

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

Injury No.: 94-115777

Employee: Debra Sanders
Employer: Echlin/Pacer Industries
Insurer: National Union Fire Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: May 5, 1994
Place and County of Accident: Franklin 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 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 December 15, 2004. The award and decision of Administrative Law Judge Kevin Dinwiddie, as issued December 15, 2004, is attached and incorporated by this reference.

The Commission finds that the ALJ correctly weighed and evaluated the lay and medical testimony in reaching his conclusions, including those as to disability and causation. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522 (Mo. App. E.D. 2002), *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. S.D. 2001), *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. banc 2003).

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 22nd day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

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

Injury No.: 94-115794

Employee: Debra Sanders
Employer: Echlin/Pacer Industries
Insurer: National Union Fire Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 19, 1994
Place and County of Accident: Franklin 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 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 December 15, 2004. The award and decision of Administrative Law Judge Kevin Dinwiddie, issued December 15, 2004, is attached and incorporated by this reference.

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LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Debra Sanders

Injury No. 94-115777 & 94-115794

Dependents:

Employer: Echlin/Pacer Industries

Additional Party: State Treasurer, as custodian of the Second Injury Fund

Insurer: National Union Fire Insurance Company

Hearing Date: 10/20/03; 5/20/04; finally submitted 10/1/04

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: KD/bb

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: 8/19/94
5. State location where accident occurred or occupational disease was contracted: Franklin County, 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:
symptomatic spondylolisthesis related to lifting at work
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: permanent and total disability
15. Compensation paid to-date for temporary disability: See Award
16. Value necessary medical aid paid to date by employer/insurer? \$90,570.00

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: -----
19. Weekly compensation rate: \$258.91 for temporary total disability and permanent total disability
20. Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer and Insurer liable for temporary total disability from 8/19/94 through 6/25/98 at the rate of \$258.91 per week; permanent and total disability

from the Employer and Insurer beginning on 6/26/98 and thereafter, at the rate of \$258.91 per week, for so long as the condition of permanent and total disability continues to subsist.

Employer to pay mileage reimbursement for travel to necessary treatment as per award.

Claim as against the Second Injury Fund is denied.

TOTAL: ----

23. Future requirements awarded:

Said payments to begin as of the date of this Award 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:

Brian L. Harvell

Attorney's lien of Fred Roth compromised in the amount of \$2000.00

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Debra Sanders

Injury No: 94-115777 & 94-115794

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: Echlin/Pacer Industries

Additional Party State Treasurer, as custodian of the Second Injury Fund

Insurer: National Union Fire Insurance Company

Checked by: KD/bb

The claimant, Ms. Debra Sanders, appeared at hearing in person, represented by Attorney Brian Harvell. Attorney Robert Hendershot appeared on behalf of the employer, Echlin/ Pacer Industries, and its insurer, National Union Fire Insurance c/o Gallagher Bassett. Assistant Attorney General Jennifer Sommers appeared on behalf of the State Treasurer, as custodian of the Second Injury Fund. This matter comes on for a final award, following a temporary or partial award previously issued and affirmed on appeal.

Hearings pursuant to a request for a final award were held on Wednesday, October 20, 2003 and again on Thursday, May 20, 2004. At hearing on 10/20/03, Attorney Harvell acknowledged that the issue as to the Attorney's Lien of Attorney Roth had been compromised in the amount of \$2,000.00. At hearing on 5/20/04, the employer and the employee stipulated and provided documentation as to a resolution of the issue as to temporary total disability benefits alleged to be due. The parties further acknowledged that any issue as to penalties, additional compensation, costs and attorney's fees with regard to collection of temporary total disability were also compromised by resolution of the TTD issue. Compromise by the parties of the aforementioned issues leaves only the following issues to be resolved at hearing in this matter; nature and extent of permanent disability, liability of the Second Injury Fund; and as to mileage expense. Note that a recitation as to the facts agreed upon, and as to the issues to be addressed, was postponed at the beginning of the hearing as a courtesy so that the testimony of Dr. Bernstein could be taken without delay. It is further the case that counsel for the employee did not note that mileage as an issue when the issues were identified by counsel prior to the taking of the testimony of Ms. Sanders, but counsel for employee did announce, during the course of the hearing, that mileage was an issue, and counsel for the employer and insurer did not object or otherwise suggest a prejudice.

