran v. Industrial Fuels & Resources, Inc., 995 S.W.2d 489, 497 (Mo. App. 1999)(citations omitted).

Ms. Titterington, vocational expert, is of the belief that employee cannot compete in the open labor market. Employee testified that he has been unable to find employment in his physical condition. Employee went so far as to apply for the jobs for which Mr. Weimholt thought he could compete but employee was met with rejection. Dr. Schroeder does not believe employee can compete in the open labor market.

I am not persuaded by the opinion of Mr. Weimholt because employee had no success securing the employment upon which Mr. Weimholt based his opinion. Employee's lack of success securing the very jobs Mr. Weimholt thought employee could secure convinces me that no employer would reasonably be expected to hire employee in the ordinary course of business. I find the testimony of employee, Ms. Titterington, and Dr. Schroeder to be the most credible evidence regarding employee's ability to compete in the open labor market.

Based upon my review of all the evidence, I find employee has shown that he is unable to compete in the open labor market and that no employer would reasonably be expected to hire employee in his present physical condition. I conclude that employee is permanently and totally disabled. I find most persuasive the evidence that the last injury alone rendered employee permanently and totally disabled.

Based upon the foregoing, I conclude that the award should be modified to award past medical expenses, future medical care, and permanent total disability against the employer/insurer. I respectfully dissent from the portions of the award and decision of the majority of the Commission to the contrary.

_____

John J. Hickey, Member

AWARD

Employee: Alvin Penn Injury No. 02-041727

Employer: ANC Rental Corporation
Alamo Rent-A-Car

Insurers: Insurance Company of the State of Pennsylvania

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

Hearing Date: April 4, 2005 Checked by: LM/abj

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: April 17, 2002.

5. State location where accident occurred or occupational disease was contracted: Kansas City, 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: Employee, while in the course and scope of employment, aggravated his low back picking up luggage.

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.

14. Nature and extent of any permanent disability: 12.5% body as a whole.

15. Compensation paid to date for temporary disability: $128.00

16. Value necessary medical aid paid to date by employer/insurer? $6,617.00

17. Value necessary medical aid not furnished by employer/insurer?

18. Employee's average weekly wages: $422.24

19. Weekly compensation rate: $281.64

20. Method wages computation: By stipulation of parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: $14,082.00

Unpaid medical expenses: -0-

50 weeks of permanent partial disability from Employer as a result of the April 17, 2002, injury

22. Second Injury Fund liability: $3,098.04

11 weeks of permanent partial disability from Second Injury Fund

TOTAL: $17,180.04

23. Future requirements awarded: No. Future medical is denied.

Said payments to begin upon receipt of Award and to be payable and 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Jerry Kenter.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Alvin Penn Injury No. 02-041727

Employer: ANC Rental Corporation
Alamo Rent-A-Car

Insurer: Insurance Company of the State of Pennsylvania

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

Hearing Date: April 4, 2005 Checked by: LM/abj

STIPULATIONS

The parties stipulated that:

1. Mr. Penn was an employee working subject to the Missouri Workers' Compensation law;
2. Mr. Penn sustained an accident arising out of and in the course of his employment;
3. notice was given and a claim filed within the time allowed by law;
4. the employer paid $6,617.00 in medical expenses and $128.00 in temporary total benefits; and
5. the employer was insured by Insurance Company of the State of Pennsylvania.

ISSUES

The parties requested the Division to determine the following issues:

1. Whether the employee sustained any disability and the nature and extent of that disability;

2. liability of the Second Injury Fund;

3. whether the employer is liable for future medical care; and

4. whether the employer is liable for past medical bills in the amount of $12,304.22.

EXHIBITS

The following exhibits were presented by Claimant and admitted into evidence:

Exhibit A– Medical records
Exhibit B– Mary Titterington's report, 10/14/03
Exhibit C– Dr. James A. Stuckmeyer's report, 8/4/03
Exhibit D– Medical bills
Exhibit E– Licensed gaming activities legislation
Exhibit F– 1/18/99 printout of e-mail regarding work of Claimant
Exhibit G– Complimentary note from customer, 9/20/96
Exhibit H– Work Ability Report, 11/4/02
Exhibit I – Off-work slip by Dr. Schroeder, 11/27/02
Exhibit J – Leave of Absence Form, 11/20/02–1/20/03
Exhibit K– Medical Examination Report, 3/5/02
Exhibit L – Notes of Claimant from job search

The following exhibits were presented by Employer/Insurer and admitted into evidence:

Exhibit 1 – Deposition of Mary Titterington, 3/2/05
Exhibit 2 – Deposition of David Rondinelli, 3/29/05
Exhibit 3 – Deposition of Gary Weimholt, 3/9/05
Exhibit 4 – Deposition of Alvin Penn, 12/14/04
Exhibit 5 – Deposition of George Varghese, M.D., 2/21/05
Exhibit 6 – Deposition of Alvin Penn, 7/23/03
Exhibit 7 – Deposition of James A. Stuckmeyer, M.D., 3/28/05
Exhibit 8 – Deposition of Jerome Hanson, M.D., 2/2/05
Exhibit 9 – Deposition of Dr. Schroeder, 4/21/05

EVIDENCE

On June 11, 2001, Claimant worked for Alamo Rent-A-Car. In this capacity he worked maintaining cars and shuttle buses. On June 11, 2001, while changing a flat tire from a shuttle bus, Claimant felt and heard a "firecracker" in his low back. He experienced immediate numbness in both legs, with the right worse than the left. Immediately thereafter he reported the injury to a co-worker and his supervisor. He was then sent to Landmark Medical where the doctors diagnosed a herniated disc at L4-5 and a disc bulge at L2-3. Claimant then went to pain management at North Kansas City Hospital where Dr. Danner treated him. There, Claimant received three epidural injections that did not provide relief.

Based on his ongoing symptoms of pain in his low back and radiculopathy into his lower extremities, he went to Dr. E. Jerome Hanson on August 7, 2001. Dr. Hanson, based on a myelogram and post myelographic CT scan, decided Claimant had a free extruded fragment of his disc at the L4-5 level and surgery was needed. On October 17, 2001, Dr. Hanson performed surgery and removed a free-floating fragment at the L4-5 levels. Thereafter, Claimant underwent work hardening at Health South Medical and was released from care on February 4, 2002, by Dr. Hanson. Although Dr. Hanson released Claimant to work, he also restricted Claimant to no lifting greater than 30 pounds and to avoid repetitive bending.

Claimant returned to his employment with Alamo, but due to the restrictions placed by Dr. Hanson, Claimant was accommodated. Claimant was placed as a bus driver for the airport terminal bus. Although Dr. Hanson's post surgical notes indicate back pain and right leg pain as resolved, Claimant continued to have problems with numbness in his right leg and hip with low back pain (see Claimant's deposition, pp. 23-24). He used Tylenol 3 on a daily basis yet was able to drive the terminal bus from the airport to the Alamo Rent-A-Car location.

On April 17, 2002, Claimant re-injured his low back while lifting a passenger's luggage onto the Alamo bus shuttle. Claimant felt a pull in the incision area where Dr. Hanson performed the prior surgery. Claimant also felt an increase in back pain, and like after the June 2001 injury, experienced radicular symptoms into his left and right legs.

The employer immediately sent Claimant to Employer Health Services where Dr. Temesgen Wakawaya ordered diagnostic testing, prescribed pain medication, and removed Claimant from work for four days. Dr. Wakawaya diagnosed Claimant with a lumbar strain and instructed Claimant to physical therapy. During the time period of April 22 to May 24, 2002, Claimant was released to work with accommodations of no repetitive bending or lifting over 10 pounds. Indeed, Claimant continued to work as a bus driver with the various restrictions imposed by Dr. Wakawaya throughout the summer and fall of 2002.

Later, Alamo accommodated Claimant's restrictions and placed Claimant in a sit-down position at a guard shack overlooking Alamo's car lots. In this capacity, a co-worker would review the car VIN numbers with the renter's agreement and Claimant would write down the various numbers. Claimant continued to work in this capacity until November 20, 2002, his last day of working in the open labor market.

Between April 17, 2002, to November 20, 2002, the employer sent Claimant to numerous medical treaters for his low back. An MRI in May 2002 revealed an epidural defect at the L3-L4 level. Claimant then returned to Dr. Bruce Hanson based on Dr. Wakawaya's referral. Dr. Hanson, a board-certified neurosurgeon, found no evidence of focal neurological deficits or nerve root impingements based on the MRI performed in May as well as his own physical examinations. Dr. Hanson opined Claimant suffered a lumbar strain superimposed on pre-existing degenerative disc disease. Dr. Hanson based this diagnosis on his numerous exams of Claimant and an MRI and EMG taken after April 2002. Regardless, Dr. Hanson referred Claimant for pain management by Dr. Lisa Hermes.

Dr. Hermes evaluated Claimant on July 17, 2002, and recommended the following: an evaluation of a pain management specialist; an EMG; and physical therapy. Claimant underwent an EMG on August 23, 2002, which revealed a normal EMG of the bilateral lower extremities and lumbosacral spine.

