

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

Injury No.: 03-042483

Employee: Joseph H. Scott
Employer: FedEx Freight East, Inc.
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: May 8, 2003
Place and County of Accident: Scott 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 June 23, 2008, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Jack H. Knowlan, Jr., issued June 23, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 5th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Joseph H. Scott

Injury No. 03-042483

Dependents: N/A

Employer: FedEx Freight East, Inc.

Additional Party: Second Injury Fund

Insurer: Self-insured

Hearing Date: March 19, 2007

Checked by: JK/kh

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease? May 8, 2003
5. State location where accident occurred or occupational disease contracted: Scott 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? No
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Self Insured
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee alleged that he injured his lumbar spine and is permanently and totally disabled as a result of an accident and injury that occurred when the employee was attempting to lift the tongue of a dolly to attach a trailer to his truck.
12. Did accident or occupational disease cause death? No

13. Parts of body injured by accident or occupational disease: Alleged injuries to his back and body as a whole
14. Nature and extent of any permanent disability: None (claim denied)
15. Compensation paid to date for temporary total disability: \$39,125.64
16. Value necessary medical aid paid to date by employer-insurer: \$62,272.13
17. Value necessary medical aid not furnished by employer-insurer: None (claim denied)
18. Employee's average weekly wage: Undetermined (maximum rates)
19. Weekly compensation rate: \$649.32 for temporary total and permanent total disability and \$340.12 for permanent partial disability
20. Method wages computation: By agreement
21. Amount of compensation payable: None (claim denied)
22. Second Injury Fund liability: Claims denied
23. Future requirements awarded: None

FINDINGS OF FACT AND RULINGS OF LAW

On March 18, 2008, the employee, Joseph H. Scott, appeared in person and by his attorney, Mr. Phillip J. Barkett, Jr., for a hearing for a final award. The employer was represented at the hearing by its attorney, Ms. Constance M. Warner. The Second Injury Fund was represented at the hearing by Assistant Attorney General, Frank A. Rodman.

At the conclusion of the hearing on March 18, 2008, the parties agreed that the hearing should be continued and the record left open to allow the introduction of certified medical records of Dr. Suthar and a certified copy of the employee's marriage certificate. These exhibits were received and admitted as employee's exhibits C and N respectively on March 28, 2008. The record was closed and hearing completed as of that date.

At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. On or about May 8, 2003, FedEx Freight East, Inc., was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and was duly qualified as a self insured employer.
2. On or about May 8, 2003, Joseph H. Scott was an employee of FedEx Freight East, Inc., and was working under the provisions of the Act.
3. The employer had notice of the employee's alleged accident and injury.
4. The employee's claim was filed within the time allowed by law.
5. The employee's average weekly wage qualified him for the maximum rates of compensation. His rate for temporary total and permanent total disability is \$649.32 and his rate for permanent partial disability is \$340.12.
6. The employer paid medical expenses in the amount of \$62,272.13.

7. The employer paid temporary total disability benefits totally \$39,125.64 that covered the time period from May 12, 2003 through July 3, 2004.

ISSUES

1. Accident or occupational disease
2. Medical causation
3. Additional medical aid
4. Nature and Extent of Disability
5. Liability of Second Injury
6. Dependents of Employee

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Curriculum Vitae of Robert E. Gardner, MD
- B. Dr. Gardner's report of May 25, 2006
- C. Medical records after May 8, 2003 reviewed by Dr. Gardner
- D. Medical records before May 8, 2003 reviewed by Dr. Gardner
- D. (1). Deposition of Dr. Gardner
- E. Curriculum Vitae of Susan Shea, M.D.
- F. Susan Shea letter report dated August 8, 2006
- G. Deposition of Susan Shea, M.A.
- H. Medical Bill from Med Cap Pharmacy and Dr. Gardner
- I. Medical records of Dr. Gardner
- J. Medical records of Dr. Deborah Price
- K. Work records of employee
- L. Summary of work records and doctor's visits by employee
- M. Diagram
- N. Marriage Certificate

Employer-Insurer's Exhibits

1. Deposition of David Anderson, M.D.
2. Deposition of John Graham, M.D.
3. Deposition of Kevin Vaught, M.D.
4. Deposition of Vic Zuccarello, OTRL
5. Deposition of June Blane
6. Deposition of Barb Ellis
7. Deposition of employee
8. Income tax returns of employee and employee's wife
9. (Withdrawn after objection sustained)
10. (Withdrawn after objection sustained)
11. Report of Dr. Manish Suthar
12. Report of Injury
13. Correspondence from employee's attorney dated February 10, 2005
14. Medical records of Regional Primary Care dated February 10, 2005
15. Medical records of Dr. Deborah Price dated January 25, 2005

Second Injury Exhibits – None offered

FINDINGS OF FACT

Based on the evidence submitted, I find as follows:

Pre Existing Back and leg Problems:

· Joseph H. Scott (“employee”) alleged that he injured his low back on May 8, 2003 while he was attempting to lift a dolly that was used to connect FedEx trailers to his truck.

· At the time of his accident, the employer was not aware of the employee’s significant history of prior back problems, and authorized the employee to receive treatment that resulted in surgery being performed by Dr. Kevin Vaught, who is a neurosurgeon in Cape Girardeau, Missouri. After taking the employee’s deposition, the employer discovered more information about the employee’s prior back problems and denied the employee’s claim.

· The employee’s prior back problems are documented in the medical records and reports of Dr. Robert E. Gardner, the physicians at Regional Primary Care and Dr. Katherine Adams and Dr. Deborah D. Price at Cape Girardeau Physician Associates (employee’s exhibits D, I and J; and Employer’s exhibits 13 and 14). These records confirm that the employee complained of low back pain, pain in both lower extremities with numbness in his feet on a regular basis from May 18, 1998 through November 18, 2002 (approximately 6 months prior to his May 8, 2003 accident).

· The first entry indicating the employee had low back leg pain occurred on May 18, 1998. The employee went to Dr. Voszler at Regional Primary Care complaining of low back pain with pain down his *left* leg for 1 week. The employee denied any injury.

· The records of Dr. Voszler indicate that 2 ½ months later, on August 5, 1998, the employee reported that he had fallen out of the truck and was experiencing low back and *right* leg pain. The employee complained of constant paresthesia in the *right* foot. The employee’s treatment for back and leg pain by Dr. Voszler continued through September 1998 (Employee’s exhibit D).

· On February 14, 2000, the employee reported a new work related injury to his “left arm, neck and *back*” (emphasis added) that occurred when he was pulling on trailer connections. An MRI of the cervical spine revealed a disc protrusion at C5-6, and the employee was referred to Dr. Robert E. Gardner at Neurologic Associates of Cape Girardeau. (Employee’s exhibit D).

· Although the employee’s initial treatment with Dr. Gardner focused on his cervical herniated disc, by September 14, 2001, the records of Dr. Gardner confirm the employee was having significant low back and leg complaints. Dr. Gardner’s hand written notes from September 14, 2001 indicate the employee complained of low back and *left* leg pain for 4 to 5 months. The employee said his legs were getting weak and may give out. He also reported tingling on the toes of his *left* foot. An MRI performed at Cape Imaging on September 14, 2001 confirmed the employee had a central disc herniation at L5 S1 “which may be impinging on the nerve root bilaterally”. The report also indicated that the employee had “diffuse degenerative changes”. These degenerative changes were confirmed in a myelogram that was done on October 8, 2001 (Employee’s exhibit D).

· Dr. Gardner’s records indicate the employee continued to have low back complaints and leg pain in 2002. On April 12, 2002 the hand written record notes increasing low back and right leg pain. On November 2, 2002 the employee reported increasing leg weakness. As a result of these ongoing complaints, Dr. Gardner ordered another myelogram with a CT scan on November 18, 2002 that confirmed “ventral indentation of the thecal sac at L3-4 and L4-5”. The post myelogram CT indicated the employee had diffuse annular bulges at L3-4, L4-5 and L5-S1 with moderate stenosis at L3-4 (Employee’s exhibit D). This diagnostic study was completed less than 6 months prior to the employee’s accident date of May 8, 2003.

· One of the multiple entries in these records that demonstrates the severity and extent of the employee’s back problems prior to his accident is set forth in a “New Patient Evaluation” taken by Dr. Katherine Adams of Cape Girardeau Physician Associates on September 4, 2001. Although the employee had many other health problems, the portion related to his low back included the following:

He also wakes up at night because of pain in his lower extremities. He has chronic pain in both legs as well as his left arm. He has had it for years since the accident of falling off the truck. It happened a couple of years ago. He was stepping out of the truck at 3 a.m. and forgot that there was no handle on the new truck that he was driving. He landed

on his right hip and has experienced a lot of pain since that time. He went for physical therapy at first with some relief of his pain. Now the pain is in both of his hips radiating anteriorly down both knees as well as down to his left foot. He also experiences some numbness on the medial aspect of his left shin above his left foot. His left foot at times feels like it is falling asleep. The patient gets much worse after walking for a prolonged period of time. He takes Ibuprofen. He has never taken any Tylenol for that. He has been under the care of Dr. Gardner in the past and in his assessment, the pain was related to a job related accident, but the insurance company did not approve it. There was some controversy about that and he was getting pain shots by Dr. Gardner. The pain is severe most of the time 9 out of 10. He cannot find any comfortable position at night because of the exacerbation of the pain. (Employee's exhibit D).

Symptoms and treatment following May 8, 2003 accident:

· After the employee's May 8, 2003 accident, he received conservative treatment from Dr. David O. Catron (Employer's exhibit 14). The employee also continued to treat with Dr. Gardner on his own. A June 2, 2003 CT scan showed tissue extending into the spinal canal at L5-S1 which impinged the perineural fat on the right. Dr. Catron ordered an MRI on June 17, 2003 that showed degenerative disc disease at L4-5 and L5-S1 with a narrowed L5-S1 interspace and right sided disc protrusion with caudal migration. Dr. Catron suggested the employee be seen by a neurosurgeon (Employer's exhibit 14).

· Dr. Kevin Vaught first saw the employee on July 14, 2003. Although the employee did advise Dr. Vaught of his 1989 work injury, the employee told Dr. Vaught that he did not recall any leg symptoms, and in 2 or 3 months his symptoms improved. The employee indicated to Dr. Vaught that he had some intermittent aching in his low back, but nothing that kept him from working. The medical records of Dr. Vaught do not indicate that he was aware of the extensive treatment the employee had received for his low back and leg complaints nor the results of the prior diagnostic testing that had been ordered by Dr. Gardner (Employer's exhibit 3, deposition exhibit B).

· Dr. Vaught felt that the employee's low back pain and bilateral leg pain were likely related to the L5-S1 herniation. When injections by Dr. Chiu failed to improve the employee's symptoms, Dr. Vaught performed a partial L5 laminectomy and medial facetectomy, bilateral foraminotomy and bilateral L5-S1 discectomy on September 4, 2003 (Employer's exhibit 3, deposition exhibit B). The results of a post myelogram CT ordered by Dr. Vaught prior to the surgery confirmed a herniated disc at L5-S1 with diffuse disc bulging at L3-4, L4-5 and L5-S1. The findings of this August 27, 2003 post myelogram CT appear to be identical to the post myelogram CT done by Dr. Gardner in November of 2002.

· After the surgery, the employee initially reported that his symptoms had improved, but later asserted that his back and leg pain increased over time and a burning sensation developed in his legs. Post surgical MRI and myelogram studies showed no evidence of a recurrent disc herniation (Employer's exhibit 3, deposition exhibit B).

· In December of 2003, Dr. Vaught discussed the possibility of fusion surgery to address the employee's degenerative disc disease. The employee testified that he was subsequently seen by Dr. Lange and Dr. Coyle for additional opinions regarding more surgery. Neither of these orthopedic surgeons felt the employee was a good candidate for fusion surgery.

· On May 12, 2004, Dr. Vaught ordered a functional capacity evaluation (FCE). The occupational therapist performing the FCE reported that the employee failed 10 of 12 symptom magnification criteria, had positive Wadell's signs and recorded a sub par effort (Employer's exhibit 4, deposition exhibit 2).

· On May 24, 2004, Dr. Vaught released the employee from his care and concluded that he was at maximum medical improvement with a 5 pound lifting restriction. Dr. Vaught subsequently changed the lifting restriction to 25 pounds (Employer's exhibit 3, deposition exhibit B).

· On June 14, 2004, the employee returned to Dr. Gardner with continuing complaints of low back pain and bilateral leg pain with loss of feeling in both legs. Dr. Gardner noted that the employee was taking Hydrocodone and Neurontin. On July 16, 2004, Dr. Gardner concluded that the employee was "100% disabled" from work because of his low back and leg complaints. The employee was taking Effexor for depression (Employee's exhibit 2).

· On July 19, 2004, the employer sent the employee to Dr. John Graham at the Pain Treatment Center in St. Louis. Dr. Graham did not believe the employee would benefit from further surgery and noted multiple findings of symptom magnification. He also suggested that the employee be weaned off the Vicodin and Neurontin (Employer's exhibit 2, deposition exhibit 2).

Employee's current condition:

- At the time of the hearing the employee was still experiencing significant low back pain and pain in both legs. The employee indicated his feet feel like they are asleep, and his pain level is generally 3 or 4 on a scale of 1 to 10. If he does any activity, his pain level increases to around 7.
- During a typical day, the employee takes pain medicine and lies down to relieve his symptoms. Although the employee does walk short distances for exercise, if he walks too far or does any activity that requires him to use his back, his pain level increases.
- At the time of the hearing, the employee testified that he continues to see Dr. Gardner every 6 months to monitor his medication.

Expert Medical and Vocational Opinions:

Employee's experts

- The employee offered the deposition testimony of Dr. Robert E. Gardner and Ms. Susan Shea.
- Dr. Gardner thought the employee's May 8, 2003 accident was a "work related exacerbation" of his "pre-existing lumbar spine pain" (Employee's exhibit D (1), page 11). Dr. Gardner concluded that the employee was "100 % disabled" (Employee's exhibit D (1), page 14). His diagnosis was "chronic pain that was related to the work injury that occurred on May 8, 2003 which caused the severe exacerbation in a relatively mild pre-existing condition that had not been interfering with his ability to function as a truck diver and which required him to subsequently have the surgery ..." (Employee's exhibit D (1), page 16). Dr. Gardner testified that the employee was at MMI, but would continue to need medical treatment to relieve his pain (Employee's exhibit D (1), page 17). Dr. Gardner further indicated that he believed the employee's disability was "directly related to the injury of May 8th, 2003" (Employee's exhibit D (1), page 17).
- Vocational rehabilitation consultant Susan Shea was deposed on April 20, 2007. Based on her interview of the employee and her review of the medical records, Ms. Shea concluded that the employee was "unemployable in the national labor market" (Employee's exhibit G, page 21).

Employer's experts

- Dr. David Anderson is an orthopedic surgeon who examined the employee on October 25, 2006. Dr. Anderson concluded that the employee's current condition and symptoms were caused by his pre-existing degenerative disc disease (Employer's exhibit 1, page 14). Dr. Anderson felt the May 8, 2003 accident may have been a precipitating factor for increasing the symptoms of his pre-existing degenerative disc disease, but "the substantial factor in the need for his surgery was his pre-existing degenerative disc disease" (Employer's exhibit 1, page 15). Although Dr. Anderson rated the employee as having a 30% disability, he felt this disability was all attributable to the pre-existing degenerative disc disease (Employer's exhibit 1, page 15).
- Dr. John Graham was deposed on March 7, 2007. Dr. Graham examined the employee on July 19, 2004, and again on September 25, 2006. Dr. Graham concluded that the May 8, 2003 accident did not aggravate the employee's pre-existing condition, and did not precipitate this current condition (Employer's exhibit 2, pages 39 and 40).
- Ms. June Blaine of Rehabilitation Management, Inc. provided a vocational assessment of the employee based on a records review. In a report dated September 17, 2007, Ms. Blaine concluded that the employee was capable of performing light or sedentary work, and that he was employable in the open labor market (Employer's exhibit 5, deposition exhibit B).

APPLICABLE LAW

- The burden is on the employee to prove all material elements of the employee's claim. *Melvies v Morris*, 422 S.W.2d, 335(Mo.App.1968). The employee has the burden of proving that not only the employee sustained an accident that arose out of and in the course of employment, but also that there is a medical causal relationship between the accident and the injuries and the medical treatment for which the employee is seeking compensation. *Griggs v A.B. Chance Company*, 503 S.W.2d 697(Mo.App.1973).
- Under the version of Section 287.020.2 RSMo. that was in effect at the time of the employee's accident, the term accident is defined to include only those injuries that are "clearly work related". Under this section an injury is

“clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor”.

· A pre-existing but non-disabling condition does not bar recovery if a work related accident causes the pre-existing condition to escalate to a level where it becomes disabling. *Winebauer v Gray Eagle Distributors*, 661 S.W.2d 652(Mo.App.1983); *Avery v City of Columbia*, 966 S.W.2d 315(Mo.App.1998); *Indelicato v Missouri Baptist Hospital*, 960 S.W.2d 183(Mo.App.1985).

· Under Section 287.140 RSMo., the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select his own physician at his own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. *Emert v Ford Motor Company*, 863 S.W. 2d 629 (Mo.App. 1993); *Shores v General Motors Corporation*, 842 S.W. 2d 929 (Mo.App.1992) and *Hendricks v Motor Freight*, 520 S.W. 2d 702, 710 (Mo.App.1978).

· Under Section 287.140.1 “the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury”.

· The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is “possible” that the claimant will need future medical treatment. *Modlin v Sunmark, Inc.*, 699 S.W. 2d 5, 7 (Mo.App.1995). The cases establish, however, that it is not necessary for the claimant to present “conclusive evidence” of the need for future medical treatment. *Sifferman v Sears Roebuck and Company*, 906 S.W. 2d 823, 838 (Mo. App.1995). To the contrary, numerous cases have made it clear that in order to meet their burden, claimants are required to show by a “reasonable probability” that they will need future medical treatment. *Dean v St. Lukes Hospital*, 936 S.W. 2d 601 (Mo.App.1997). In addition, employees must establish through competent medical evidence that the medical care requested, “flows from the accident” before the employer is responsible. *Landers v Chrysler Corporation*, 963 S.W. 2d 275, (Mo.App.1997).

· Temporary total disability benefits are intended to cover the healing period, and are not warranted beyond the point in which the employee is capable of returning to work. Temporary total disability benefits are not intended to compensate the employee after his condition has reached the point where further progress is not expected. *Brookman v Henry Transportation* 924 S.W.2d 286 (Mo.App.1996). See also *Williams v Pillsbury Company* 694 S.W.2d 488, 489 (Mo.App.1985). The pivotal question in determining whether an employee is totally disabled is whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in his present physical condition. *Brookman Id.* at 290.

· Section 287.020.7 RSMo. provides as follows:

The term “total disability” as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

· The phrase “the inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). 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. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the “inability to return to any reasonable or normal employment”. *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that persons physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).

· The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability,

then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

Under Section 287.220.1 RSMo., the Second Injury Fund has no liability and the employer is responsible for full, permanent total disability benefits if the last injury "considered alone and of itself" results in permanent total disability. *Roller v Treasurer of the State of Missouri*, 935 S.W.2d 739 (Mo.App.1996) and *Maas v Treasurer of the State of Missouri*, 964 S.W.2d 541 (Mo.App.1998).

RULINGS OF LAW:

Issue 1. and Issue 2. Accident and Medical Causation

When the employee was questioned by his attorney about his physical condition before his May 8, 2003, his response was that he was in "good shape", and that he had no back pain or injuries other than the usual aches due to being bounced around in a truck. This picture of a relatively "clean" medical history was also provided by the employee to the employee's treating doctors and the specialists who examined the employee in order to prepare for the hearing.

After carefully examining the employee's medical records, it is clear that the statements made by the employee were, at best, woefully inaccurate. Either the employee has a very poor memory or he was intentionally misrepresenting the extent of his prior back problems with the hope of improving his chances of success on his workers' compensation claim. This reluctance on the part of the employee to provide an accurate history regarding his pre existing back problems had a significant, negative impact on the employee's credibility.

The medical records paint an entirely different picture. The employee had severe low back pain for several years prior to his accident. He also had multiple complaints of left and right leg pain with numbness and tingling in his feet. The medical records reveal at least two other incidents that were just as likely to have caused the employee's back and leg complaints. It is significant to note, however, that when he reported his initial episode of back pain in 1998, the employee denied any injury. Although he was able to continue working before his May 8, 2003 accident, the employee told Dr. Anderson that his pain level was at 9 on a 1 to 10 scale, and the employee sought treatment from several different doctors. Approximately 6 months before his May 8, 2003 accident, the employee's continuing complaints led Dr. Gardner to order a post myelogram CT. The employee had already had an MRI and a Myelogram that confirmed a herniated disc at the L5-S1 level. This was the same level on which Dr. Vaught later performed surgery. A careful review of the pre accident and post accident diagnostic studies fails to reveal any significant differences. The employee's pre accident and post accident complaints and symptoms were also nearly identical.

In conclusion, the medical records confirm that the employee's back and leg complaints before and after May 8, 2003 were almost identical. The medical evidence also indicated that his symptoms and need for treatment were caused by a combination of a herniated disc at the L5-S1 level and degenerative disc disease at several levels of the lumbar spine, and all of these conditions were diagnosed and disabling prior to the May 8, 2003 accident.

Based on these facts, it would be completely irrational for any doctor or workers' compensation judge to conclude that the employee's May 8, 2003 accident was a substantial factor in causing those diagnosed conditions and the resulting need for treatment. With the benefit of every doubt, a judge might conclude that the employee's May 8, 2008 work activity of jerking on the tongue of the dolly caused a temporary exacerbation of his pre existing condition and precipitated an increase in his symptoms. Given the fact that his pre existing condition had been diagnosed and was symptomatic for several years before this incident, however, it would be very difficult to justify a conclusion that the employee's work activity was a substantial factor in causing the employee's disability and need for treatment.

On the issues of accident and medical causation, I find that the opinions of Dr. Anderson and Dr. Graham were more credible than the opinion of Dr. Gardner. Dr. Gardner's initial opinion that the May 8th act of lifting the dolly caused

an exacerbation of the pre existing condition may have been accurate, but it clearly did not rise to the level of being a substantial factor.

Based on these conclusions, I find that the employee has failed to satisfy his burden of proof on the issues of accident and medical causation. The employee's claim for compensation is therefore denied.

Based on the denial of the employee's claim on the issues of accident and medical causation, the remaining issues are moot and shall not be ruled upon.

Given the denial of the employee's underlying claims against the employer-insurer, the employee's claims against the Second Injury Fund are also denied.

Date: _____ Made by:

Jack H. Knowlan, Jr.
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Jeff Buker
Division Director
Division of Workers' Compensation