At some point in the proceedings the claimant further raised the issue of commutation, and the issuance of a final award was held in abeyance pending an agreement as to readiness for a hearing as to commutation. By letter dated October 1, 2004, counsel for claimant advised that the request for a hearing on commutation was being withdrawn, and that the parties were ready for a final award.

EXHIBITS

The claimant objected to the offer of the videotapes marked as Employer and Insurer's Exhibit Nos. 10, 11, 13, and 15. The record was left open for the Employer and Insurer to submit the original tapes corresponding to the duplicates marked as 10, 11, 13, and 15. Original videotapes to 11, 13, and 15 were marked and received in evidence without objection as Employer and Insurer's Exhibit Nos. 20, 21, and 22. Employer and Insurer were not able to find the original tape corresponding to the duplicate marked as Employer and Insurer's Exhibit No. 10. The objections of the claimant to Employer and Insurer's Exhibit Nos. 10, 11, 13, and 15 are sustained, and those tapes are not admitted. The following exhibits are in evidence:

Claimant's Exhibits

- A. Decision of Labor and Industrial Relations Commission in Injury Numbers 94-115777 & 94-115794
- B. Medical report of Dr. P. Brent Koprivica dated 4/25/02
- C. Report of Samuel Bernstein, PhD, dated 8/20/02
- D. Compilation of medical records
- E. Deposition of Dr. P. Brent Koprivica taken on 10/9/02
- F. Curriculum vitae of Samuel Bernstein, PhD
- G. Report of Samuel Bernstein, Ph.D., dated 5/28/96

Employer and Insurer's Exhibits

1. Medical records of David B. Robson, M.D.
2. Medical report of John A. Gagnani, M.D., dated 4/2/96
3. Medical reports of David G. Kennedy, M.D.
4. Deposition of Dr. Marvin Mishkin taken on 12/16/02
5. Deposition of Wayne A. Stillings, M.D., taken on 12/17/02
6. Deposition of Debra Y. Sanders taken on 9/12/94
7. Deposition of Debra Y. Sanders taken on 3/21/00
8. Certified medical records of Urgi-Care (Dr. Bonney)
9. Surveillance report of Ms. Pam Springer for 4/15/98-5/22/98
10. Not admitted
11. Not admitted
12. Surveillance report of Ms. Pam Springer for 6/5/98- 6/6/98
13. Not admitted
14. Surveillance report of Ms. Pam Springer for 7/10/98-8/29/98
15. Not admitted
16. Surveillance report of Matt Morgan for 12/22/02
17. Surveillance videotape for 12/22/02
18. Report of Karen Kane dated 4/28/03
19. Curriculum vitae of Karen Kane Thaler

20. Surveillance videotape
21. Surveillance videotape
22. Surveillance videotape
23. Letter from Ms. Springer to Robert Hendershot dated 5/14/04
24. Letter from Robert Hendershot to Brian L. Harvell dated 5/10/04
25. Letter from Brian L. Harvell to Robert Hendershot dated 5/15/04

Second Injury Fund Exhibits

- I. Deposition of Debra Sanders taken on 2/1/02
- II. Letter from M. Jennifer Sommers, A.A.G dated 5/19/04

SUMMARY OF WITNESS TESTIMONY

Debra Sanders

Ms. Sanders relates that she pays on a mortgage on her own home, which has also always been home to her daughter, Alicia, and to her two grandsons, now 10 and 7 years old. Ms. Sanders further confirms that she is 51 years old; that she left high school after the 10th grade; that she was able to acquire her GED some 20 years thereafter; and that she had some college credit from a three-month course in retail sales taken at a junior college.