Claimant was then referred and saw Dr. Robert David Rondinelli on several occasions in August and September 2002. At Claimant's last visit in September 2002, Dr. Rondinelli opined Claimant had a back strain type injury from the luggage incident that resolved. Indeed, Dr. Rondinelli testified Claimant's current symptoms are those he experienced after the first surgery but before April 17, 2002. Dr. Rondinelli believed the April 17, 2002, incident did not produce new or additional impairment (page 18 of Dr. Rondinelli's deposition). On September 11, 2002, Dr. Rondinelli also found Claimant could return to a medium work capacity and restricted Claimant to lifting an occasional 25 pounds. Dr. Rondinelli's restrictions were based on a functional capacity evaluation performed on September 10, 2002, that showed Claimant capable of performing medium physical-demand work such as the bus driving position at Alamo. Just as Rondinelli restricted, Claimant continued to work at Alamo during his treatment with Drs. Hanson, Hermes, and Rondinelli.

Further review of the voluminous medical records reveal that Claimant presented to North Kansas City Hospital Emergency Room on October 20, 2002, complaining of severe lower back pain with radicular symptoms into his lower extremities. Claimant was treated conservatively with Toradol, Valium, and Vicodin for pain and was referred to Employer Health Services. At Employer Health Services, ongoing conservative treatment was recommended and the patient was instructed not to lift more than 5 pounds or push or pull more than 5 pounds. Claimant was then referred back to physical therapy.

On November 4, 2002, Claimant was evaluated by Dr. Alexander, who felt that pain management was

indicated. It also appears that Mr. Penn was also evaluated by his own physician, Dr. Schroeder, who also recommended pain management on November 27, 2002.

On November 27, 2002, Dr. Schroeder diagnosed Claimant with radicular back pain and referred him to pain management. However, Dr. Schroeder did not determine the cause of Claimant's back pain in November 2002. Dr. Schroeder testified Claimant suffered chronic low back pain from the initial injury, scar tissue postsurgical, degenerative disc disease, spurring, and the second injury (Exhibit No. 9, p. 16). Dr. Schroeder continues to prescribe narcotic medication to Claimant for low back pain.

Additionally, Dr. Schroeder felt narcotic medication appropriate treatment for Claimant due to a bulging disc at L4-L5. However, Dr. Schroeder would not state within a reasonable degree of medical certainty whether the April 17, 2002, incident was a substantial contributing factor to Claimant's current physical condition (Dr. Schroeder's deposition, p. 18). He also stated he would not prescribe narcotic pain medication for a back strain. Dr. Schroeder opined Claimant unemployable based on the previous surgery, degenerative arthritis, and the April 17, 2002, event (Dr. Schroeder's deposition, p. 24).

On December 26, 2002, Claimant went to Northland Pain Management Clinic. Claimant saw a Dr. Scott T. Boyd at the Liberty Hospital Pain Clinic initiated by Claimant. Dr. Boyd prescribed Methodone as well as Vicodin and Gabitril. Claimant then presented again to the Liberty Hospital Emergency Room, once again with severe back pain, on January 5, 2003. The emergency room instructed Claimant to have a follow-up with his personal physician, Dr. Schroeder. Claimant also saw a Dr. Kevin Knop following the emergency room visit on January 17, 2003, and Dr. Kopp also prescribed pain medications.

Claimant also testified that on January 27, 2003, while he was not working, he was at a convenience store filling up air in his tires when he felt pain in his back and could not straighten it. He noticed increased pain at that time. He stated that he felt the pain shoot out in his back when he rose from filling his tire. He testified that it was the same type of pain as before (Penn deposition, pp. 61-62). He went on his own to an emergency room as a result of this incident.

Claimant also saw a Dr. George Varghese, a rehabilitation medical specialist, for an assessment. On January 27, 2003, Dr. Varghese opined, based on diagnostic testing and his own examination, that Claimant had mechanical low back pain without neurological issues as a result of the April 2002 incident. Additionally, Dr. Varghese opined Claimant "had base line numbness from the previous surgery and we did not find any evidence of any new nerve problem" (page 11, deposition of Dr. Varghese).

Like Dr. Rondinelli and Dr. Hanson, Dr. Varghese released Claimant to medium work capacity with occasional lifting over 25 pounds and found Claimant had reached maximum medical improvement. Dr. Varghese did not recommend any further treatment for Claimant despite his knowledge of Claimant seeing other doctors for narcotic pain medication (page 15, Dr. Varghese's deposition).

