

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

Injury No.: 96-107734

Employee: Ova Scott

Employer: Asarco, Inc.

Insurer: Asarco, Inc.
c/o Missouri Private Sector Individual Self-Insurer's Guarantee Corp.

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

Date of Accident: September 9, 1996

Place and County of Accident: Reynolds 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 October 9, 2007. The award and decision of Chief Administrative Law Judge Jack H. Knowlan, Jr., issued October 9, 2007, 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 18th day of June 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Ova Scott

Injury No. 96-107734

Dependents: Undetermined

Employer: Assarco, Inc.

Additional Party: Second Injury Fund

Insurer: Assarco, Inc., self-insured in 1996; current successor party – Missouri Private Sector Individual Self-Insurer's Guarantee Corp. pursuant to Section 287.860 RSMo. 1996 c/o Corporate Claims Management Inc.

Hearing Date: August 9, 2005 (delayed due to bankruptcy stay)
July 12, 2007

Checked by: JK/kh

SUMMARY OF FINDINGS

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 9, 1996
5. State location where accident occurred or occupational disease contracted: Reynolds 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? Self-insured with the Missouri Private Sector Individual Self-Insurer's Guarantee Corporation as the current successor party
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was lifting a sand bag and injured his cervical spine.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Cervical spine
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to date for temporary total disability: \$7,353.32
16. Value necessary medical aid paid to date by employer-insurer: \$20,591.73

17. Value necessary medical aid not furnished by employer-insurer: \$577.94
18. Employee's average weekly wage: \$749.61
19. Weekly compensation rate: \$499.74 for temporary total disability and permanent total disability and \$268.72 for permanent partial disability
20. Method wages computation: By agreement
21. Amount of compensation payable: (See findings)

Previously incurred medical expenses: \$577.94

Permanent Total Disability: \$499.74 per week commencing on April 7, 2000, and continuing for the remainder of the employee's life or until suspended, if the employee is restored to his regular employment or its equivalent as provided in Section 287.200 RSMo.

22. Second Injury Fund liability: Claim denied (see findings).
23. Future requirements awarded: Future medical aid pursuant to Section 287.140 RSMo. and permanent total disability benefits.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Mr. Christopher Tucker

FINDINGS OF FACT AND RULINGS OF LAW

On August 9, 2005, the employee, Ova B. Scott, appeared in person and by his attorney, Mr. Christopher Tucker, for a hearing for a final award. The employer was represented at the hearing on August 9, 2005 by its attorney, Mr. Robert Haeckel. The Second Injury Fund was represented at the hearing by Assistant Attorney General Gregg Johnson. Shortly after the hearing was concluded Asarco filed for Chapter 11 Reorganization and Protection under the supervision of the U.S. Bankruptcy Court in Corpus Christi, Texas. The workers' compensation proceedings were subsequently stayed by the U.S. Bankruptcy Court. In October of 2006, the Missouri Division of Workers' Compensation, Director of Self-insured Bonds, Mr. Rick Cole, declared self-insured, Asarco, Inc. insolvent in relation to its pending workers' compensation claims, and the claim under injury number 96-107734 was referred to the Missouri Private Sector Individual Self-Insurer's Guarantee Corporation c/o Corporate Claims Management, Inc., for administration pursuant to Section 287.860 RSMo. 1996. The Missouri Private Sector Individual Self-Insurer's Guarantee Corporation retained Evans & Dixon, LLC for representation of this claim on behalf of Missouri Private Sector Individual Self-Insurer's Guarantee Corporation.

Given the length of time that the matter had been delayed because of the bankruptcy stay, the parties agreed to have a transcript prepared of the August 9, 2005 hearing, and requested an additional hearing to allow the parties to present further evidence on the disputed issues. The second hearing was scheduled and held on July 12, 2007. On that date, the employee, Ova B. Scott appeared in person, and by his attorney, Mr. Christopher T. Tucker. The Missouri Private Sector Individual Self-Insurer's Guarantee Corporation appeared at the hearing by its attorney, Mr. Robert Haeckel. At the time of the second hearing, Mr. Haeckel was not representing Asarco, Inc. and no one appeared on behalf of Asarco, Inc. The Second Injury Fund was represented at the July 12, 2007 hearing by Assistant Attorney General Gregg Johnson.

At the time of the hearings, 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 September 9, 1996, Asarco, Inc., was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and it was duly qualified as a self-insured employer.
2. On or about September 9, 1996, Ova B. Scott was an employee of Asarco, Inc., and was working under the provisions of the Missouri Workers' Compensation Act.
3. On or about September 9, 1996, the employee sustained an accident that arose out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim for compensation was filed within the time allowed by law.

6. The employee's average weekly wage was \$749.61, and his rate of compensation is \$499.74 for temporary total disability and permanent total disability and \$268.72 for permanent partial disability.
7. The employer paid medical bills in the amount of \$20,591.73.
8. The employer-insurer paid temporary total disability benefits in the amount of \$7,353.32. This covered 15 5/7 weeks, and included the time periods from August 5, 1998 through November 8, 1998 and May 19, 1999 through June 2, 1999. The parties stipulated that prior to April 7, 2000, the employee had either worked or had received temporary total disability benefits.

ISSUES

1. Medical causation
2. Additional medical aid – previously incurred medical expenses and future medical aid
3. Nature and extent of disability – permanent total disability or permanent partial disability
4. Liability of the Second Injury Fund

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical records from various healthcare providers
- B. Medical bills
- C. List of healthcare providers
- D. Medical records for pre-existing injuries
- E. Deposition of Dr. Raymond F. Cohen
- F. Deposition of Dr. Henry F. Steele, III
- G. Deposition of Donna Kisslinger Abram
- H. Report of Injury
- I. Additional medical records of Dr. Henry Steele
- J. Records from Brown's Pharmacy

Employer-Insurer's Exhibits

1. Deposition of Dr. David S. Raskas
2. Certified records of Division of Workers' Compensation for prior low back claim
3. List of hunting and fishing permits and other records from the Department of Conversation
4. Medical records of Dr. Walter C. Boardwine
5. Medical records of Dr. Paul Rains

Second Injury Fund Exhibits

None offered

FINDINGS OF FACT

Based on the employee's testimony, the medical records and the other evidence admitted, I find as follows:

Education and Work History

- Ova B. Scott ("employee") was 49-years-old at the time of the last hearing on July 12, 2007.
- The employee's education was limited to completing the eleventh grade. The employee did not obtain a GED.
- The employee's work history was limited to jobs that required heavy manual labor, and included jobs with Alberici Construction, Black River Asphalt, and Daly Oil Tools.

Pre-Existing Conditions

- The employee had pre-existing injuries to his low back and his right ankle. On October 3, 1990, the employee injured his low back

while laying railroad track for the employer. The employee had low back surgery on December 11, 1990 by Dr. Carl Jacobs. Dr. Jacobs performed a laminectomy at L4-L5 (Employee's exhibit D, #2). The employee settled his workers' compensation claim for the low back injury for 21.25 percent of his body as a whole. After recovering from his low back injury, the employee returned to work without restrictions. Although the employee had occasional back pain and took medication on a few occasions, the employee was able to perform heavy work, and was able to function at home and at work without any limitations.

The employee fractured his right ankle in 1988. The fracture was treated with a cast, but the employee did not require surgery. After recovering from his fractured ankle, the employee returned to work without restrictions or limitations. The employee indicated that after his fracture had healed he did fine except for occasionally experiencing pain that was similar to a sprained ankle.

Primary Injury and Medical Treatment

On September 9, 1996, the employee was driving a locomotive for Asarco and injured his neck while lifting a heavy bag of sand. The employee reported his accident and was authorized to see Dr. Charles Cunningham. The employee's initial complaints were of pain in his neck, between his shoulder blades, and in the area of his low back (Employee's exhibit A, #1).

After his initial treatment by Dr. Cunningham, the employee continued to experience significant pain in his cervical spine. Although the employer repeatedly ignored the employee's request for treatment, the employer eventually authorized the employee to see a physician sometime in January of 1998. The employee received conservative treatment from a number of physicians, including pain injections from Dr. Andrew Walker at the St. Francis Medical Center in March of 1998. Two bills from St. Francis Medical Center totaling \$577.94 were submitted by the employee as part of employee's exhibit B.

After conservative treatment failed to improve his symptoms, the employer authorized treatment with Dr. Peter Merkin, who is an orthopedic surgeon in St. Louis, Missouri. On August 6, 1998, Dr. Merkin performed an anterior cervical interbody fusion at the C5-6 level.

The employee was taken off work from August 5, 1998 through November 8, 1998, and received temporary total disability benefits during this time period.

Both the medical records and the employee's testimony confirm that he had a poor result from Dr. Merkin's surgery, and his symptoms of burning pain in his neck with left shoulder and left arm pain continued and gradually got worse.

At the time the employee was released by Dr. Merkin, the Sweetwater Mine, where he had been working had been purchased by Doe Run. The employee was hired by Doe Run and returned to work.

When the employee's symptoms failed to improve the employer agreed to send the employee to Dr. David Raskas, who is an orthopedic surgeon in St. Louis, Missouri. Dr. Raskas ordered a cervical myelogram, which revealed that the bone graft was not completely incorporated (Employee's exhibit A, #10 and 11). Dr. Raskas recommended pain management that was provided through Dr. Walker in the form of trigger point injections, which were concluded in December of 1999 (Employee's exhibit A, #4 and 10). Although the trigger injections provided some temporary relief, the employee continued to experience severe neck and left arm pain. On March 28, 2000, the employee was sent back to Dr. Peter Merkin. Dr. Merkin ordered a functional capacity evaluation that was performed at HealthSouth Industrial Rehabilitation on April 5, 2000. The functional capacity evaluation indicated the employee could function in the light work demand level with assigned restrictions (Employee's exhibit A, #7 and 13). Dr. Merkin subsequently released the employee from his care on April 7, 2000, and recommended he be released to return to work in the light duty category as noted in the functional capacity evaluation (Employee's exhibit A, #7).

After he was released by Dr. Merkin, the employee was not allowed to return to work for Doe Run because of they could not accommodate his restrictions. Although the employee made several attempts to find a job, he was not successful in obtaining employment. Subsequently, the employee applied for and received social security disability benefits. The employee does not believe he is capable of working because of the pain in his neck and left upper extremity.

After his release by Dr. Merkin, the employee sought additional treatment on his own from Dr. Henry F. Steele, who is the employee's family physician. Dr. Steele has treated the employee primarily with prescription medication in the form of pain pills and muscle relaxers. At the time of the initial hearing in August of 2005, the employee was taking OxyContin, but by the date of the second hearing on July 12, 2007, the employee's OxyContin had been replaced with Morphine. Dr. Steele is also prescribing Cyclobenzaprine as a muscle relaxer, Diazepam or Valium and Hydrocodone or Lorcet. The medication prescribed by Dr. Steele has been filled at Brown's Pharmacy. The employee has requested an award for his out of pocket pharmacy expenses related to the medication prescribed by Dr. Steele as reflected in employee's exhibit B.

Current Complaints and Limitations

The employee indicated his neck felt like it was "in a vice and all screwed together". The employee has a burning sensation in his neck that has gradually gotten worse. He testified that his fingers and arms seemed to be going numb. The employee rated his pain at a seven or eight level out of ten. The employee has the most difficulty in the morning, and emphasized that it takes him three to four hours to reduce the pain to a level where he can do anything. The employee gets assistance from his wife to put his socks and shoes on, and has problems gripping and lifting any objects with his left hand.

The employee noted that he waits as long as he can to take his medicine each day, but is forced to take the Morphine within three or four hours after he gets up.

In addition to the pain in his neck and left upper extremity, the employee also has numbness and tenderness on the inside of his left hip where the bone graft was removed. At times this graft site bothers the employee when he walks.

On a "typical day", the employee tries to walk and "loosen up". The employee indicated that his neck and arm pain "destroys his day",

and makes it very difficult for him to go anywhere or do anything. The employee has problems sleeping for more than two hours at a time, and attempts to obtain relief by changing back and forth between his bed, the couch and a chair.

· In addition to his severe pain level, the employee also believes he is suffering from depression. The employee testified that he feels worthless because he is no longer able to support his wife and children. The employee has received no treatment for depression other than some prescription medication from Dr. Steele.

· As a result of the pain in his neck and left arm, the employee has problems sitting or standing for long periods of time. He can sit for "a while", and is able to walk for approximately four to five hundred yards. The employee rests and walks back to his home. The employee is still able to drive, but is forced to stop and get out and take breaks after thirty minutes to an hour. The employee noted that his medication does make him sleepy, and makes it difficult for him to drive and concentrate.

Medical and Vocational Testimony

Raymond F. Cohen D.O.

· Dr. Raymond F. Cohen examined the employee on April 18, 2001, and his deposition was taken on October 16, 2002. Based on his examination and his review of the medical records, Dr. Cohen diagnosed the employee as having chronic pain syndrome, status post cervical surgery for disc herniation at C5-6, left cervical radiculitis and cervical myofascial pain disorder (Employee's exhibit E, page 16).

· On the issue of medical causation, Dr. Cohen testified that the employee's work injury on September 9, 1996 was the substantial factor in causing his diagnosed conditions and resulting disability (Employee's exhibit E, page 16 and 17).

· When questioned about the employee's need for ongoing treatment, Dr. Cohen stated "he will need pain management, which is the medications, plus the doctor's care that would be prescribing the medications" (Employee's exhibit E, page 17). Although Dr. Cohen did not believe the employee needed an additional fusion, he commented that the fact that the bone plug that was taken from his hip was not fully fused at the time of the myelogram CT in May 1999 created at least the possibility that he might need further surgery to correct that problem (Employee's exhibit E, page 19).

· For the employee's primary injury to his cervical spine, Dr. Cohen assigned a 60 percent permanent partial disability of the body as a whole. For the pre-existing injury to the employee's lumbar spine, Dr. Cohen rated the employee at 35 percent of the body as a whole. Dr. Cohen also assigned a 20 percent permanent partial disability for the employee's prior injury to his right ankle (Employee's exhibit E, page 20 and 21).

· Dr. Cohen further testified that he believed the employee was permanently and totally disabled and not capable of gainful employment in today's open labor market (Employee's exhibit E, page 21 and 22). Dr. Cohen later added that he believed the employee's permanent and total disability was related solely to the restrictions to his neck and left upper extremity (Employee's exhibit E, page 65 and 66).

· Dr. Cohen recommended several permanent restrictions. He suggested the employee should avoid prolonged standing, stooping, twisting or lifting. He indicated the employee should not lift more than ten to fifteen pounds at any one time, and should not do any type of work that required him to hold his neck in a sustained or extended type of position. He also suggested the employee avoid any type work in which he had to do any significant walking or climbing (Employee's exhibit E, page 22).

Dr. Henry F. Steele, III, D.O.

· Dr. Henry Steele's deposition was taken on December 12, 2003. Dr. Steele first noted that he felt the employee had been suffering from depression and cervical radiculopathy. Dr. Steele thought the depression was related to the employee's cervical injury because the employee was no longer able to perform as he did previously and because of his inability to provide for his family. Dr. Steele had treated the employee's depression with a trial prescription of Paxil (Employee's exhibit E, page 17 & 18).

· Dr. Steele further testified that he believed the employee was permanently and totally disabled because of the "cervical radiculopathy and neck pain; failed surgery" (Employee's exhibit E, page 19 & 27).

· On the issue of additional medical treatment, Dr. Steele indicated that the employee would require further medical management of his analgesics medications. At the time of his deposition, the employee was taking Valium, Soma, Oruvail, OxyContin and Cytotec (Employee's exhibit E, page 28).

Donna Kisslinger – Abram

· Donna Abram is a vocational consultant who evaluated the employee on April 29, 2004. Based on her evaluation and testing of the employee, Ms. Abram concluded that "I do not believe that he would be able to obtain and maintain employment". Ms. Abram based this conclusion on the employee's background, his education, and the results of the testing that she administered to the employee. She also based this conclusion solely on the limitations and restrictions assigned by the doctors due to the injuries he sustained to his neck and left upper extremity on September 9, 1996 without regard to any limitations and restrictions that had been assigned for his pre-existing low back and right ankle injuries (Employee's exhibit E, page 36, 37 & 38).

David S. Raskas, MD

Dr. Raskas was deposed on September 23, 2003. Dr. Raskas initially evaluated the employee on May 21, 1999. Based on his clinical examination of the employee, Dr. Raskas first noted that he did not believe the employee's symptoms were consistent with a non union of a fusion or "pseudo arthrosis" (Employer's exhibit 1, page 12). Dr. Raskas further testified that he did not believe the employee would benefit from further surgery (Employer's exhibit 1, page 14.) Dr. Raskas assigned a permanent partial disability of eight percent of the body as a whole that he felt was related to September 9, 1996 accident (Employer's exhibit 1, page 15).

Dr. Raskas also performed a second examination of the employee on December 16, 2002. At the time of his second evaluation, Dr. Raskas felt the employee was exhibiting three or more positive Waddell's findings (Employer's exhibit 1, page 19). Dr. Raskas agreed that the employee might benefit from some form of pain management, but did not believe it was a good idea for the employee to be treated with OxyContin or other strong narcotic medications (Employer's exhibit 1, page 20 and 21). Dr. Raskas concluded that the employee was suffering from a "preaxial pain syndrome that did not resolve as a result of his surgical intervention, and repeated his conclusion that the employee had an eight percent permanent partial disability of his cervical spine" (Employer's exhibit 1, page 21). Dr. Raskas noted that some of the employee's complaints such as the numbness in his face was an indication of "pain magnification behavior" (Employer's exhibit 1, page 21). When questioned about the employee's capacity to work, Dr. Raskas stated "I didn't feel there was any objective data that stated that he was not able to work" (Employer's exhibit 1, page 22).

APPLICABLE LAW

The burden is on the employee to prove all material elements of the employee's claim. *Melvie 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".

Under Section 287.140.2 "If it be shown that the requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby, the division or commission may order a change in the physician, surgeon, hospital or other requirement".

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).

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 person's 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. Medical Causation

Although the employer technically disputed medical causation, the employer has not offered any credible evidence to support its position that the employee's cervical injury was not medically causally related to his accident. Dr. Cohen and many of the treating physicians attributed the employee's cervical problems to his accident, and there was nothing in the testimony of Dr. Raskas to contract this conclusion.

Based on this evidence, I find that the employee's September 9, 1996 accident was a substantial factor in causing herniated disc in the employee's cervical spine and the resulting medical treatment and disability.

Issue 2. Additional Medical Aid

Previously Incurred Medical Expenses

The employee has requested an award of medical bills totaling \$1,208.94 plus co-payments for prescriptions in the amount of \$955.06. The employer has disputed these bills on the basis of authorization, reasonableness, necessity and causation.

The bills submitted by the employee include a \$631.00 charge from Cape Radiology Group, Inc., and two bills from St. Francis Medical Center for \$296.97 and \$280.97. The two bills from St. Francis Medical Center are related to epidural injections given to the employee by Dr. Andrew F. Walker on March 17, 1998 and March 31, 1998, and total \$577.94. The Cape Radiology charge is based solely on a collection letter dated April 7, 2003, and the collection letter gives no information as to the date of the service or the nature of the service rendered.

Based on the testimony of the employee and the medical records, it appears that the injections given by Dr. Andrew Walker in March 1998 were authorized by the employer, and were medically necessary to cure and relieve the employee from his symptoms. The evidence also supports a finding that the charges were reasonable and the injections were causally related to the employee's accident.

As to the Cape Radiology Charge of \$631.00, however, the employee has failed to satisfy his burden of proof. There is no itemized bill, and the collection letter dated April 7, 2003 does not provide sufficient information to make a determination as to whether the services rendered by Cape Radiology were authorized, reasonable, medically necessary or causally related to the employee's accident. The employee's request for an award of the \$631.00 charge from Cape Radiology, Inc. is therefore denied.

The employee has also requested an award for out of pocket prescription costs from Brown's Pharmacy. All of these prescriptions are for medication that was prescribed by Dr. Steele after the employee had been released by Dr. Merkin. The employee acknowledged that Dr. Steele was not authorized by the employer, and the employee has not offered any credible evidence to support a finding that after he was released by Dr. Merkin, he requested and the employer denied additional treatment in the form of prescription medication. Thus, absent proof of a waiver, the prescriptions charges from Brown's Pharmacy must be denied since they were prescribed by an unauthorized physician. The employee's request for an award of prescription out of pocket expenses is therefore be denied.

Based on these rulings, the employer is directed to pay to the employee the sum of \$577.94 for the St. Francis Medical Center bills related to the injections performed by Dr. Andrew Walker.

Issue 3. Future Medical Aid

The employee has requested an award for future medical aid. Although no doctor has indicated the employee requires further surgery, all the physicians agree that the employee will require prescription medication and other types of pain management to relieve him from the symptoms that he is experiencing as a result of the injury to his cervical spine and the related surgery.

The employer is therefore directed to furnish additional medical aid pursuant to Section 287.140 RSMo. This obligation shall include all medical treatment that is causally related to the employee's accident, and is reasonable and necessary to cure and/or relieve the employee from the effects of his September 9, 1996 accident.

Given the award of permanent total benefits and future medical aid, and the continuing obligations imposed on the Division under Chapter 287, for purposes of resolving subsequent disputes related to these two issues, this award shall be deemed a temporary award, and the Division and Commission shall retain jurisdiction.

Issue 4. Nature and Extent of Disability

Based upon the testimony of the employee and the other evidence submitted, I find that the employee is not able to compete in the open labor market, and is permanently and totally disabled. After observing the employee during two separate hearings and reviewing the medical evidence, it is clear that the employee is suffering from severe pain and had significant limitations that would preclude him from competing in the open labor market.

The evidence also supports a finding that the employee's permanent total disability was caused by the employee's last injury alone, without consideration of any pre-existing injuries to his low back or ankle. Although the employee continued to experience occasional symptoms related to his back and ankle prior to September 6, 1996, the evidence supports a finding that even if the employee had not had any pre-existing injuries, the primary injury to his cervical spine and the poor result he experienced from Dr. Merkin's surgery would have caused the employee to be permanently and totally disabled.

Based on these conclusions, the employer is directed to pay to the employee the sum of \$499.74 per week commencing on April 7, 2000, and said benefits shall be payable during the continuance of such permanent total disability for the lifetime of the employee pursuant to Section 287.200.1, unless such payments are suspended during the time in which the employee is restored to his regular work or its equivalent as provided in Section 287.200.2.

Issue 5: Liability of the Second Injury Fund

Based on the finding that the last injury alone caused the employee to be permanently and totally disabled, the Second Injury Fund has no liability for either permanent total disability or permanent partial disability. The employee's claim against the Second Injury Fund is therefore denied.

ATTORNEY'S FEE

Mr. Christopher T. Tucker, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

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