

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

Injury No.: 04-095052

Employee: Mike Sanders
Employer: Lionmark Construction
d/b/a Pace Construction (Settled)
Insurer: Liberty Mutual Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 17, 2009. The award and decision of Administrative Law Judge Suzette Carlisle, issued September 17, 2009, 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 25th day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Mike Sanders Injury No.: 04-095052
Dependents: N/A Before the
Employer: Lionmark Construction (d/b/a) Pace **Division of Workers' Compensation**
Construction (Settled) Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Liberty Mutual Insurance Company (Settled)
Hearing Date: June 16, 2009 Checked by: SC:

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: September 15, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant injured his back while operating heavy equipment at work.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: Permanent Total Disability against the Second Injury Fund
15. Compensation paid to-date for temporary disability: \$72,104.11
16. Value necessary medical aid paid to date by employer/insurer? \$150,515.44

Employee: Mike Sanders

Injury No.:04-095052

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for maximum rates for Permanent Partial Disability, Temporary Total Disability, and Permanent Total Disability
- 19. Weekly compensation rate: \$675.90/\$354.05
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

120 weeks of permanent partial disability from Employer (Previously paid)	(\$42,486.00)
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- 22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$321.85) payable by SIF for 120 weeks
beginning February 1, 2007 and, thereafter, (beginning May 22, 2009)
the sum of \$675.90 for Claimant's lifetime

TOTAL: TO BE DETERMINED

- 23. Future requirements awarded: N/A

Said payments to begin 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: John Larsen

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Mike Sanders	Injury No.: 04-095052
Dependents:	N/A	Before the
Employer:	Lionmark Construction (d/b/a) Pace Construction (Settled)	Division of Workers' Compensation Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Liberty Mutual	Checked by: SC

STATEMENT OF THE CASE

Michael Sanders (Claimant)¹ requested a hearing for a final award pursuant to §287.450 RSMo (2000).² A hearing was held at the Missouri Division of Workers' Compensation, St. Louis office on June 16, 2009. Attorney John Larsen represented Claimant. Assistant Attorney General Kristen Frazier represented the Second Injury Fund (SIF). Claimant seeks permanent total disability from the SIF. The hearing closed after presentation of all the evidence.

On October 30, 2008, Claimant settled with Lionmark Construction d/b/a Pace Construction (Employer) and Liberty Mutual Fire Insurance Company (Insurer) for 30% PPD of the BAW referable to the low back.³

Claimant's Exhibits A-E and SIF's Exhibits I-VIII were admitted. Any notations contained in the records were present when admitted. Any objections contained in the depositions and not addressed in this award are overruled.

The parties stipulate that on or about September 15, 2004: The alleged accident occurred in St. Louis, County, Claimant was employed by Employer, Claimant and Employer operated under the Missouri Workers' Compensation Law; Employer's liability was fully insured; Employer received proper notice; a Claim for Compensation was timely filed; Claimant's average weekly wage was sufficient for a maximum rate of \$675.90 for Temporary Total Disability (TTD) and Permanent Total Disability (PTD) and \$354.05 for Permanent Partial Disability (PPD); Employer paid \$72,104.11 in TTD benefits for 110 2/7 weeks, from September 15, 2004, to February 1, 2007, and Employer paid medical benefits totaling \$150,515.44, and Claimant achieved maximum medical improvement (MMI) on February 1, 2007.

The parties identified the following issues for disposition: 1. Did Claimant sustain an accident? 2. If so, was the accident medically causally related to Claimant's work activities? 3. What is the nature and extent of Employer liability for PPD or PTD benefits? 4. What is the nature and extent of SIF liability for PPD or PTD benefits?

¹ Division records reflect Claimant's first name as Mike, however, he testified his name is Michael.

² All statutory references are to the 2000 Revised Statutes of Missouri unless otherwise stated.

³ All references to the Employer also include the Insurer.