As noted earlier, Claimant simultaneously to being evaluated by Dr. Varghese also went on his own to Dr. Schroeder, Dr. Kevin Knop, and Dr. Scott Boyd. All three doctors at Liberty Hospital prescribed on every occasion some type of narcotic medication for low back pain. It appears from the last record from Liberty Hospital dated February 5, 2003, that Dr. Knop indicated Claimant had chronic lumbosacral pain with apparent failed back syndrome. Dr. Knop also noted at that time the Claimant "is likely to require chronic pain medication."

Claimant then underwent a repeat myelogram in July 2003 and continued treatment with his own doctor, Dr. Schroeder. Although Dr. Schroeder felt Claimant may benefit from further surgical treatment to the low back based on the repeat CT myelogram, he also recommended an expert neurosurgical or orthopedic spine specialist as to how to proceed with Claimant's complaints of low back and bilateral leg pains. Dr. Schroeder continued to prescribe Oxycontin throughout 2003, 2004, with the last record dated February 17, 2005. Lastly, Dr. Schroeder opined in various letters and on a benefits claim that Claimant was 100 percent disabled.

Claimant was also evaluated on August 4, 2003, by Dr. James A. Stuckmeyer. Dr. Stuckmeyer opined Claimant sustained a 25 percent permanent partial body as a whole due to the April 17, 2002, incident and 20 percent permanent partial disability body as a whole from the June 11, 2001, injury. He also felt Claimant was

permanently totally disabled due to the last accident of April 17, 2002, alone. Dr. Stuckmeyer bases this opinion due to Claimant's chronic narcotic utilization as well as low back pain with radicular symptoms. Dr. Stuckmeyer opined Claimant a surgical candidate and recommended a referral to an orthopedic spine specialist.

Lastly, Claimant returned to Dr. Bruce Hanson on December 18, 2003. Dr. Hanson reviewed the last myelogram and CT scan taken in July 2003. Dr. Hanson did not change his diagnosis of back strain superimposed on degenerative disc disease nor did he recommend any treatment. Dr. Hanson opined Claimant sustained a 7 percent impairment as a result of the April 2002 incident and 10 percent impairment as a result of the June 11, 2001, injury.

Two vocational experts, Gary Weimholt and Mary Titterington, testified on whether any employer would reasonably be expected to hire Claimant in his present physical condition. Ms. Titterington concluded that Claimant is unemployable based on Claimant's inability to sustain concentration and complete tasks as well as the severe unremitting pain Claimant experiences even when taking significant amounts of narcotic medication. Ms. Titterington described Claimant as pain-focused and unemployable until Claimant's pain is brought under control. Ms. Titterington also opined Claimant had no transferable skills and he would not be a vocational rehabilitation candidate based on Claimant's current low intellectual functions.

On the other hand, Gary Weimholt opined Claimant is employable in the open labor market within the range of light work based on the restrictions of Drs. Varghese, Rondinelli, and Hanson, as well as the functional capacity evaluation. Mr. Weimholt also stated that Claimant would be a suitable candidate for several jobs and listed those employers located locally. Unlike Ms. Titterington, Mr. Weimholt concluded that her IQ testing results were inconsistent with Claimant's past employment history and reading comprehension.

Currently, Claimant has difficulty bending. Claimant testifies he experiences burning pain across his low back with radicular pain down to his right calf. Claimant's left leg will go numb if Claimant increases his activity levels. Claimant complains of bladder and bowel problems. According to Claimant, he takes frequent naps throughout the day and is unable to work due to his low back and bilateral leg pain. Claimant stated he would like to have back surgery and stop his narcotic use.

Claimant also requests the Division find Claimant unemployable in the open labor market based on Claimant's physical condition. I am unable to do so and rely on the employer's vocational expert, doctors' opinions, and a Functional Capacity Evaluation revealing Claimant could perform within light to medium work restrictions.

The central question in determining whether a claimant suffers from permanent total disability is whether any employer in the usual course of business would reasonably be expected to employ the claimant in his present condition to perform the work for which he is hired, and given the employee's situation and condition, if he is competent to compete in the open labor market. Faubion v. Swift Adhesives Co., 869 S.W.2d 839 (Mo.App. 1994); Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo.App. E.D. 1992).