Ms. Sanders acknowledges that for a year or more she spent time as a secretary for a company in the oil business, and that her duties included handling payroll, invoices, and paperwork as to insurance benefits. Claimant further notes that she has worked as a stocker, as a cashier, as a waitress, and at various times in shoe factories. On cross-examination by the Second Injury Fund, Ms. Sanders acknowledged that while employed at Pacer she was working three jobs. Claimant notes that for approximately nine months prior to her injury in August of 1994, she worked as a stocker and cashier at Bud's Warehouse, and also worked as a waitress, serving drinks at Pioneer Lounge. Ms. Sanders agreed that between the three jobs she most likely was working 50 or more hours per week, working 40 hours per week with Pacer, and with some overtime with Pacer as well.

Ms. Sanders notes that she has not worked since suffering a back injury at work in August of 1994. She identifies the various records within Claimant's Exhibit D as including the history of treatment provided post her back injury.

Claimant relates that even after an incident in May of 1994 that affected her back and led her to seek treatment, she had no back complaints prior to August of 1994 that affected her ability to sit, stand, bend, walk, carry, or lift. Claimant recalls that after the incident in May of 1994, she suffered from some back soreness but was able to work.

Ms. Sanders notes that Dr. Bonney performed the pre-employment physicals that she had prior to her employment with Pacer, and also did the pre-employment physical that she had when applying for work with St. Clair Die Casting. Ms. Sanders recalls having Dr. Bonney place a 25-pound lifting restriction on her activity as a part of the pre-employment physical with St. Clair Die Casting, and recalls that prior to her second period of employment with Pacer, St. Clair Die Casting had refused to offer her employment.

Ms. Sanders noted that on a good day she would rate her tailbone, left hip, and low back complaints as a 5 on a 0 to 10 scale, and stated that her tailbone pain was constant. Ms. Sanders reported that on a bad day, her pain was at least a 9 on a 10-point scale. Ms. Sanders acknowledged that in addition to grandsons Jacob and Cole, she also has twin eight-year-old granddaughters, and a four-year-old grandson named Caleb. Ms. Sanders notes that she did not limit her lifting of her grandchildren when they were babies, and that she would assist in getting them into their car seats. Ms. Sanders could not recall at what age she would stop lifting her grandchildren, but acknowledges holding the four-year-old on the two occasions when he broke his arm and his leg.

Ms. Sanders acknowledged that she has suffered from migraine headache as often as three times a week for the past 25 years. Ms. Sanders agrees that she takes medication for her migraines, and that the headaches are bad enough to keep her in bed on occasion, and have caused her to have thoughts of suicide from time to time. Ms. Sanders notes that she has sought psychiatric care in the past, but has not sought such care since having suffered her back injury.

The claimant acknowledged that she continues to suffer from numbness in both hands, and that she advised Dr. Bernstein that she had trouble with dropping objects, and with turning doorknobs. Claimant also acknowledges having been a cigarette smoker for over 30 years, noting that she has been using inhalers over the past six or so years.

Ms. Sanders further acknowledged suffering a motor vehicle accident in February of 2000, leading to a left shoulder rotator cuff surgery.

Ms. Sanders acknowledges that since her daughter found employment some eight or so years ago, the claimant has had the primary responsibility for performing household chores. Claimant relates that she will from time to time hang a basket of laundry outside; that she will mow grass; and that she will drive to town on a regular basis. Ms. Sanders notes that from time to time her grandchildren will help her with the various household chores, including the mowing of the grass.

The claimant recited the various medications that she takes for easing her pain. She notes that her back and shoulder pain affects her ability to sleep at night. Ms. Sanders notes that prior to her back injury she had an active lifestyle, dancing, riding horses, and holding three jobs while raising two daughters as a single parent. Claimant notes that after her back injury she has not worked, has not sought work, and has a more sedentary lifestyle.

Ms. Sanders further testified by her depositions taken on 9/12/94, 3/21/00, and on 2/1/02, marked and received in evidence respectively as Employer and Insurer's Exhibit Numbers 6 and 7, and Second Injury Fund Exhibit Roman Numeral I.

The testimony contained within Employer and Insurer's Exhibit No. 6 is particularly helpful as to an understanding of the mechanics of the repetitive lifting done by the claimant at Pacer Industries, to the extent that the claimant's recall is fresh (testimony given in a deposition as to Injury Numbers 92-149278 and 94-028979, taken only a month following the injury in August of 1994), and much more detail is provided than was the case when the claimant testified at hearing in the matter. The same is true as to the history provided by Ms. Sanders by deposition as to the initial course of medical treatment provided to her.

The testimony contained in Employer and Insurer's Exhibit No. 7, taken on 3/21/00, was generally consistent with the claimant's testimony at hearing, and with the videotapes submitted as to activities observed during surveillance of the claimant performed in 1998.

The testimony contained in Second Injury Fund Roman Numeral I, taken on 2/1/02, is helpful to the extent that the Second Injury Fund focus on direct examination was as to the claimant's history of complaints, and how those various complaints have affected claimant over the years both before and after August of 1994.

Samuel Bernstein. Ph.D.

Dr. Bernstein testified on behalf of the claimant at hearing. Dr. Bernstein is a licensed psychologist, and will pair that expertise with his experience in vocational rehabilitation to render an opinion as to how exertional and psychological factors affect the ability of an individual to be employable. Dr. Bernstein notes that he met with Ms. Sanders on 5/28/96 and again on 8/20/02, and authored two written reports in evidence, Claimant's Exhibits G and C respectively. In those reports Dr. Bernstein goes through the various medical records he reviewed; the testing that he performed; and the histories that he elicited from the claimant prior to reaching his conclusion as to her employability.

Dr. Bernstein received a history from the claimant as to suffering from dizziness; from migraine headache that at times became incapacitating; and from an unoperated condition of carpal tunnel syndrome in the right hand. He further noted that the claimant had a surgery for a left carpal tunnel syndrome, and also had a left ulnar nerve surgery. Dr. Bernstein further noted the history of treatment had by the claimant as to her back, including two surgeries related to fusion of the vertebrae of the low back. Dr. Bernstein also concluded that the claimant suffered from a major depression, and noted that Ms. Sanders reported having suicidal thoughts on a regular basis. A plain reading of page eight of his report dated 5/28/96 leads to the conclusion that Dr. Bernstein believes that a combination of disability renders the claimant unemployable, where he states; "Therefore, when considering the combination of impairments, both psychological and physical, and how they impact upon her ability to carry out any activity, even household activities, I must conclude Debra Sanders is unemployable in the labor market". However, when asked on cross-examination by counsel for the Second Injury Fund, Dr. Bernstein stated affirmatively that he believed that the claimant's low back complaints alone were the cause of a permanent and total disability. Dr. Bernstein acknowledged that he came to his conclusion as to employability without a transferable skills analysis, and without having performed a labor market survey. He notes that he believes that the claimant lacks the requisite concentration, persistency, and pace to complete a regular workday.

Dr. Marvin Mishkin

On 10/21/02, and at the request of the employer and insurer, Dr. Mishkin performed an independent medical examination of Ms. Sanders. Dr. Mishkin took a history from Ms. Sanders; reviewed certain medical records, as well as certain surveillance videotapes; and performed a physical examination of the upper and lower back, and as to the upper and lower extremities, which included taking x-rays of the claimant's lumbar spine.

Dr. Mishkin notes that the claimant provided a history of having suffered from back pain while at work in August of 1994 or 1995, lifting heavy metal parts. Dr. Mishkin notes that he finds the claimant to have a pre-existing condition known as spondylolisthesis. Dr. Mishkin notes that the x-rays showed surgical changes at L4-5 and S1 compatible with the history of fusion provided by Drs. Boland and Robson.

Dr. Mishkin notes that his review of the records of Dr. Ashby includes a reference to an x-ray from 1987 reported as showing spondylolisthesis "about the same as it was in 1994 when he reviewed her x-rays" (Employer and Insurer's Exhibit No. 4, at page 25). It is worth note that any medical records of Dr. Ashby that predate 1994 are not in evidence, nor is there any x-ray report in evidence that predates August of 1994. For that matter, there is a complete dearth of medical records in evidence as to any prior medical evaluation or treatment had by the claimant for any back complaints prior to her injury in

August of 1994.