FINDINGS OF FACT

All evidence was reviewed but only evidence supporting this award is considered to establish the following facts based on competent and substantial evidence:

1. Claimant is 47-years-old and obtained a GED in 1979. He worked as an operating engineer for Local 513 from age 17 until he retired in April 2007. He ran heavy equipment, such as cranes and backhoes. He sat a lot, lifted heavy items, and assembled cranes with the help of a “bull gang” (apprentices). Claimant received work assignments through the union hall.
2. Claimant worked periodically for Employer during 2004. He operated a backhoe and picked up loose asphalt. To operate the backhoe, Claimant used a bucket to dig out asphalt or “ram it and pop it up.” While operating the backhoe, Claimant bounced around the cab “like a ping pong ball.”
3. On September 15, 2004, Claimant turned in his seat and placed the backhoe in reverse. He drove over a “lip” in the pavement, bounced about a foot high, and landed with his tailbone on the armrest. He felt immediate pain. He stretched out on the grass and reported the incident to his supervisor.
4. The next day, treatment began at BarnesCare. Doctors ordered x-rays, physical therapy, an injection, and took Claimant off work. In October 2004, Claimant was referred to Sandra Tate, M.D.
5. He returned to work with Alberici as a heavy equipment operator. He worked with the help of friends who accommodated his limitations, but he could not perform the work.
6. On December 21, 2004, David Kennedy, M.D., examined Claimant. April 6, 2005, Employer sent Claimant to Dr. Chabot. Dr. Chabot unsuccessfully provided injections and recommended surgery in June 2005.
7. Employer referred Claimant to Dr. Lange for a second opinion in August 2005. On September 23, 2005, Dr. Lange performed a redo laminectomy and discectomy at L5-S1, posterior fusion at L5-S1 with instrumentation at L4-5 and L5-S1, and bone graft harvest.
8. Initially, Claimant improved, but later, symptoms increased. Physical therapy did not help. On October 11, 2006, Dr. Coyle examined Claimant and recommended surgery, but did not believe it would be successful. Based on this, Claimant declined additional surgery.
9. After Claimant declined surgery, Dr. John Graham provided pain management. Current medications include Lyrica, Vicodin, Zanax and high blood pressure medicine. Claimant’s primary physician prescribes pain medication which he takes on a daily basis. Medication causes him to be “flighty” and unable to concentrate. Claimant’s sleeping problems started in the 1990’s but he did not seek medical attention until after the 2004 work accident.

10. Complaints include constant low back pain, right leg throbbing, pain to toe, no feeling in the middle section of the back and right leg to the heel. Claimant's low back pain is worst and he feels like he is 75-years-old. Minimum level of constant pain is 5-6/10. Maximum pain level is 10/10. Symptoms vary each day. Claimant cuts the grass in shifts. Several times a month he is home for a few days because of pain. He sleeps for a couple of hours and is awake the remainder of the night. He naps during the day from 15 minutes to several hours as needed. Back pain increased after a sneezing episode, and his right leg numbness returned. Claimant would like to work but does not believe he can.

Pre-existing Medical Conditions

11. About 1990, Claimant grabbed a 12 foot, 120-pound spinning drill steel and was twisted and pulled into a machine. He treated for problems with his neck, shoulder, arm and low back. Dr. Schoedinger treated Claimant's back pain.⁴ Claimant missed about six months work. Complaints included a stiff neck. He cannot hang high steel due to inability to look up for extended periods of time. His neck locks if it is in one position too long.
12. From 1991 to 1994, Claimant worked as a business agent assisting workers with settlement disputes. Claimant resigned when a new union president was hired. He returned to work as an operating engineer pumping sand, a less strenuous job, for fifteen months. Claimant received no treatment between 1994 and leading up to October 1996. Claimant settled for 17% PPD of the low back and missed 35 and 3/7 weeks from work.⁵
13. On October 7, 1996, Claimant injured his low back and right leg when he jumped onto loose gravel, landing on his buttocks. MRI results show L5-S1 herniation on the right. **Dr. Kennedy** performed a microdiscectomy at L5-S1 on November 13, 1996, and released him to return to work with no restrictions in February 1997.
14. Claimant returned to work, and in May 1997 experienced "basic pain." He could not operate some equipment because it "beat you to death." He avoided quarry and rock jobs because of his low back. Also, looking up for long periods caused his neck to lock up. He continued to drive pilings (bridge work) because he received breaks and did not have to look up. He chose the equipment he operated.
15. On February 25, 1998, the Honorable Matthew D. Vacca awarded 20% PPD of the low back to Claimant for his 1996 low back injury.⁶ Claimant missed 19 weeks from work before Dr. Morrow returned him to work on February 17, 1997.
16. From 1996 to 2004, Claimant received chiropractic treatment for his back and neck but no MRI or medication.⁷ He continued to operate a crane but performed no high work. He chose to drive pilings because he could take breaks as needed, unlike jobs that required Claimant to look up.