Although Claimant applied to the various employers based on Mr. Weimholt's recommendations and has not received a job offer, I am still not persuaded the employer is responsible for Claimant's unemployability when a past felony conviction and chronic narcotic use is partly responsible. Indeed, the overwhelming evidence supports that Claimant suffered a low back strain from the April 17, 2002, incident and is capable of working within the restrictions supported by the functional capacity evaluation, Dr. Varghese, Dr. Hanson, and Dr. Rondinelli's recommendations. Additionally, I find Gary Weimholt's opinion regarding Claimant's employability status more persuasive than Ms. Titterington's with regard to Claimant's ability to perform work in the open labor market.

Finally, I find Dr. Hanson's, Dr. Rondinelli's, and Dr. Varghese's opinions more credible than Dr. Stuckmeyer's with regard to Claimant's diagnosis of a back strain, restrictions, as well as permanent partial disability as it relates to the April 17, 2002, incident. I find Claimant sustained a 12.5 percent body-as-a-whole permanent partial disability relating to the April 17, 2002, injury.

I also find Claimant sustained a 15 percent permanent partial disability body as a whole as a result of the June 11, 2001, accident. Claimant testified and I find he continued to have low back and right leg pain after the

October 2001 surgery that continues today. Additionally, Dr. Hanson placed restrictions on lifting that Claimant did not have prior to June 11, 2001. This evidence, as well as the fact that Claimant took Tylenol 3 on a daily basis, leads me to find that Claimant sustained 15 percent permanent partial disability body as a whole due to the June 11, 2001, accident.

Although permanent partial disability for the April 17, 2002, injury has been noted above, I find it relevant that Claimant's symptoms of pain in his low back and right leg were exacerbated when lifting the luggage. As such, I find the April 17, 2002, incident a substantial contributing factor to Claimant's symptoms of increased pain in the right leg, low back, and occasional radiculopathy into his left leg.

I also find that the Second Injury Fund is liable for permanent partial disability based on a combination of the April 22, 2002, back strain and the prior June 11, 2001, back injury. Uhlir v. Farmer, 945 S.W.3d 441 (Mo.App. E.D. 2003) (SIF liable for back on back). The claimant testified and I find that his prior knee injury was not a hindrance or obstacle and therefore does not create a synergistic effect with the two back injuries. However, Dr. George Varghese opined that the April 2002 and the June 2001 combined to create greater disability than the last injury alone (pages 21-23, Dr. Varghese's deposition).

Claimant underwent surgery, missed work, and a doctor assigned permanent restrictions as a result of the June 11, 2001, accident. I find his low back and right leg conditions to be a hindrance or obstacle to employment. As noted earlier, I find Claimant sustained a 15 percent permanent partial disability body as a whole relating to the June 11, 2001, incident.

Claimant's primary injury exacerbated his prior symptoms of low back, right and left legs by 12.5 percent permanent partial disability body as a whole. When Claimant's pre-existing disability combines with the last accident, the combination creates a substantially greater disability than the simple sum. The Second Injury Fund is ordered to pay 12.5 percent permanent partial disability body as a whole from the April 22, 2002, injury and 15 percent permanent partial disability body as a whole from the June 11, 2001, injury, which is the equivalent of 110 weeks. Combining 110 weeks with a 10 percent load, the Second Injury Fund is responsible for 11 weeks or $3,098.04.

Claimant's request for future medical care is also denied. Claimant must show by reasonable probability that he is in need of additional medical treatment by reason of his work-related accident. Landers v. Chrysler Corp., 963 S.W.2d 275, p. 283 (Mo.App. 1997). All of Claimant's experts recommend treatment and pain management but also refer Claimant to a neurosurgeon or an orthopedic specialist for an expert opinion. Claimant's request was granted by Employer when they sent him to Dr. Hanson in December 2003. Dr. Hanson is a board-certified neurosurgeon specializing in spines who did not feel Claimant was a surgical candidate and did not recommend further treatment including narcotic prescriptions following a back sprain (Dr. Hanson's deposition, p. 25).

Claimant also requests the employer reimburse him for past medical expenses in the amount of $12,304.22. I do not find these bills were authorized and therefore deny Claimant's request.

The employer and insurer Insurance Company of the State of Pennsylvania is liable to Claimant for 12.5 percent body as a whole or 50 weeks of compensation as a result of the April 17, 2002, accident, or $14,082.00. The employer and insurer Liberty Mutual is responsible for 15 percent permanent partial disability body as a whole as a result of the June 11, 2001, injury, or $18,000. The Second Injury Fund is liable in the amount of $3,098.04, or 11 weeks of compensation.

This Award is subject to an attorney's lien of 25 percent in favor of Jerry Kenter.

Date: _____ Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia “Pat” Secrest
Director
Division of Workers' Compensation