Dr. Mishkin reaches the following conclusion as to the claimant's back condition:

This patient has a history of preexisting spondylolisthesis that most likely was present all her life or since developmental ages as a teenager, and people with that condition are known to develop intermittently back pain under stressful conditions. This patient also underwent an operative procedure, and so that there is further changes occurring in her back as a result of the fusion and pseudoarthrosis, and it would be in the patient's Best interests to avoid lifting objects over 20, 25 pounds on a regular basis and to be allowed to be able to sit intermittently and to take stress off of their back. (Employer and Insurer's Exhibit No. 3, at pp. 35,36)

Dr. Mishkin notes that he reviewed a prior x-ray from 1987 showing a spondylolisthesis (Id., at p. 47). Notwithstanding the history provided by the claimant as to being asymptomatic in her back prior to events in 1994, Dr. Mishkin believes it more likely that the claimant did suffer from prior low back pain due to her second- degree spondylolisthesis. Dr. Mishkin further acknowledges that he believes the claimant's spondylolisthesis to be congenital developmental condition.

Dr. P. Brent Koprivica

Dr. Koprivica notes that he is board certified in emergency medicine and in occupational medicine; that his practice is almost exclusively devoted to performing independent medical examinations; and that he will perform as many as 2,000 such examinations in a year.

Dr. Koprivica relates that one such examination was performed on Ms. Sanders on April 25, 2002. Dr. Koprivica notes that he reviewed certain medical records; took a history from Ms. Sanders as to her education and as to her various employment; inquired as to her health and personal history; and performed a physical examination.

Dr. Koprivica recalls that the claimant denied a history of significant low back problems prior to 1994, noting that the claimant related that she had not been limited vocationally in any way with regard to her ability to bend and lift.

Dr. Koprivica concludes that the claimant exhibited no exaggeration or inappropriate pain behaviors during the physical examination, and that her presentation was consistent with her history of treatment. He further concludes that after a failed two-level fusion surgery with pseudoarthrosis, he believes the claimant to be permanently and totally disabled. His recommendations include a 20-pound lifting limit, and a proscription against frequent or constant bending at the waist, pushing, pulling, or twisting. Dr. Koprivica further would limit the claimant from captive sitting for over an hour at a time, and from captive standing and walking activities lasting over 30 minutes at a time. Dr. Koprivica acknowledges that he was aware that the claimant suffered from disability relative to her upper extremity conditions at the carpal and cubital tunnels, but nonetheless concludes that the back condition alone renders the claimant permanently and totally disabled.

Dr. Wayne A. Stillings

Dr. Stillings, on behalf of the employer and insurer, testified as to his psychiatric evaluation of the disability status of the claimant. Dr. Stillings acknowledges that on 11/04/02 Ms. Sanders took the MMPI, or Minnesota Multiphasic Personality Inventory, and that on 11/5/02 he had the opportunity to meet with Ms. Sanders in person. Dr. Stillings notes that the claimant provided him with family, social work, injury, and medical histories, and that he read various medical records, as well as the report of Dr. Bernstein dated 8/20/02.

Dr. Stillings refers to the MMPI as the "Cadillac" of assessment tools, and further notes that among its various virtues, the MMPI "provides you with a wealth of information about an individual's approach to the actual test-taking itself. Whether they are minimizing or underreporting the psychological conflict, whether they are candid and forthright in reporting their psychological state, or thirdly, if they are overreporting or overemphasizing their subjective complaints" (Employer and Insurer's Exhibit Number 5, at page 18).

Dr. Stillings concludes that his review of the MMPI results indicates that the study was of doubtful validity, inasmuch as he believes the claimant to have overreported the extent of her medical symptoms, and concludes that such an overreporting is consistent with what he perceives to be the claimant's personality structure. Dr. Stillings goes on to note, "So to an extent, she has the kind of personality where she is going to adopt the sick role and put herself into a dysfunctional occupational state. I think this is consistent with her psychosocial history." Id., at pp. 23,24.

Dr. Stillings concludes that the claimant suffers from a depressive disorder that pre-existed the involved work injury

to her back. Dr. Stillings notes that his review of the GAF (Global Assessment of Functioning) score suggests that the claimant has minimal to mild psychiatric symptoms. He notes that the claimant continues to complain of such symptoms as insomnia, fatigue, and irritability, consistent with her depressive disorder, but does not believe the claimant's psychiatric condition to be disabling from an occupational perspective. Dr. Stillings believes that the claimant suffers from a 10% permanent partial disability referable to a preexisting depressive disorder, and further believes that the work injury caused an aggravation of that disorder, resulting in an additional 2% permanent partial psychiatric disability. Lastly, Dr. Stillings notes that after reviewing all of the medical reports and records at his disposal, he is unable to conclude that the claimant is rendered unemployable as the result of her physical and psychiatric disability.

Karen Kane Thaler

Ms. Thaler testified on behalf of the employer and insurer in her capacity as a vocational consultant for the last thirteen years with Crawford and Company Healthcare Management Services. Ms. Thaler acknowledged that she performs reviews as to the employment prospects of individuals, and will perform job analysis and training designed to return individuals to the work force. The witness relates that her assessment as to employability included a review of the claimant's work and education histories, in order to perform a transferable skills analysis. The witness acknowledged that she did not interview or otherwise meet and have an opportunity to perform any testing of Ms. Sanders, but rather relied on such resources as the deposition of Ms. Sanders, and the vocational report prepared by Dr. Bernstein.

As a result of her analysis, Ms. Thaler concluded that, in the absence of any physical requirements that would otherwise operate as a bar to certain employments, Ms. Sanders would be able to compete for a semi-skilled category of employment. Ms. Thaler further notes that she reviewed the various medical records, took note of the various work restrictions recommended by the evaluating physicians, and identified those job titles that described those positions that claimant would be able to access given the following restrictions; maximum lift of no more than 20 pounds; ability to alternately sit, stand, or walk; ability to get up and move as needed; and no repetitive bending or squatting. The witness relates that claimant would only be capable of accessing those semi-skilled employments in the sedentary to light work categories. Ms. Thaler then utilized her resources, such as the Dictionary of Occupational Titles, and her understanding of the St. Clair/Sullivan labor market, to identify a sampling of positions that she supposed that claimant would be capable of accessing (See page 7 of the report of Ms. Thaler, Employer and Insurer's Exhibit No. 18).

Ms. Thaler relates that she performed a labor market survey with respect to Ms. Sanders, using St. Clair/Sullivan as the appropriate market, supposing that a 50 to 60 mile radius constituted an acceptable commute. Ms. Thaler relates that she contacted various employers within the market to determine whether there were jobs available within the market that the claimant would be able to access. The witness then identified those jobs within the market the claimant would be able to access, and concluded that claimant would not be precluded from finding full-time gainful employment on the open labor market.

Pam Springer and Matt Morgan

Ms. Springer and Mr. Morgan testified in their capacities as investigators for Confidential Business Resources and for Photofax respectively. Both investigators testified as to the surveillance performed by them of Ms. Sanders, and as to the reports and surveillance videotapes generated by their surveillance activity.

FINDINGS OF FACT AND RULINGS OF LAW

In evidence are medical records and reports, including those of Drs. Boland and Robson, as to the history of fusion surgery at L4-S1 performed on 1/20/95, with a follow up surgery on 1/09/96 to remove certain instrumentation in an attempt to alleviate complaints of ongoing back pain (See Employer and Insurer's Exhibit No. 1 and Claimant's Exhibit D). Myelogram and x-rays taken prior to the second surgery showed the fusion to be solid, without structural abnormality; the operative note with respect to the removal of instrumentation contained a notation stating that the fusion appeared to be intact from L4 to S1. Claimant continued to complain of back pain and pain into the left upper extremity.

Dr. John A. Gragnani performed a disability evaluation of Ms. Sanders on 4/2/96 (See Employer and Insurer's Exhibit No. 2). Dr. Gragnani reviewed various medical records, performed a physical examination as to the back, and concluded as follows:

At this time, the way I see this is that this patient does, in fact, have a very bad back, and she has a congenital defect and deformity that appears to involve not only the spondylolisthesis, but also an apparent deformity which yields some curvature of the spine in that there is an excessive amount of lordosis and possibly even some mild scoliosis.

Dr. Gragnani further opines that the claimant should under no circumstances lift more than 35 pounds; that the claimant is not a good candidate to return to heavy or even moderate labor work; and that claimant should consider the type of secretarial work that would allow her to change positions throughout the day.

Tomography of the lumbar spine performed on 4/8/96 at the request of Dr. Gragnani post his evaluation on 4/2/96 was interpreted as showing a posterolateral graft fusion to be unsuccessful. Specifically, the report states, in part, "Posterolateral graft fusion has been applied but most of these pieces are unfused to each other or to the host bone." (See St. Luke's Hospital radiology report, under Tab. No. 4 within Claimant's Exhibit D). Thereafter, Dr. Boland continued to provide treatment for what he diagnosed as pseudoarthrosis or failure of the original fusion.

Dr. David G. Kennedy performed an evaluation of Ms. Sanders on 6/25/98 (See Employer and Insurer's Exhibit No. 3). Dr. Kennedy concluded that it was doubtful that a further surgery would alleviate the back pain associated with claimant's pseudoarthrosis. Dr. Kennedy further believes that the claimant should be limited to lifting less than 20 pounds, and that she should perform only infrequent bending, twisting, or stooping. Dr. Kennedy noted that he reviewed certain video tapes that depicted the claimant performing a variety of activities, and concluded that it would be reasonable for claimant to continue in a job capacity "wherein she is sitting or standing throughout the day". Dr. Boland recommended a subsequent surgery for revision of the pseudoarthrosis. In his letter dated 7/17/96 Dr. Robson noted that he believed Ms. Sanders "needs repair of the nonunion of her spine fusion"; a surgery was scheduled and was subsequently cancelled for reasons as documented in various letters among and between Ms. Sanders, Dr. Robson, and Gallagher Bassett Services.

Ms. Sanders has had no subsequent surgeries to the low back. Prior to her back injury, Ms. Sanders had a left ulnar nerve anterior subcutaneous transposition, in response to a finding by Dr. Rottler that she suffered from a left cubital tunnel syndrome. After her last back surgery on 1/09/96, Ms. Sanders had a left carpal tunnel release performed by Dr. Glogovac on 4/23/96. Ms. Sanders further provided a history of having treated for a rotator cuff injury after suffering a motor vehicle accident in 2000.

Ms. Sanders testified that she takes medication on a daily basis for her complaints of chronic pain in her low back. Records from Dr. Riffel, the claimant's personal physician prior to his retirement, indicate that he treated the claimant for, among others, headache and low back complaints until the latter months of 1998. Thereafter, according to the testimony of Ms. Sanders, claimant continued to receive treatment for her back from Dr. Agostino (sp), her family care physician, and from Dr. Boland.

PERMANENT DISABILITY/LIABILITY OF THE SECOND INJURY FUND

The employer and insurer put in evidence various videotapes that documented surveillance performed on Ms. Sanders in May, June, and August of 1998. The videotapes revealed that Ms. Sanders was capable of bending over at the waist to broom and sweep; to bend over from the waist to ground level to pick up objects; to carry and assist small children in and out of the back seat of a sedan; drive an automobile; shop; push a lawn mower and lawn mow for as much as five or so minutes; and to carry a small laundry basket

Ms. Sanders suffers from a failed fusion in her low back. Drs. Gragnani and Boland persuade that the claimant suffers from what is described as a very bad back, and one that prohibits her from performing any kind of repetitive bending and lifting, and of the sort that lends itself to a medical restriction that would limit her from attempting to lift anything over 20 pounds.

At issue is whether the claimant's back injury renders her incapable of obtaining employment on the open labor market. Each party has offered their expert testimony to support opposing conclusions as to the ability of Ms. Sanders to find and to engage in gainful employment.

Dr. Stillings argues that the claimant has a dependent personality, and that she over reports her subjective complaints as a way of controlling and being dependent on others. This analysis strikes this fact finder as being at odds with the claimant's actual personal history of having raised two daughters as a single mother after her divorce, and having worked multiple jobs at any one time in order to make ends meet. This analysis seems further at odds with what is seen on videotape surveillance, which suggests that despite her back complaints, the claimant is willing and able to care for her grandchildren and perform such household functions as clean house, wash the laundry, and to an extent, mow the yard.

Ms. Thaler believes the claimant to be capable of certain semi-skilled sedentary to light work categories of employment believed to be available in the St. Clair/Sullivan market. Drs. Bernstein and Koprivica believe the claimant to be permanently and totally disabled. Dr. Mishkin agrees with Dr. Koprivica that the claimant should be allowed to sit intermittently to take stress of her back.

The test for permanent total disability is whether, given the claimant's situation and condition, he is competent to compete in the open labor market. Laturno v. Carnahan, 640 S.W.2d 470, 472 (Mo.App. 1982). This test measures the worker's prospects for returning to employment. Patchin v. National Supermarkets, Inc., 738 S.W.2d 166, 167 (Mo.App. 1987). Total disability means the inability to return to any reasonable employment; it does not require that the employee be completely inactive or inert. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990). The question is whether in the ordinary course of business an employer would reasonably be expected to hire the claimant in his present

physical condition, reasonably expecting him to perform the work for which he is hired. Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982).

If the complaints of Ms. Sanders as to her back complaints are to be believed, the opinions expressed by Drs. Bernstein and Koprivica would persuade that the claimant has been rendered unemployable as a result of her work related back injury. The wholly credible opinions of Drs. Boland and Gragnani as to the severity of her back condition lends further credence to the conclusion that the claimant now suffers a permanent and total disability.

The testimony of Ms. Sanders as to her back complaints is found wholly worthy of belief. Her testimony persuades that she has a back condition of such severity as to preclude her from exhibiting the requisite persistency and pace to compete for even the most light and sedentary levels of employment. The evidence further persuades that it is the work related back injury alone that is the cause of her permanent and total disability. Given this finding that employer and insurer are liable for the permanent and total disability, the claim as against the Second Injury Fund must be dismissed.

Pursuant to the temporary award in this matter, the claimant was found to have suffered temporary and total disability from the date of the work injury, 8/19/94, to the date of the temporary award, 12/19/96, payable for so long as that condition continued to subsist. Dr. Kennedy performed his evaluation on 6/25/98, and concluded at that time that claimant was not likely to achieve any symptomatic improvement from further surgery. Dr. Kennedy found Ms. Sanders to have reached maximum medical improvement as to her lumbar spine. Claimant is found to have suffered temporary and total disability from 8/19/94 to 6/25/98, payable by the employer and insurer. Employer and insurer are to pay a permanent and total disability benefit, beginning on 6/26/98 and thereafter, at the rate of \$258.91 per week, for so long as the condition of permanent and total disability continues to subsist.

MILEAGE TO AND FROM TREATMENT

At hearing for a temporary award, Ms. Sanders provided a listing of her mileage to and from treatment. Those listings are to be found in Claimant's Exhibit A as offered on 12/19/96. The mileage request was previously denied for failure to provide the requisite corresponding medical records to support the claim for mileage.

Contained within Claimant's Exhibit D is a compilation of various medical records, a large share of which is related to treatment received for the claimant's back injury.

Section 287.140.1 RSMo provides, in part, as follows:

When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the place of injury or the place of his residence, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses;

The claimant is found to be entitled to reimbursement, per Section 287.140.1, for trips she made from her home to medical treatment totaling 120 and 122 miles, depending on the destination as shown in Claimant's Exhibit A as offered at hearing for the temporary award. Those trips documented in Claimant's Exhibit D for treatment as to the back are to be reimbursed at the following rates:

<u>Dates</u>	<u>Cents per mile</u>
July 1, 1994 to June 30, 1995	26 cents
July 1, 1995 to June 30, 1996	27 cents
July 1, 1996 to June 30, 1997	28 cents

The employer and insurer are to rely on the dates of treatment showing in the medical records as the basis for calculating the amounts due for mileage to and from treatment provided for the back at the direction of the following care providers: Drs. Gragnani, Robson, and Boland.

This award is subject to a lien in favor of Brian L. Harvell, Attorney at Law, in the amount of 25% thereof for necessary legal services rendered.

This award is subject to interest as provided by law.

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Date: December 3, 2004

Made by: /s/ KEVIN DINWIDDIE
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ GARY ESTENSON
GARY ESTENSON
Director
Division of Workers' Compensation