⁴ Dr. Schoedinger's records are not in evidence.

⁵ The Stipulation of Compromise Settlement and related medical records are not in evidence but are discussed in the Findings of Fact stated in the award of Judge Vacca for injury number 96-122371, and are incorporated by reference.

⁶ Judicial notice is taken of the award related to injury number 96-122371.

⁷ The chiropractic records are not in evidence.

17. Before the primary injury, Claimant returned to unrestricted duty after each injury, but tried to avoid equipment that bounced.

Medical Evidence

18. In September 2004, Claimant received treatment at BarnesCare. Between October 2004 and December 2004, Dr. Tate examined Claimant and diagnosed right S1 radiculopathy. A series of epidural injections at L5-S1 on the right and physical therapy provided no improvement. Dr. Tate noted symptom magnification and “pain out of proportion to objective findings.” A 2004 functional capacity evaluation (FCE) showed symptom magnification.⁸ Nerve conduction studies revealed chronic right S1 radiculopathy related to the 1996 surgery. MRI showed scar tissue around the right L5 nerve root. Dr. Tate returned Claimant to work without restrictions on December 8, 2004.
19. **Michael C. Chabot, M.D.**, treated Claimant from April 2005 to June 2005. An October 2004 MRI revealed advanced degenerative disc disease, disc space narrowing and neuroforaminal narrowing at L5-S1 with disc protrusion on the right. Myelogram CT revealed significant spinal stenosis at L2 to L5 with congenitally shortened pedicles. X-rays showed disc space narrowing at L5-S1. Dr. Chabot recommended laminectomies from L2 to L5 with fusion at L5-S1. Cervical rotation was decreased by 25 degrees in all directions.
20. On August 1, 2005, Claimant gave **David R. Lange, M.D.** a history of no problems after back surgery in the 1990’s. Radiographs taken on September 16, 2004 show degenerative changes. A June 2005 myelogram revealed either postoperative changes of the right S1 nerve root or ongoing compression, but no acute abnormality. MRI findings show a degenerative disc at L5-S1, with postoperative changes on the right, partially calcified and degenerative changes at L4-5.
21. On September 23, 2005, Dr. Lange performed a “redo” discectomy at L5-S1, fusion at L5-S1, with instrumentation at L4-5 and L5-S1 and a bone graft. He received physical therapy and light work conditioning. A myelogram CT ordered by James Coyle, M.D., in the fall of 2006, revealed a non-functioning implanted device at L4-5.
22. In April 2006, Claimant developed right leg pain after a violent sneezing and vomiting attack. A myelogram CT was normal. Also, physical therapy aggravated the S1 nerve root, and caused increased pain.
23. FCE results on January 25, 2007, show Claimant able to work in a sedentary position, lifting 10 pounds waist to shoulder, bilaterally carrying 15 pounds, 23.5 to 29.9 pounds push/pull. He performed maximal effort but could not return to work as an operating engineer.
24. On February 1, 2007, Dr. Lange rated 30% PPD of the low back.⁹ He questioned the validity of the 2007 FCE due to inconsistencies between test results and Claimant’s symptoms. Also, Dr. Lange believed Claimant could lift more than 10 pounds occasionally, despite low back problems. Dr. Lange placed Claimant at MMI and

⁸ Dr. Tate refers to the 2004 FCE results but they are not in evidence.

⁹ The signature page is missing, but is presumed to be Dr. Lange’s rating report.

released him to work in the light demand level, lifting 20 pounds occasionally, with intermittent sitting, standing and walking.

