

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

Injury No. 03-138392

Employee: Randy Smith
Employer: Curators of the University of Missouri (Settled)
Insurer: Self-Insured (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 § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 14, 2014, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued July 14, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21st day of November 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: **Randy Smith**

Injury No. **03-138392**

Dependents:

Employer: **Curators of the University of Missouri (settled)**

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: **Second Injury Fund**

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

Insurer: **Self-Insured (settled)**

Hearing Date: **April 15, 2014**

Checked by: RJD/njp

FINDINGS OF FACT AND RULINGS OF LAW

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: **Occupational disease alleged from November 5, 2002 to April 21, 2003.**
5. State location where accident occurred or occupational disease was contracted: **Boone 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? **Employer was self-insured.**
11. Describe work employee was doing and how accident occurred or occupational disease contracted: **It is alleged that Employee sustained an occupational disease in that overhead lifting and turning of the head and neck for 5 ½ months caused a further aggravation and/or progression of ongoing, underlying degenerative changes of the cervical spine.**
12. Did accident or occupational disease cause death? **No.** Date of death? **N/A.**
13. Part(s) of body injured by accident or occupational disease: **Right shoulder.**
14. Nature and extent of any permanent disability: **10% permanent partial disability of the right shoulder.**
15. Compensation paid to-date for temporary disability: **Unknown.**
16. Value necessary medical aid paid to date by employer/insurer? **Unknown.**

Employee: **Randy Smith**

Injury No. **03-138392**

17. Value necessary medical aid not furnished by employer/insurer? **Unknown.**
18. Employee's average weekly wages: **\$503.55.**
19. Weekly compensation rate: **\$335.70.**
20. Method wages computation: **Stipulation.**

COMPENSATION PAYABLE

Second Injury Fund liability:

NONE. The claim against the Second Injury Fund is denied in full.

Said payments to begin immediately 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:

Allen & Nelson PC.

Employee: **Randy Smith**

Injury No. **03-138392**

FINDINGS OF FACT AND RULINGS OF LAW

Employee: **Randy Smith**

Injury No. **03-138392**

Dependents:

Employer: **Curators of the University of Missouri (settled)**

Additional Party: **Second Injury Fund**

Insurer: **Self-Insured (settled)**

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

PRELIMINARY MATTERS

These two cases (Injury No. 02-148433 and Injury No. 03-138392) were consolidated for hearing. The evidentiary hearing was held on April 15, 2014 in Columbia. The parties requested leave to file post-hearing briefs, which leave was granted. The cases were submitted on May 2, 2014. Randy Smith ("Claimant") appeared personally and by counsel, Truman Allen. The Second Injury Fund appeared by counsel, Assistant Attorney General Brian Herman. The claims in both cases against the Employer, the University of Missouri, were settled by stipulations approved June 8, 2010.

STIPULATIONS IN INJURY NO. 02-148433

In Injury No. 02-148433, the parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue for the evidentiary hearing is proper in Boone County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Claimant's average weekly wage is \$503.55, with compensation rate of \$335.70;
6. That Claimant, Randy Smith, sustained an accident arising out of and in the course of his employment with the University of Missouri on November 5, 2002; and
7. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation against the Second Injury Fund.

Employee: **Randy Smith**

Injury No. **03-138392**

STIPULATIONS IN INJURY NO. 03-138392

In Injury No. 03-138392, the parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue for the evidentiary hearing is proper in Boone County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Claimant's average weekly wage is \$503.55, with compensation rate of \$335.70; and
6. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation against the Second Injury Fund.

ISSUE TO BE DECIDED IN INJURY NO. 02-148433

The issue to be decided in Injury No. 02-148433 is the liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

ISSUES TO BE DECIDED IN INJURY NO. 03-138392

In Injury No. 03-138392, the hearing was held to determine the following issues:

1. Whether Claimant sustained an accident or occupational disease on or about April 21, 2003 arising out of and in the course of his employment with the University of Missouri; and
2. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

EVIDENCE

The evidence consisted of the testimony of Claimant, Randy Smith as well as the deposition testimony of Randy Smith; medical records; the narrative report and deposition testimony of Dr. David Volarich; the deposition testimony of Dr. John Wagner; and the deposition testimony of Mr. Gary Weimholt, a vocational rehabilitation consultant.

DISCUSSION

The hearing in these cases was held to resolve the Second Injury Fund claims in Injury No. 02-148433 (date of accident 11-5-2002) and Injury No. 03-138392 (alleged occupational disease accruing between November 6, 2002 and April 21, 2003); both of those claims were resolved against the employer by stipulations approved June 8, 2010. A stipulation in another case (Injury No. 01-026509) was also approved on June 8, 2010, for an accident date of March 6, 2001. A thorough discussion of the March 6, 2001 accident and injury is necessary to decide the issues in these cases.

Randy Smith ("Claimant") was born November 11, 1950, and began working for University of Missouri ("Employer") in 1992 as a senior storage clerk. The evidence strongly suggests that Claimant had no known injuries or disabilities prior to the March 6, 2001 accident.

Claimant testified that on March 6, 2001, while working for Employer, he was climbing a rack when he slipped, missing a step, and fell to the ground. Dr. Volarich, Claimant's evaluating physician, noted that in the 3-6-01 accident Claimant injured his back and his neck. Claimant went to a chiropractor on March 9, 2001, reporting, *inter alia*, neck pain. When Claimant went to the University of Missouri Hospital and Clinics Staff Health Services, his complaints included neck stiffness and he stated that his neck "gradually worsened as time went on" from the March 6, 2001 injury. On March 30, 2001, Claimant saw Dr. Robert Conway and reported complaints that included non-radiating neck pain since the fall at work on March 6, 2001. Dr. Conway diagnosed Claimant with cervical and lumbar strains.

Dr. Conway released Claimant on June 28, 2001, but noted intermittent neck and back pain. Dr. Volarich reported that over the next six months Claimant continued to experience symptoms. This led to an x-ray of Claimant's cervical spine on December 13, 2001 because of a history of cervicalgia. According to the radiologist, the x-ray revealed cervical spondylosis with degenerative changes greatest at C5-6 and C4-5. The radiologist also suspected central stenosis in the bilateral intervertebral foramina at C5-6. On January 2, 2002, Claimant underwent an MRI of his cervical spine due to neck and left shoulder pain. This MRI revealed spinal stenosis at C5-6 and less pronounced changes at C4-5 and C3-4. It also revealed mild asymmetric uncovertebral changes at C5-6, left greater than right, and mild left lateral bulge at C7-T1.

Following these diagnostic results, Claimant saw Dr. Steven Street, a pain management doctor, on March 14, 2002, complaining of neck pain at a level of four out of ten. Dr. Street noted that Claimant presented with left-sided neck pain that radiated into his shoulders "since a fall in March 2001." Dr. Street diagnosed Claimant with likely cervical facet joint pain, cervical radiculopathy, and cervical degenerative disc disease, and performed left C5-6 and C6-7 facet joint injections, which confirmed the cervical facet joint pain diagnosis. Dr. Street performed a repeat injection on March 21, 2002. On April 19, 2002, Claimant returned to Dr. Street reporting that his pain was returning. Dr. Street recommended radiofrequency ablation of the medial branch nerves to the C5-6 and C6-7 facets, and this was performed May 6, 2002.

When Claimant's symptoms did not resolve after the radiofrequency ablation, Dr. Street referred Claimant to Dr. Thomas Highland, a spine surgeon, for surgical evaluation. Dr. Highland evaluated Claimant on August 30, 2002, noting the injury in March 2001 and that

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Claimant was being seen for neck pain. Per Dr. Highland's notes, Claimant was also reporting problems supporting his neck: "(w)hen he is at work or when he is trying to do anything he feels like he has to support his neck." Dr. Highland took his own x-rays, which showed narrowing and osteophyte formation at C5-6 and Dr. Highland diagnosed Claimant with degenerative disease of C4-5 and C5-6 with possible Schmorl's node. He then advised that lesions at C4-5 and C5-6 could be causing Claimant's pain and the only other option was surgery.

Shortly after surgery was offered for his neck, Claimant suffered the November 5, 2002 work injury to his shoulder that is the first claim in this matter (Injury No. 02-148433). He testified that a cart was pushed into him and "jammed" his right shoulder. Claimant testified that he has never asked for and has never received treatment for his right shoulder. He simply continued working full time after this injury. His job duties after the shoulder incident did not change and included filling orders, retrieving products from shelves, unloading trucks, and general housekeeping, with lifting between fifty and one hundred pounds.

Injury No. 03-138392 alleges an occupational disease. The claim for compensation alleges a date of "on or about April 21, 2003", and states:

While in the course and scope of employment Claimant continued to work after the injury of November 5, 2002, which aggravated the previous injury. Proper notice was given.

It appears that the claim for compensation in Injury No. 03-138392 alleges that Claimant's work between November 5, 2002 and April 21, 2003 (a period less than six months) aggravated the November 5, 2002 right shoulder injury; however, from the evidence presented at the hearing it is clear that Claimant is claiming that his work between November 5, 2002 and April 21, 2003 aggravated the (previous) neck injury, i.e., the neck injury of March 6, 2001.

No specific incident occurred on April 21, 2003, but Claimant stated that he had to do something for his pain. Claimant went back to Staff Health Services on that date, reporting that his neck pain was ongoing from the injury of March 6, 2001. The medical assessment was "reported unresolved low back strain/neck strain." The note from Claimant's visit on April 21, 2003, provides an injury date of March 6, 2001. Claimant went back to the work injury clinic on April 24, 2003, and the nurse again noted a history of unresolved sacral strain and cervical strain from March 6, 2001 and assessed an unresolved cervical strain.

Approximately one month later, on May 21, 2003, an MRI of Claimant's cervical spine was taken. It found disc space narrowing at C4-5 and C5-6, diffuse disk bulge at C4-5 with bilateral foraminal narrowing secondary to uncovertebral osteophytes, diffuse disk bulge at C5-6 with bilateral foraminal narrowing secondary to uncovertebral osteophytes, and mild disk bulge at C6-7. The impression was "unchanged spinal stenosis at C5-6 secondary to disk osteophyte complex" and the foraminal narrowing as described above. That is, the MRI results mirrored the results of the x-rays taken in December 2001 and the cervical MRI taken on January 2, 2002.

Claimant was next evaluated by Dr. John Oro, a neurosurgeon, on June 13, 2003. Dr. Oro noted a history of a fall at work on March 6, 2001. His impression was cervical spondylosis with foraminal stenosis, worse at C5 and C6. This corresponds to the impression

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from the x-ray obtained in December 2001. In follow up on July 11, 2003, Dr. Oro noted the failure of conservative measures and recommended surgery. In his pre-surgery workup on August 5, 2003, Dr. Oro assessed "significant neck pain secondary to a fall in 2001..." On August 6, 2003, Dr. Oro performed an anterior cervical discectomy and fusion at C4-5 and C5-6 and gave a postoperative diagnosis of cervical spondylosis and stenosis at C4-5 and C5-6.

Post-operatively, Claimant continued to complain of neck pain and received additional injections. Claimant saw Dr. Fisher in the pain clinic from July 2004 through October 2005. Additional treatment included a TENS unit and physical therapy. When Claimant was evaluated for continuing symptoms by the neurology clinic on June 21, 2005, Dr. Khan reported a history of a fall at work on March 6, 2001, leading to a cervical fusion in August 2003. Dr. Khan recommended Botox treatments to help with muscle spasms in Claimant's neck. Claimant testified at hearing that he has continued to receive these treatments at the VA hospital, although no VA records have been entered into evidence.

On June 8, 2010, stipulations for compromise settlement in Injury Nos. 01-026509, 02-148433 and 03-138392 were approved by an administrative law judge of the Missouri Division of Workers' Compensation. The stipulation in Injury No. 01-026509 recited that Employer paid medical expenses of \$1271.31 and \$143.88 for TTD; the settlement was for a permanent partial disability of 15% body as a whole relative to the low back. (It is interesting to note that Dr. Volarich rated Claimant's disabilities for the 3/6/01 injury at 15% body as a whole/neck and 12.5% body as a whole/low back.) The stipulation in Injury No. 02-148433 recited that Employer paid nothing for medical expenses and nothing for TTD; the settlement was for a permanent partial disability of 10% of the right shoulder and a compromise of all issues. The stipulation in Injury No. 03-138392 recited that Employer paid nothing for medical expenses and nothing for TTD; the settlement was for a permanent partial disability of approximately 14.8% body as a whole relative to the cervical spine. It is interesting to note that the claim for compensation in Injury No. 03-138392 alleges that Claimant's work between November 5, 2002 and April 21, 2003 "*aggravated the previous injury*"; as the settlement in Injury No. 03-138392 is for a disability to the cervical spine, one would suspect that one or both of the prior settlements would have included compensation for a disability to the cervical spine. However, the prior settlements are for "low back" and "right shoulder"; neither settlement mentions cervical spine, even though Dr. Volarich's rating for the cervical spine for the 2001 injury is higher than that for the low back.

It appears to me that the evidence as a whole indicates that Claimant injured his low back and cervical spine in the March 6, 2001 accident. It also appears that Claimant's cervical spine condition from the March 6, 2001 accident did not reach maximum medical improvement until long after Dr. Oro's surgery of August 6, 2003. Claimant consistently gave a history to all his medical providers (including Dr. Oro) of unresolved neck problems from the March 6, 2001 accident. Under this interpretation of the evidence, Claimant's claimed occupational disease, that his work for Employer between November 5, 2002 and April 21, 2003 "*aggravated the previous injury*" would fail.

Nevertheless, Dr. Volarich gave opinions consistent with the claimed occupational disease. In his deposition testimony of September 14, 2007 Dr. Volarich was asked on direct examination if asked about his causation opinions "would you essentially give me back the

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report, Deposition Exhibit 2”, to which question Dr. Volarich answered “yes”. The pertinent portions of Dr. Volarich’s report are as follows:

Leading up to 4/21/03, he reported he continued to work and aggravated his neck and back injuries. (Page 2)

JOB ACTIVITIES: Mr. Smith was a warehouseman for hospitals and clinics supply warehouse. He indicated climbing up on racks or stooping to fill numerous orders daily. This would entail him to lift boxes of various weights and sizes and other items filling orders for the hospital and clinics. He would stack boxes on pallets once filled and ship out orders. His job entailed him to also keep the shelves stocked by lifting and places (sic) boxes or other items on the shelves. (Pages 2-3)

Following the injury of 3/6/01, Mr. Smith complained of neck pain radiating into bilateral shoulders and back pain without radiation. He tells me range of motion in his neck is limited and painful and accompanied by popping. He cocks his head to the right. He tells me he no longer suffers from headaches, and fixed positions can be maintained for a maximum of one to two hours. (Page 3)

I asked Mr. Smith about difficulties he had with his neck, back or right shoulder girdle prior to 3/6/01, and he never had any problem or hindrance in his ability to work. I asked Mr. Smith about the severity of the neck injuries when comparing the 3/6/01 to the problems that occurred leading up to 4/21/03. He tells me that the leading up to 4/21/03 caused him significantly more difficulties with his neck and ultimately prevented him from returning to work, causing him to stop working on 4/21/03. (Page 3)

DIAGNOSES RE THE INJURY OF 3/6/01: Cervical strain with aggravation of cervical spine degenerative arthritis and spinal stenosis with mild disc bulging C6-7. (Page 7)

DIAGNOSES RE THE INJURY LEADING UP TO 4/21/03: Repetitive trauma cervical spine aggravating degenerative arthritis and spinal stenosis – s/p two-level anterior cervical discectomy and fusion with instrumentation at C4-5 and C5-6. (Page 7)

Finally, it is my opinion the repetitive trauma to the cervical spine performed by Mr. Smith, particularly the filling of orders, driving forklifts, lifting boxes of materials weighing up to 40 pounds, including repetitive overhead work lifting and retrieving items as described in the history and job activities section of this report, are the substantial contributing factors causing the aggravation of his cervical syndrome including spinal stenosis, degenerative disc disease, and degenerative joint disease that required two-level anterior cervical discectomy and fusion at C4-5 and C5-6. (Page 8)

Employee: **Randy Smith**

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On cross-examination, Dr. Volarich testified:

Q. Okay. Would you agree that the type of degenerative changes he had in his spine in 2001 are conditions that often become symptomatic insidiously or without any kind of trauma?

A. They can.

Q. Okay. And your opinion is that it's his continued work that caused the ongoing symptoms?

A. Progression of the symptoms, yes.

Q. And what is it about his work activities as opposed to the normal activities of daily living that would –

A. What he told me he did, the overhead lifting. He told me there's frequent lifting of 40-pound boxes, the working overhead filling the orders, driving the fork lifts. That requires turning your upper torso of head and neck to see behind you, all those types of things. It was a progression of aggravation of the ongoing, underlying degenerative change.

The above is the totality of Dr. Volarich's "testimony" regarding the issue of whether Claimant sustained a compensable occupational disease to his cervical spine from his work for Employer between November 5, 2002 and April 21, 2003. While rather vague, it appears that Dr. Volarich's opinion is that overhead lifting and turning of the head and neck for 5 ½ months caused a further aggravation and/or progression of "ongoing, underlying degenerative changes". But how did such "aggravation" or "progression" manifest itself? The results of the May 21, 2003 cervical spine MRI were essentially identical to the results of the cervical spine MRI of January 2, 2002; if Claimant's work from November 5, 2002 to April 21, 2003 "aggravated" or "progressed" the "degenerative changes" to any significant degree, why does the May 21, 2003 MRI not evidence such "aggravation" or "progression"? And perhaps equally importantly, why did Claimant tell all the health care providers that his symptoms were from the March 6, 2001 accident? The evidence and logic all lead to the conclusion that there was no appreciable "aggravation" or "progression" of Claimant's underlying degenerative cervical spine changes due to the work Claimant performed for Employer from November 5, 2002 to April 21, 2003, and thus no compensable occupational disease.

In many respects, the claimed occupational disease in Injury No. 03-138392 is similar to that alleged in *Seifner v. Treasurer*, 362 S.W.3d 59 (Mo. App. WD 2012). In *Seifner*, Mr. Seifner claimed that he was permanently and totally disabled due to a combination of preexisting injuries and an alleged occupational disease due to repetitive work during two months in 2003 causing a thoracic disc herniation. Mr. Seifner settled the 2003 occupational disease claim with the employer for 10% of the body as a whole; the employer had paid no medical benefits or TTD benefits. The appellate court affirmed the Commission's denial of Mr. Seifner's claim against the Second Injury Fund on the basis that there was no compensable occupational disease. The Court held that Seifner's settlement with the employer was not

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res judicata or collateral estoppel on the issue of occupational disease. The Court also held that the Commission was allowed to disbelieve the testimony of the sole physician who testified in the case on the issue of occupational disease.

I find that there was no compensable occupational disease in Injury No. 03-138392. Therefore, all other issues in Injury No. 03-138392 are moot.

Regarding Claimant's claim for permanent partial disability benefits against the Second Injury Fund in Injury No. 02-148433, I find that Claimant's sole alleged "prior injury" is the March 6, 2001 injury. While counsel for Second Injury Fund is indeed correct in alleging that Claimant's cervical spine injury had not achieved maximum medical improvement prior to the November 5, 2002 right shoulder injury, and thus cannot form a basis for Second Injury Fund liability, *see: Hoven v. Treasurer*, 414 S.W.3d 676, 678, 681 (Mo. App. E.D. 2013), I find that Claimant's low back injury from the March 6, 2001 accident had achieved maximum medical improvement prior to the November 5, 2002 right shoulder injury, and thus serves as a basis for Second Injury Fund liability.

FINDINGS OF FACT AND RULINGS OF LAW IN INJURY NO. 02-148433

In addition to those facts and legal conclusions to which the parties stipulated, in Injury No. 02-148433, I find the following:

1. On November 5, 2002, Claimant sustained a compensable last injury which resulted in permanent partial disability of 10% of the right shoulder (23.2 weeks).
2. As of the time the last injury was sustained, Claimant had a preexisting permanent partial disability of 12.5% of the body as a whole/lumbar spine (50 weeks) which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment.
3. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disability, causes 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 23.2 weeks for last injury + 50 weeks for preexisting injuries = 73.2 weeks x 15% = 10.98 weeks of overall greater disability.

ORDER IN INJURY NO. 02-148433

In Injury No. 02-148433, the Second Injury Fund is ordered to pay Claimant the sum of \$3,685.99 for permanent partial disability benefits. Attorney for Claimant, Allen & Nelson PC, shall be entitled to an attorney fee of 25% of this award.

FINDINGS OF FACT AND RULINGS OF LAW IN INJURY NO. 03-138392

In addition to those facts and legal conclusions to which the parties stipulated, in Injury No. 03-138392, I find the following:

1. Claimant is making a claim in this case for exposure to occupational disease for a period beginning November 5, 2002 and ending with the last date of employment, which was April 21, 2003;
2. Claimant's claimed occupational disease is for aggravation or progression of preexisting cervical spine degenerative changes;
3. Prior to March 6, 2001, Claimant had no known injuries or disabilities;
4. On March 6, 2001, Claimant sustained a fall while climbing a rack, injuring his low back and cervical spine;
5. On March 30, 2001, Claimant saw Dr. Robert Conway and reported complaints that included non-radiating neck pain since the fall at work on March 6, 2001; Dr. Conway diagnosed Claimant with cervical and lumbar strains;
6. On December 13, 2001, cervical spine x-rays revealed cervical spondylosis with degenerative changes greatest at C5-6 and C4-5 and suspicion of central stenosis in the bilateral intervertebral foramina at C5-6;
7. On January 2, 2002, a cervical MRI revealed spinal stenosis at C5-6 and less pronounced changes at C4-5 and C3-4 and mild asymmetric uncovertebral changes at C5-6, left greater than right, and mild left lateral bulge at C7-T1;
8. Claimant saw Dr. Steven Street, a pain management doctor, on March 14, 2002, complaining of neck pain at a level of four out of ten; Dr. Street noted that Claimant presented with left-sided neck pain that radiated into his shoulders "since a fall in March 2001"; Dr. Street diagnosed Claimant with likely cervical facet joint pain, cervical radiculopathy, and cervical degenerative disc disease, and performed left C5-6 and C6-7 facet joint injections, which confirmed the cervical facet joint pain diagnosis; Dr. Street performed a repeat injection on March 21, 2002; on April 19, 2002, Claimant returned to Dr. Street reporting that his pain was returning; Dr. Street recommended radiofrequency ablation of the medial branch nerves to the C5-6 and C6-7 facets which was performed on May 6, 2002;
9. Dr. Street referred Claimant to Dr. Thomas Highland, a spine surgeon, for surgical evaluation; Dr. Highland evaluated Claimant on August 30, 2002, noting the injury in March 2001 and that Claimant was being seen for neck pain; per Dr. Highland's notes, Claimant was also reporting problems supporting his neck: "(w)hen he is at work or when he is trying to do anything he feels like he has to support his neck"; Dr. Highland took his own x-rays, which showed narrowing and osteophyte formation at C5-6 and Dr. Highland diagnosed Claimant with degenerative disease of C4-5 and C5-6 with possible Schmorl's node; Dr. Highland advised that lesions at C4-5 and C5-6 could be causing Claimant's pain and the only other option was surgery;
10. On April 21, 2003, Claimant went to Staff Health Services stating that his neck pain was ongoing from the injury of March 6, 2001; the medical assessment was "reported unresolved low back strain/neck strain"; the note from Claimant's visit on April 21, 2003, provides an injury date of March 6, 2001; Claimant went back to the

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- work injury clinic on April 24, 2003, and the nurse again noted a history of unresolved sacral strain and cervical strain from March 6, 2001 and assessed an unresolved cervical strain;
11. On May 21, 2003, a cervical spine MRI showed disc space narrowing at C4-5 and C5-6, diffuse disk bulge at C4-5 with bilateral foraminal narrowing secondary to uncovertebral osteophytes, diffuse disk bulge at C5-6 with bilateral foraminal narrowing secondary to uncovertebral osteophytes, and mild disk bulge at C6-7; the radiologist's impression was "unchanged spinal stenosis at C5-6 secondary to disk osteophyte complex" and the foraminal narrowing as described above;
 12. The May 21, 2003 cervical MRI and the January 2, 2002 cervical MRI were essentially the same;
 13. Claimant was evaluated by Dr. John Oro, a neurosurgeon, on June 13, 2003; Dr. Oro noted a history of a fall at work on March 6, 2001; his impression was cervical spondylosis with foraminal stenosis, worse at C5 and C6; Dr. Oro's impression corresponds to the impression from the x-ray obtained in December 2001; in follow up on July 11, 2003, Dr. Oro noted the failure of conservative measures and recommended surgery; in his pre-surgery workup on August 5, 2003, Dr. Oro assessed "significant neck pain secondary to a fall in 2001 . . . "; on August 6, 2003, Dr. Oro performed an anterior cervical discectomy and fusion at C4-5 and C5-6 and gave a postoperative diagnosis of cervical spondylosis and stenosis at C4-5 and C5-6;
 14. The pertinent opinions of Dr. David Volarich are that Claimant sustained an occupational disease to his cervical spine from his work for Employer between November 5, 2002 and April 21, 2003; i.e., that overhead lifting and turning of the head and neck for 5 ½ months caused a further aggravation and/or progression of ongoing, underlying degenerative changes;
 15. The opinions of Dr. Volarich fail to detail any aggravation and/or progression of Claimant's cervical spine underlying degenerative changes;
 16. The opinions of Dr. Volarich fail to account for the fact that the January 2, 2002 cervical MRI and the May 21, 2003 cervical MRI were essentially the same;
 17. The opinions of Dr. Volarich fail to account for the fact that Claimant reported to Staff Health Services and to Dr. Oro that his cervical symptoms were from the March 6, 2001 accident;
 18. Dr. Volarich's medical conclusions regarding the existence and cause of an occupational disease are not credible as they fail to account for relevant uncontroverted facts;
 19. Claimant did not sustain a compensable occupational disease; and
 20. As there is no compensable occupational disease, there is no legal basis for Second Injury Fund liability.

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ORDER IN INJURY NO. 03-138392

In Injury No. 03-138392, the claim against the Second Injury Fund is denied in full.

Made by: /s/Robert J. Dierkes 07/14/2014

Robert J. Dierkes
Chief Administrative Law Judge
Division of Workers' Compensation