Expert Medical Opinions

25. After treating Claimant for low back pain, Dr. Chabot opined Claimant's symptoms were related to the September 2004 work accident.
26. Dr. Kennedy examined Claimant on December 21, 2004, and diagnosed sciatica caused by the September 2004 work accident. He noted Claimant "did well following a lumbar microdiscectomy and did not have any symptoms until the most recent event and I attribute his current symptoms and need for further evaluation and potential treatment to the events of September 15, 2004."
27. **Timothy G. Lalk**, a vocational rehabilitation counselor, interviewed Claimant and administered 3 tests on October 31, 2007, at the request of his attorney. Mr. Lalk found Claimant to be easily confused by questions, but cooperative. During the 90 minute interview, Claimant walked slowly, changed positions, and frequently stood up. At the end of a 15 minute test, he reclined on the couch and requested aspirin for a headache. Claimant scored 5th grade level in arithmetic and 6.6 grade level in reading. Having worked as a heavy equipment operator since age 17, Mr. Lalk found Claimant had no transferable skills.¹⁰
28. Mr. Lalk concluded Claimant was unemployable based on his need to lie down throughout the day because of his back. No employer would accommodate his need to repeatedly lie down during the day. Also, employers would be unwilling to hire Claimant given the level of difficulty he had sitting through the interview with Mr. Lalk and answering test questions. Reaching for milk can trigger pain in Claimant's low back and right leg. Mr. Lalk concluded the 1996 surgery constituted a hindrance or obstacle to employment.
29. **David T. Volarich, D.O.**, evaluated Claimant at his attorney's request on November 13, 2007. For the primary injury, Dr. Volarich diagnosed recurrent herniated disc at L5-S1 to the right with radiculopathy, aggravation of degenerative disc disease and degenerative joint disease with spinal stenosis at L4-5, repeat L5-S1 discectomy with fusion and instrumentation, pedicle instrumentation without fusion at L4-5, and post laminectomy syndrome with right leg radiculopathy.
30. For the primary injury, Dr. Volarich recommended Claimant avoid all bending, twisting, and lifting, limit lifting to 15 pounds, carry no weight overhead, away from the body, long distances, or on uneven terrain, change positions every 30 minutes, and lie down as needed.
31. Dr. Volarich found the September 2004 work injury was the "substantial contributing factor as well as the prevailing or primary factor causing recurrent disc herniation at L5-S1, aggravation of spinal stenosis, degenerative disc disease and degenerative joint disease at L4-5." He rated 50% PPD of the low back for the 2004 injury. Dr. Volarich

¹⁰ Mr. Lalk's report is referenced during his deposition but is not in evidence.

deferred to a vocational expert to determine if work could be found that Claimant could perform.

32. Dr. Volarich diagnosed the following preexisting conditions: herniated disc L5-S1 to the right with radiculopathy, and herniated disc at C6-7, and possible depression. Dr. Volarich limited repetitive bending and related activities. He opined the primary and preexisting disabilities combined to create greater disability than their simple sum and a loading factor should apply. Dr. Volarich found the preexisting disability created a hindrance or obstacle to employment.
33. Dr. Volarich found the preexisting disability constituted a hindrance or obstacle to employment. He rated 20% PPD of the low back for the 1996 injury and 25% PPD of the cervical spine for the 1990 injury. Dr. Volarich limited repetitive twisting, limited lifting to 30 pounds occasionally, pushing, pulling, carrying, climbing, and avoid fixed positions for more than 60 minutes.
34. Dr. Volarich opined medication could impair Claimant's ability to function throughout the work day.

RULINGS OF LAW

After giving careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Claimant sustained an accident that was medically causally related to his work activities

At the hearing, the parties raised accident and medical causation as issues. Section 287.020.2 defines accident as 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 causing the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

I find Claimant's testimony is generally credible. Employer authorized medical treatment which began the day after the accident. Claimant consistently provided treating physicians with a history of developing back pain while operating a backhoe at work on September 15, 2004. I find the movement of the backhoe was sudden and violent, and produced immediate back and leg pain. I find Claimant sustained a work related accident.

Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App.1991).

I find credible the opinions of Drs. Kennedy, Chabot, and Volarich that Claimant's 2004 low back injury was caused by his work activities. Further, Dr. Lange, the treating physician, did not dispute causation. I find Claimant sustained a recurrent herniated disc at L5-S1 when the

backhoe he operated bounced, causing him to land on his tailbone. I find the low back injury is medically causally related to his work activities on September 15, 2004.

Claimant is permanently and totally disabled due to a combination of the last injury and preexisting medical disabilities

Claimant asserts he is PTD as a result of his pre-existing medical conditions and the September 2004 work accident. SIF contends if Claimant is PTD, it is due to the last injury alone and subsequent injury caused by sneezing and vomiting. In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury Fund Liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968).

Section 287.020.7 defines "total disability" as the inability to return to any employment and not merely inability to return to the employment the employee was engaged in at the time of the accident. The test for PTD is the worker's ability to compete in the open labor market. *Karoutzos v. Treasurer of State*, 55 S.W. 3d 493, 499 (Mo.App. 2001) (*Citations omitted*). (*Overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003)).¹¹ The "crucial question is whether or not an employer can reasonably be expected to hire the claimant in his present physical condition and can reasonably expect him to perform the work successfully." *Muller v. Treasurer of Missouri*, 87 S.W.3d 36 (Mo. App. 2002). However, before SIF liability can be determined, Employer's liability must be determined for the last injury alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. 2003) (*Citations omitted*). If the last injury alone rendered Claimant PTD, then the SIF has no liability and Employer is responsible for the entire amount of compensation. *Id.*

The Last Injury Alone

I find Claimant sustained permanent disability from the 2004 work injury. Dr. Lange released Claimant to work in the light demand level lifting up to 20 pounds occasionally with intermittent sitting, standing and walking. Dr. Lange rated 30% PPD of the low back. Dr. Volarich rated 50% PPD of the low back and imposed restrictions. Claimant's complaints include constant right leg pain to the toe, which increases with activity, and loss of sensation in the middle section of the back of the leg. Pain keeps him home 2 to 3 times a month. Claimant naps up to several hours per day as needed. He had sleep problems before the 2004 accident, but now takes medication to help him sleep. Claimant settled with Employer for 30% PPD of the low back, however the SIF is not bound by a settlement agreement between Claimant and Employer. *Totten v. Treasurer of Missouri*, 116 S.W.3d 624 (Mo.App. 2003). Based on the medical records, reports, doctor's ratings and Claimant's testimony, I find Claimant sustained 30% PPD of the low back from the 2004 work injury.

Permanent Total Disability

Claimant and all experts agree he can no longer work as an operating engineer. At issue is conflicting evidence about his ability to perform other work activities and whether his need to lie down was caused solely by the 2004 accident.

¹¹ Several cases herein were overruled by *Hampton* on grounds other than those for which the cases are cited. No further reference will be made to *Hampton*.

Medical evidence revealed Claimant could return to work with restrictions. FCE results placed him in the sedentary work demand level lifting 10 pounds waist to shoulder, and 15 pounds bilaterally. Dr. Lange imposed the restrictions discussed above. Dr. Volarich recommended he avoid all bending, twisting, limit lifting to 15 pounds, carry no weight overhead, away from the body, long distances, or over uneven terrain, change positions every 30 minutes, and lie down as needed. According to Dr. Volarich, Claimant could work within the restrictions if he was able to, however, he deferred to a vocational expert regarding Claimant's ability to work.

I find Claimant's need to lie down during the day was not based solely on the September 2004 back injury. Dr. Volarich opined that if Claimant could not work, it was due to a combination of the primary back injury and the preexisting back and cervical disability.

I find credible Dr. Volarich's opinion that Claimant needed to lie down because of 'failed back syndrome.' Claimant injured his back in 1990 and 1996. Dr. Volarich reviewed records from Drs. Coyle and Schoedinger III regarding Claimant's preexisting back conditions. The award issued by Judge Vacca for the 1996 injury reflects a preexisting lumbar herniation and possible cervical herniation from a 1990 injury. During treatment for the 1990 injury, Claimant missed 35 and 3/7 weeks from work and settled the case for 17% PPD of the body as a whole for the neck and back. No settlement agreement between Claimant and Employer binds the SIF, but after the accident, Claimant took a less strenuous job as a business agent.

In 1996, Claimant reinjured his low back after he returned to work as an operating engineer. Dr. Kennedy performed a microdiscectomy at L5-S1, the same disc that was injured in 2004. Dr. Kennedy's opinion is not persuasive that Claimant's current symptoms were caused solely by the 2004 injury, because Claimant continued to have right leg pain when Dr. Kennedy last saw him in 1996. Also, Claimant testified he received chiropractic treatment for his back and neck between 1997 and 2004. The case settled for 20% PPD of the body for the low back and Claimant missed 19 weeks from work. After the accident, Claimant selected work assignments that did not involve equipment that bounced, and co-workers allowed him to take breaks as needed.

Additionally, Dr. Volarich, found Claimant's congenitally short pedicles create radicular problems when abnormal discs are present due to narrow canal space.¹²

Mr. Lalk is the only vocational expert in the case, and the only expert to find Claimant unable to work, based on Dr. Volarich's restriction that Claimant lie down as needed due to his back. Mr. Lalk predicted Claimant would have difficulty convincing an employer to hire him based on his level of symptoms and limitations. If Claimant were hired, Mr. Lalk did not believe employers would accommodate his need to lie down. Reaching for milk can trigger low back and leg pain and require Claimant to lie down for up to an hour. Claimant testified he stays home several days each month because of pain. He naps during the day due to inability to sleep well at night. During the interview with Mr. Lalk, Claimant walked slowly, changed positions, frequently stood up, and struggled to answer written questions.

¹² Dr. Volarich explained: "the pedicles are a portion of the posterior elements of the back part of bony vertebral structure that protects the spinal cord." With short pedicles, the diameter of the spinal cord, front to back, is narrower than normal.

During the hearing, I observed Claimant shift in his seat every 15 minutes and sigh when getting up from the chair.

Although Mr. Lalk testified the need to lie down prevented Claimant from working, he did not conclude it was caused solely by the 2004 back injury. It is not clear from the record that Mr. Lalk knew about the 1990 back injury, but he did know about the 1996 back surgery and the accommodations Claimant made after the accident.

Mr. Lalk did not recommend postsecondary education for Claimant because he scored 5th grade in arithmetic and 6th grade in reading. Also, he found Claimant possessed no transferable vocational skills, hobbies or interests that would provide work opportunities within Claimant's restrictions.

Dr. Volarich and Mr. Lalk found the earlier back surgery constituted a hindrance or obstacle to employment or reemployment.

Based on credible testimony by Dr. Volarich, Mr. Lalk, medical records, reports, Claimant's credible testimony, age, education, lack of transferable skills, and demeanor during the hearing, I find no employer can reasonably be expected to hire him in his current condition and reasonably expect him to perform successfully. I find Claimant is unable to compete in the open labor market due to a combination of the primary and preexisting disabilities, which render him permanently and totally disabled.

Commencement Date for Permanent Total Disability Payments

The obligation to pay permanent disability compensation commences under Section 287.160.1 RSMo (2000) on the date claimant's permanent disability begins. ***Kramer v. Labor & Indus. Rel. Com'n***, 799 S.W.2d 142, 145 (Mo. App. 1990). On February 1, 2007, Dr. Lange found Claimant reached MMI for the 2004 work injury.

The parties stipulated Claimant reached MMI on February 1, 2007. I find Claimant reached MMI on February 1, 2007. Having previously found 30% PPD of the low back, I find Employer liable for 120 weeks of compensation at the stipulated rate of \$354.05 per week, beginning retroactively on February 1, 2007.

Where, as in the instant case, the rates of compensation for PPD and PTD are different, the SIF is liable for the difference between what should be paid by the Employer and Insurer for PPD under Section 287.190, and what Claimant should receive for PTD under Section 287.200. ***Kowalski v. M-G Metals and Sales, Inc.***, 631 S.W.2d 919, 923 (Mo. App. 1982).

I find Employer's liability for PPD should have commenced February 1, 2007, and concluded on May 21, 2009. SIF is liable to pay Claimant the sum of \$321.85 (\$675.90 PTD rate less \$354.05 PPD rate) per week for 120 weeks, and thereafter (beginning May 22, 2009) the sum of \$675.90 per week for the remainder of Claimant's life. ***Laterno v. Carnahan***, 640 S.W.2d 470, 471 (Mo. App. 1982).

CONCLUSION

Claimant sustained injury to his low back from an accident that is medically causally related to his work activities on September 15, 2004. Claimant is permanently and totally disabled as a result of his primary and preexisting disabilities. SIF is liable for permanent total disability benefits. The award is subject to a lien in favor of Claimant's attorney for legal services rendered.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation