

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

Injury No.: 02-036875

Employee: Harold W. Stoffregen  
Employer: U Haul of Missouri  
Insurer: Ace American Insurance Company/TPA ESIS  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: April 3, 2002  
Place and County of Accident: Cape Girardeau 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. We have reviewed the evidence, read the briefs of the parties, heard oral argument and considered the entire 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, except as modified herein. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated April 20, 2007.

The administrative law judge found that employer/insurer was obligated to provide future medical care; however, issued a temporary or partial award for the limited purpose of resolving all issues and disputes that may arise under section 287.140 RSMo. We agree with the award of future medical care but it is appropriate to do so by final award. Accordingly, by final award we direct employer/insurer to provide future medical care to employee as may be reasonably required to cure and relieve employee from the effects of the injury.

The award and decision of Administrative Law Judge Gary L. Robbins issued April 20, 2007, as modified, 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 8<sup>th</sup> day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

## FINAL AWARD

Employee: Harold W. Stoffregen

Injury No. 02-036785

Dependents: N/A

**Employer: U Haul of Missouri**

Additional Party: Second Injury Fund

Insurer: Ace American Insurance Company/TPA ESIS

Hearing Date: March 13, 2007

Checked by: GLR/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? April 3, 2002
5. State location where accident occurred or occupational disease contracted: Cape Girardeau County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was standing on a ladder when it broke. He fell to the ground injuring his neck, right arm, left hip and body as a whole.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Neck, right arm, left hip and body as a whole.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to date for temporary total disability: \$46,435.53
16. Value necessary medical aid paid to date by employer-insurer: \$194,534.01
17. Value necessary medical aid not furnished by employer-insurer: \$0
18. Employee's average weekly wage: \$494.00
19. Weekly compensation rate: \$329.33
20. Method wages computation: By agreement
21. Amount of compensation payable: See Award
22. Second Injury Fund liability: None
23. Future requirements awarded: Yes. See Award

Said payments shall be payable as provided in the statement of 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 employee 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 employee: Chris N. Weiss

## **FINDINGS OF FACT AND RULINGS OF LAW**

On March 13, 2007, Harold W. Stoffregen, the employee, appeared in person and by his attorney, Chris N. Weiss, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, John P. Kafoury. Assistant Attorney General Frank A. Rodman represented the Second Injury Fund. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. 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 statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act and liability was fully insured by Ace American Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of U Haul of Missouri and was working under the Workers' Compensation Act.
3. On or about April 3, 2002 the employee has an accident or occupational disease arising out of and in the course of his employment.
4. The employer had notice of the employee's claim.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$494.00 per week. His compensation rate for all purposes is \$329.33 per week.
7. The employee's injury was medically causally related to his accident or occupational disease.
8. The employer-insurer paid \$194,534.01 in medical aid.
9. The employer-insurer paid \$46,435.53 in temporary total disability benefits, covering the period from June 12, 2003, to July 26, 2005, and equaling 141 weeks in benefits.
10. The parties agree that July 26, 2005 is the date of maximum medical improvement.
11. The employee is not seeking any benefits for a second job wage loss.

### **ISSUES**

1. Future Medical. Whether the employer-insurer should be responsible to pay future medical benefits?
2. Permanent Total Disability. Whether the employee's accident caused him to become permanently and totally disabled?
3. Permanent Partial Disability? Whether the employee's accident caused him to have a permanent partial disability?
4. Second Injury Fund Liability. Whether the Second Injury Fund is responsible to pay either permanent partial or permanent total disability benefits?

### **EXHIBITS**

The following exhibits were offered and admitted into evidence: The Second Injury Fund objected to EE Exhibit K. That objection was overruled. All exhibits that were offered were admitted into evidence without further objection.

Employee's Exhibits:

- A. Medical records of Michael E. Beatty, M.D.
- B. Medical records from Saint Francis Medical Center/records of Dennis J. Straubinger, D.O.
- C. Medical records from Southeast Missouri Hospital/records of Scott R. Gibbs, M.D.
- D. Medical records from Brain & Neurospine Clinic/records of Scott R. Gibbs, M.D.
- E. Medical records from Silver Springs Surgery Center/Pain Management records of Wai E. Chiu, M.D.
- F. Medical records from Neurological Consultants/records of Randall L. Stahly, D.O.
- G. Medical records from Forest Park Hospital/records of Clayton Perry, M.D.
- H. Treatment records from Orthopaedic Associates/ records of William K. Kapp, M.D. and Bernard C. Burns, D.O.
- I. Deposition of Shawn L. Berkin, D.O., dated October 24, 2006.
- J. Deposition of Susan L. Shea, M.A., dated October 26, 2006.
- K. Stipulation for Compromise Settlement in case numbered 93-162840.

Employer-Insurer's Exhibits:

1. Deposition of Bernard C. Burns, D.O. dated November 27, 2006.

Second Injury Fund Exhibits:

None

**STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:**

**STATEMENT OF THE FINDINGS OF FACT:**

Harold W. Stoffregen, the employee, is fifty-two years old, has been married for thirty-two years, has no children living at home, completed the eighth grade, obtained his GED, went to trade school and completed a couple hours of college credit.

A lot of the employee's work history involved working with sheet metal. From 1980 until 1993 the employee worked as a union sheet metal worker fabricating metal buildings, constructing ductwork, installing siding, and doing various other jobs associated with sheet metal fabrication. The employee testified that most of his work history involved the use of hand shears to cut sheet metal. He described this job as hand intensive as he was constantly cutting heavy sheet metal with left, right or straight snips.

As a result of this repetitious use of his hands, the employee developed bilateral Carpal Tunnel Syndrome/CTS and had his first round of surgeries in 1994. The employee indicated that after Dr. Kim performed the first CTS surgeries, he had little improvement and continued to have a lot of difficulty with his hands. He indicated that Dr. Kamath treated him for depression during this period because of the pain and poor result that he had from his CTS surgeries. He testified that he settled this case as a workers' compensation claim.

Dr. Michael E. Beatty performed a second round of CTS surgeries in 1995. The employee testified that this surgery solved a lot of his hand problems, but he was left with a 75% loss of strength in his hands. The employee testified that he never returned to his prior vocation as a union sheet metal worker.

The employee next worked as a truck driver and then did some welding until 1998 when he and his wife started a business called Wayne's Muffler Shop. At first the employee did all types of auto mechanic repairs, but after approximately one year he operated just as a muffler shop.

In 2000 the employee began his work with U Haul and worked his muffler shop business part time and on the weekends. U Haul employed the employee as a truck mechanic. The majority of his duties involved engine and brake work, as well as bodywork on U Haul rental vehicles. The employee testified that he took classes and advanced to be an engine specialist. The employee's work schedule was eight to eight and one-half hours per day, Monday through Friday, with some overtime. In addition the employee was still working at his muffler shop on nights and weekends. **The employee testified that prior to April 3, 2002 he had no problems doing any of the work at U Haul.**

On April 3, 2002, the employee had an accident while repairing a truck for U Haul. Another employee named Ronnie Pruett was standing on a ladder fixing a light on a rental truck. The ladder was a sixteen-foot ladder that had been cut back to fourteen feet due to a broken leg. The employee testified that Ronnie Pruett was standing on one side of the ladder. The employee went up the other side of the ladder to hand Mr. Pruett a tool. As the employee was ascending the ladder, the leg broke and both employees fell. The employee testified that he jumped backwards and possibly hit a truck door on the way down. The employee testified that he landed in a twist. The testified that he thinks he landed on his feet and went to his knees. He further testified that everyone in the shop was gathered around him when he got up. He indicated that he was dazed but not knocked out. He stated that he did not know exactly what happened, but got up feeling feverish and sick to his stomach, and had pain in his neck, head and shoulders. The employee indicated that he went home and continued to be sick and feverish. Later that evening, the employee's wife called the shop supervisor and the employee was instructed to go to the emergency room at St. Francis Medical Center.

**Note: the Court has included a partial but not complete summary of the employee's medical care and treatment in order to present a picture of the employee's medical history. The bold type indicates information that the Court highlighted for emphasis.**

On April 3, 2002, the employee began treatment for his accident at St. Francis Medical Center emergency room. Spinal x-rays and a cervical CT scan were done. The CT scan showed a left disc bulge at C6/7 that encroached the thecal sac, but no acute herniations were found. On April 16, 2002, the employer sent the employee to Dr. Dennis J. Straubinger, an occupational medicine specialist. He noted that the employee had been working full duty since the alleged injury date, diagnosed a cervical strain and prescribed moist heat therapy. Dr. Straubinger ordered an MRI that was performed on May 7, 2002. That testing was read as showing normal cervical alignment with some anterior osteophytosis at C4-5, C5-6, and C6-7

with left side disc bulge at C6-7. On May 13, 2002, Dr. Straubinger reviewed the MRI findings and referred employee for a neurosurgical consultation. The employee was taking medications including Vioxx and Flexeril. He was also on limited duty. The employee saw Dr. Kennedy on June 12, 2002. On August 8, 2002, the employee was seen by Dr. Stephen W. Stigers for myofascial pain treatment and was given trigger point injections. Another MRI scan was performed on February 28, 2003, at St. Francis Medical Center.

On April 14, 2003, the employee was sent to Dr. Scott R. Gibbs' office and saw Nurse Christine Byrd. She ordered a myelogram and post-myelogram CT scan. At that time Dr. Gibbs' records report:

1. the employee's neck pain may be related to his cervical spondylosis
2. the employee's current symptoms are related to the April 3, 2002 work injury
3. the employee has failed to improve with exhaustive conservative treatment
4. a recommendation for additional testing as it was over a year since the initial injury
5. a recommendation for EMG/NCV studies
6. that the employee should take Celebrex, Skelaxin and Ultracet
7. follow up care

On April 15, 2003, Dr. Gibbs reviewed the February MRI scan and noted mild degenerative changes at C5-6 and C6-7, along with a C6-7 disc bulge. On May 6, 2003, Dr. Gibbs reviewed the CT scan and myelogram results and diagnosed multisegmental cervical spondylosis with no spinal cord deformity and confirmed the left side C6-7 disc bulge. He ordered EMG/NCV studies to determine whether the employee had an ulnar neuropathy. On June 18, 2003, Dr. Gibbs reviewed the EMG/NCV studies and diagnosed mild left carpal tunnel syndrome. He recommended nerve root blocks at the C6-7 level to alleviate the employee's pain complaints. On June 26, 2003, Dr. Gibbs recommended surgery, and on July 7, 2003, he performed a C6-7 anterior cervical discectomy and fusion with bone graft and anterior instrumentation. Following surgery, the employee initially reported improvement in his neck and left arm pain and parasthesia.

Following surgery, the employee continued to report some improvement in his pain symptoms, but indicated that his neck and bilateral shoulder pain continued. On September 16, 2003, the employee saw Dr. Gibbs who recorded that the employee had complete resolution of his arm pain and parasthesia but indicated some neck stiffness. On October 30, 2003, the employee reported that he developed right neck and shoulder pain radiating into his right arm following physical therapy. On December 2, 2003, due to continued right side complaints, Dr. Gibbs ordered another EMG/NCV study. On December 23, 2003, Dr. Gibbs diagnosed right cubital tunnel syndrome and bilateral carpal tunnel syndrome based upon the EMG/NCV study. He recommended selective C4 and C5 nerve root blocks to determine whether foraminal stenosis at those levels contributed to the employee's pain complaints. On January 13, 2004, Dr. Gibbs noted that the employee had complete resolution of his right shoulder pain with the nerve root block, but no relief in the right elbow or ulnar nerve. At that time, Dr. Gibbs causally related the right arm complaints to the employee's work injury. Dr. Gibbs recommended a second neck surgery to relieve the right-side neck and shoulder pain, and surgery to relieve the ulnar nerve pain. His report shows that the employee was not working and in general the employee felt that he was getting worse.

On March 15, 2004, Dr. Gibbs performed a right ulnar nerve external neurolysis. On April 5, 2004, Dr. Gibbs performed a two-level, C4-5 and C5-6 anterior cervical discectomy and fusion with bone graft, and replacement of prior placed anterior plating with a Synthes plate from C4 through C6. On April 13, 2004, the employee told Dr. Gibbs that he had improvement of his right arm and neck pain. On May 11, 2004, the employee told Dr. Gibbs that his right arm symptoms had resolved, but that he had neck pain and intermittent left shoulder pain. The employee also had left hip pain complaints, which was the biggest pain problem that the employee had at that time. The pain complaints required the use of narcotic medications. Dr. Gibbs reported that the employee has intrinsic hip joint problems that may have resulted from the fall off the ladder. Bone from the employee's left hip had also been harvested for the fusion surgery.

The employee saw Dr. Wai E. Chiu from June 14, 2004, through July 20, 2004, for pain management for the left hip and left groin. Dr. Chiu treated the employee with lumbar injection therapy. Her records indicated that the employee only got short-term relief from the injections. On July 20, 2004, Dr. Gibbs ordered an MRI of the lumbar spine and on August 19, 2004, Dr. Gibbs did not find anything significant, although there were disc bulges at L4-5 and L5-S1. He placed the employee at maximum medical improvement (MMI) for the neck on that date and provided no permanent work restrictions. Dr. Gibbs did recommend a left hip MRI and orthopedic consultation.

The employee then saw Dr. William K. Kapp for the left hip complaints. On September 13, 2004, Dr. Kapp did a left hip arthrogram that revealed a left hip labral tear. He suspected that the labral tear was the cause of the employee's left hip pain. On October 18, 2004, Dr. Kapp performed a left hip arthroscopy with joint debridement. Following surgery, the

employee was prescribed Neurontin and Percocet for pain. As of December 2004, surgery had not helped. **Dr. Kapp indicated that there may be a need for hip replacement.** On January 3, 2005, the employer sent the employee to Dr. Clayton Perry for an independent medical evaluation of the left hip. Dr. Perry noted an equivocal examination and diagnosed myofascial pain. On February 17, 2005, Dr. Perry surgically injected the left hip with pain medication. On February 21, 2005, the employee told Dr. Perry that his pain became worse after the injection and radiated down the back of his left leg to the knee. Dr. Perry determined that the employee's pain was not coming from the hip and further surgery would not be beneficial. He also reported that the hip pain was not from arthritis.

On March 2, 2005, the employer sent the employee to Dr. Bernard C. Burns for pain management for the left hip. Dr. Burns reported that the employee's primary complaint was left hip pain. Dr. Burns reported "**Pain is well controlled by markedly restricting his activities, as a mechanic this is a devastating consequence**". The employee's prescription for Hydrocodone was doubled. Dr. Burns attempted hip injections with no pain relief. He ordered an MRI that showed bursitis in the hip. As of April 22, 2005 Dr. Burns reported that the employee was approaching MMI, he still had hip pain and that the only thing left to do was to determine if the Hydrocodone would stabilize the employee's pain. On May 18, 2005, Dr. Burns reported, "Harold has completed an FCE which does suggest he is unable to return to his previous work assignment. In review of that FCE and review of his injuries and previously discussed intolerances, I think it is reasonable to return him to light medium work at the DOT level. This is a 30 pounds max lift with frequent lifting and carrying of only up to 20 pounds. I would further restrict him against push/pull, bend, squat, or twist." He also reported that with the use of Hydrocodone, the employee's sleep and mood disturbance seems to have worsened. He reported that the employee demonstrates guarded gait problem and very guarded hip motion. As of July 8, 2005 Dr. Burns reported that the employee is still having hip pain and that the employee was reporting it as worse. Dr. Burns further reported:

1. He did not return to work secondary to being terminated. They would not take him back with restrictions of light/medium work.
2. as the employee did not return to work, the hip should be rechecked.
3. the employee was not at MMI yet.

On July 26, 2005, Dr. Burns saw the employee to review a hip MRI. Dr. Burns assessed chronic hip pain due to a work injury. Dr. further reported:

1. the employee is at MMI
2. the employee is released to sedentary work duty at the light work level. Max 20# lifting, carrying 10#. No push/pull. No bend, squat or twist.
3. **given his chronic condition the employee is a candidate for maintenance medications**

Although he initially felt that the employee could follow up with his primary care physician for pain medications, Dr. Burns continues to prescribe Hydrocodone and Flexeril for the employee's symptoms. On September 26, 2005, Dr. Burns rated the employee at 15% of the cervical spine, 7% of the hip and an additional 3% of the hip.

In addition to treatment records that have been summarized, Dr. Burns, Dr. Shawn Berkin and Susan Shea testified by deposition.

Dr. Burns's deposition was taken on November 27, 2006. He indicated that by the time he saw the employee he had already had a significant amount of treatment, and that the employee was sent to him regarding pain management and rehabilitation to try to increase his activity level to make him more active. The biggest issues were hip pain and pain with walking. Dr. Burns testified that the employee had guarded hip movement with a gait pattern that is consistent with his pain that is not uncommon. Dr. Burns testified that all the care that the employee received was medically causally related to his accident and was reasonable and necessary.

**Dr. Burns testified that the employee had a complex work injury and "really was not ever able to reduce his pain".** He indicated that he thinks the employee got to doing light activities for a short period, but he was still having a lot of trouble with prolonged sitting and he had to break his activities down as any sustained walking, or a static position was bothering his pain. **He further testified that the employee is a candidate for more chronic treatment, more a long-term treatment of maintenance for pain.** He further indicated that he has not seen the employee since August 2006, but he was taking Hydrocodone and Flexeril at the time of his release. **Dr. Burns testified that he rated the employee's disability but apparently did not consider pain as part of his rating.** He also did not include sleep disturbance or CTS as part of his rating. He testified that pain is very individualized and subjective, and whether a person can do a job is left up to an individual person. He testified that with the restrictions he imposed, the employee will not be able to work as a mechanic.

**Dr. Burns further testified that total hip replacement may be an option for the employee down the road.** Dr. Burns noted that the employee was working as a mechanic at the time of his injury and did not indicate there were any left hip or neck problems prior to the U Haul accident. He further indicated that the employee returned to work for a short period after the accident, but his hip problems were getting progressively worse.

Dr. Shawn L. Berkin testified by deposition taken October 24, 2006. He reviewed medical records, took a history from the employee and performed a physical examination. After that examination he had several final impressions:

1. cervical strain with a herniated disc at C6-C7 and C4-C5

2. post anterior cervical discectomy at C6-C7 with anterior plating and left iliac-crest bone graf.
3. post additional surgery for anterior cervical discectomy and fusion at C4-C5.
4. right cubital tunnel syndrome
5. post surgery for neurolysis of the ulnar nerve at the elbow
6. tear of the labrum involving the left hip associated with hypertrophy and ligamentum teres
7. post arthroscopic surgery of the left hip for debridement of the joint
8. chronic subtrochanteric bursitis of the left hip

Based on the information that Dr. Berkin had, he formulated several conclusions:

1. due to a April 3, 2002 fall from a ladder, the employee injured his neck, right arm, and left hip
2. the employee received ER care
3. the employee had follow up care with Dr. Straubinger
4. the employee was treated with meds and muscle relaxants
5. an MRI revealed a herniated disc at C6-7
6. Dr. Gibbs did a cervical discectomy and fusion at C6-7
7. the employee continued to have symptoms
8. in April 2004 the employee had additional surgery to his neck-a fusion at C4-5
9. the employee had treatment for his left hip
10. the employee received injections in the hip
11. in October 2004 the employee had arthroscopic surgery to the hip and a torn labrum was debrided
12. the employee continued to have hip problems which were treated with injections
13. Dr. Burns also treated with home exercise program and anti-inflammatory meds
14. since his injury the employee has continued to have complaints of pain and tenderness of the neck that he rates at 5-6/10
15. the employee complains of tightness and muscle spasm to his neck
16. the employee's symptoms are made worse by weather changes
17. the employee has pain to the neck when sitting for extended periods
18. the employee has pain when bending over and when getting out of a chair
19. the employee complains of numbness of the right elbow
20. the employee complains of weakness in right arm
21. the employee complained of constant pain in the left hip at a level of 6-7/10
22. the employee complained of pain in the hip when standing and walking
23. the employee has difficulty squatting
24. the employee has difficulty walking up stairs

Dr. Berkin testified that the employee's fall from the ladder was the prevailing factor regarding the employee's neck, elbow and hip surgeries. He provided disability ratings:

1. permanent partial disability of 55% of the body as a whole at the level of the cervical spine
2. 35% of the right upper extremity at the level of the elbow
3. 40% of the left hip
4. due to multiplicity, total is greater than sum ... therefore a loading factor.

Dr. Berkin also rated the employee's pre-existing medical conditions:

1. pre-existing CTS of 40% of each wrist that represented a hindrance or obstacle to employment or reemployment at the time of the injury in April 2002 following his fall.
2. the pre-existing injuries also combine with the April 2002 injury.

**Dr. Berkin provided an opinion about the employee's ability to work. He testified "... due to the nature and extent of his disabilities, and consideration of his age and his limited job skills, I do not feel that he is capable of competing for or maintaining gainful employment in the labor market. And for this reason I feel he is permanently and totally disabled to work". Dr. Berkin further testified that that the employee's permanent total disability is from a combination of his pre-existing conditions and the primary accident.**

Dr. Berkin provided his opinions regarding treatment recommendations:

1. the employee should rely on non-steroidal anti-inflammatory meds to control the symptoms in his neck, right arm and left hip
2. the employee should be involved in a home exercise program to strengthen and improve the mobility and flexibility of his neck and right arm and hip
3. the employee should avoid extreme movement of the neck
4. the employee should avoid maintaining his neck fixed in one position for extended periods of time
5. the employee should avoid standing and walking for extended periods of time
6. the employee should avoid squatting, kneeling, stooping, turning, twisting and climbing
7. the employee should avoid climbing ladders and working at heights above ground level
8. the employee should be cautious about climbing stairs
9. a 40 pound lifting restriction from floor to waist as a single event
10. a 10 pound lifting restriction from waist to shoulder

11. the employee should take frequent breaks if required to perform exertional activities for an extended time-needs time to recover and to avoid exacerbation of his symptoms or further injury to his neck, right arm and left hip

During cross-examination by the employer-insurer Dr. Berkin was questioned about his evaluation of the employee. He agreed that the employee's reports of pain, stiffness, tenderness and ranges of motion are subjective. He testified that the employee cooperated with him in his evaluations, and further testified that the fact that something is subjective does not make it any less credible.

**During cross-examination by the Second Injury Fund, Dr. Berkin testified that the employee was able to do his job when he was working at U Haul and had the accident, but was unaware that the employee had testified that he performed his job at U Haul with no problems and that the employee was working at his own muffler shop.**

Susan Shea, M.A. testified by deposition taken on October 26, 2006. Ms. Shea is board certified as a Certified Rehabilitation Counselor. She met with the employee on April 26, 2006, reviewed medical records, took a history from the employee and prepared a report.

**Ms. Shea opined that the employee is not employable in the open labor market.** As part of the basis for her opinion she found that:

1. the employee can't return to any past work
- 2. the employee reports a level of pain that precludes all work**
3. the employee is approaching older age as far as vocational life
4. due to his limitations the employee cannot perform the full range of sedentary work due to his limitations on sitting and standing and holding his neck in one position
5. the employee has limitations in the use of his hands
6. the employee's degree of pain causes him to use narcotic medications
7. the employee has had more than one spine surgery
8. the employee has had several surgeries involving his hands, arms, neck, hip and back
9. the employee has sleep apnea

**Ms. Shea testified that the employee is permanently and totally disabled from a combination of the limitations from the combination of injuries. She goes on to say that "I do think the limitations from the, from the most recent injury would keep him from returning to work in any capacity. And that is partially based on the severity of the pain that he has from that injury"**. She additionally testified that the employee is not able to perform a sedentary job, it is more difficult for a man to adjust to new types of work after age fifty, and that there are no employers that would hire the employee.

Ms. Shea during cross-examination agreed that she did not run a job search for the employee, but explained that she did not do so as her opinion was that the employee could not work. She stated that as to CTS, no doctor ever told the employee that he could not go back to work and there were no restrictions placed on him. She further agreed that there was nothing in the medical records that said he had to end his sheet metal work. She testified Dr. Berkin was the only doctor that testified that the employee could not work, as most doctors did not address the issue of whether the employee could work. She testified that the employee was not taking Hydrocodone or Flexeril prior to his accident in April 2002.

The employee and his wife testified about the effects that his injuries have had on his life. He testified that he continues to see Dr. Burns to get his prescriptions refilled. In addition to other medications, the employee continues to take Hydrocodone and Flexeril. The employee testified that he takes four Hydrocodone pills a day and one Flexeril a day.

He indicated that he has both pain in his neck and pain in his hip at all times. The Hydrocodone and sleep help relieve some of the pain. In addition to the neck pain, the employee testified that his neck pops and he has restrictions of movement, both left and right and up and down. He testified that the scar tissue in his neck causes him to have trouble swallowing. He testified that he strangles when he is eating and at nighttime. The employee also testified that activity and lying wrong causes his neck to lock and or hurt worse. He also testified that he does drive, but he has trouble turning his head to see, and after sitting for a while his legs go to sleep. In addition he indicated that his hip feels like he is walking bone on bone. If he sits a certain way or walks far, or stands too long, he has more pain.

In addition the employee indicated that he has a general weakness. He testified that he has a hard time lifting his fourteen-pound grandson, and has to hold him close to his body to do so. In addition he indicated that he cannot hold his arms over his head very long. The employee testified that the surgery to his right elbow caused him to lose strength and while his elbow pain is not constant, he experiences sharp shocks of pain in his elbow four to five times a day.

The employee testified that he cannot kneel or squat and can't pick things up off the floor. He testified that he can go up stairs, but he does it slowly and one step at a time. He reported that he has to be careful about what he is doing as one leg may give out.

The employee testified that he does drive, but he has trouble looking over his shoulder, and his legs cramp if he drives as much as 100 miles. In addition to his other problems, the employee testified that he now has to use an inhaler and now has

sleep apnea and high blood pressure.

Before his accident, the employee testified that he fished, hunted, went to stock car races, rebuilt old cars, and worked around his house. He testified that he did all of his jobs at U Haul before he got hurt and did not have to have any accommodations. After he fell off the ladder, he tried to return to work for a while but had difficulty doing his job. He indicated that he had trouble getting under trucks to work on them and had to have help from other employees to work with tires.

At trial the employee testified that he cannot work. He indicated that he has had four surgeries since the accident, two to the neck, one to his right arm and one to his left hip. He testified that the elbow surgery was the most successful, the hip is still a problem and the pain in his neck and hip is bad. He testified that he was not taking any prescription medications before his April 3, 2002 accident, and was not taking any over the counter medications on a regular basis.

The employee's wife, Cathy Stoffregen testified at trial. She indicated that prior to his accident in 2002 her husband was very active. She stated that he worked full time at U Haul and they ran the muffler shop at night. She testified that the employee worked in the muffler shop most nights from six to ten or eleven o'clock and even worked on Saturdays if there was work. She indicated that after the accident her husband could not longer go to the stock car races due to the pain in his neck and in his hip. She testified that he tried to fish three times in 2006, but after he got out of the boat he could not walk for a week due to the pain. She reported he cannot use a riding lawnmower as the vibration hurts him too much, and he has trouble getting dressed, and has to have help with his pants, shoes and socks. She testified that her husband cannot do what he used to do, he feels sick all the time.

## **RULINGS OF LAW:**

### **Liability of the employer-insurer or the Second Injury Fund for either permanent partial or permanent total disability-**

The parties stipulated to all issues other than liability of the employer-insurer for either permanent partial or permanent total disability; liability for future medical care, and the liability of the Second Injury Fund for either permanent partial or permanent total disability.

The employee has alleged that he is permanently and totally disabled as a result of his April 3, 2002 accident and the disabilities that resulted from that accident, and/or that he is permanently and totally disabled due to the affects of the April 3, 2002 accident in combination with his pre-existing injuries. Section 287.020.7 RSMo. provides as follows:

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

The phrase "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 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 question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present 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.

Notwithstanding the arguments of the employer-insurer or the Second Injury Fund, the facts are clear and unequivocal. As a result of the April 3, 2002 accident, the employee has had two surgeries to his neck, one surgery to his right arm and one

surgery to his left hip. The possibility exists that the employee will have to have a total hip replacement in the future. The employee is suffering from chronic pain on a daily basis. To obtain relief from his pain, the employee is taking narcotic pain medication. The effects of the pain and the pain medication affect every aspect of the employee's life. The employee's pain makes it difficult for him to sleep at night, let alone participate in the activities of everyday life. The employee's pain appears to be aggravated by almost any type of movement. These facts have not been refuted by the employer-insurer or the Second Injury Fund, and require a finding that the employee is permanently and totally disabled.

The facts clearly show that the employee is unemployable in the open labor market and is permanently and totally disabled. At issue is whether the effects of the April 3, 2002 alone caused the employee to be PTD or whether it is the effects of that accident in combination with the pre-existing problems related to his CTS that causes him to be PTD. In the first instance the employer-insurer is liable for PTD, in the second instance the SIF is liable for PTD.

The employer-insurer first argues that the effects of the April 3, 2002 accident only caused the employee to suffer from permanent partial disabilities and that he is not permanently and totally disabled as result of the accident of April 3, 2002, and can continue to work in some capacity. To support this position, the employer offered the medical reports and opinions of Dr. Burns wherein he found the employee to be at maximum medical improvement, released the employee to return to light duty work with restrictions, provided final ratings, and suggested that the employee needs to be on medications for an indefinite period. Under this evidence the employer-insurer argues that they have liability for permanent partial and not permanent total disability. A big fallacy in this position and argument is that Dr. Burns specifically testified that he did not take pain into consideration as part of his decision making process. If credible, in the Court's opinion, pain is always a major factor in determining the disability of an employee. Pain is a significant problem affecting the employee's ability to work, and a problem that continues to be addressed with follow up care.

After reviewing all of the medical evidence, after assessing the credibility of the employee, after comparing the testimony of the employee and finding consistency with the medical records, after observing the employee and concluding that his subjective reports of pain and physical impairments are genuine, the Court rejects the position of the employer-insurer that the accident of April 3, 2002 only caused the employee to suffer from permanent partial disabilities. On the issue of PTD, the Court finds the opinions of Doctor Berkin and Susan Shea to be based on more complete information and therefore more credible than the opinion of Dr. Burns.

While not specifically argued in its brief, the employer-insurer's secondary argument is that even if the employee is permanently and totally disabled, his disability is the result of a combination of his last injury and his pre-existing disabilities. The employer-insurer points out that the pre-existing CTS surgeries and their affects, and the testimony of Dr. Berkin and Susan Shea to support the position that if the employee is permanently and totally disabled, it is as a result of a combination of the pre-existing and current disabilities that the employee became permanently and totally disabled. While not specifically stated in the employee's brief, this position places permanent total disability on the Second Injury Fund. Dr. Berkin opined **"... due to the nature and extent of his disabilities, and consideration of his age and his limited job skills, I do not feel that he is capable of competing for or maintaining gainful employment in the labor market. And for this reason I feel he is permanently and totally disabled to work"**.

The Court has already listed the permanent restrictions that Dr. Berkin placed on the employee. However, Dr. Berkin apparently was not made aware of the fact that the employee was performing his duties at U Haul with no problems. Dr. Berkin apparently was also not made aware the employee was conducting his own mechanic/muffler business in addition to his duties at U Haul. For these reason, the Court rejects Dr. Berkin's opinion that the employee is PTD from the combination of his pre-existing disabilities and the disabilities that resulted from the accident of April 3, 2002.

The only pre-existing injuries in this case of any consequence are the CTS surgeries that the employee had in the mid 1990's. The employee testified that he had to quit his job as a union sheet metal worker due to the problems he had with his hands, mainly loss of strength. The only evidence on that matter is the statement of the employee. The employee worked with the effects of his CTS since 1995. He worked at his own mechanic/muffler shop and began employment with U Haul in 2000. Each activity involved continuous work with a person's hands. The employee, despite his statement regarding strength loss specifically stated that until April 3, 2002, he was able to perform all aspects of his employment with little or no problems. The evidence in conjunction with the employee's work history at U Haul and his own muffler/mechanic shop does not support a position that the effects of the CTS surgeries was job disabling. Given the facts in this case, the Court specifically rejects the position that the CTS combines with the accident of April 3, 2002. That position is supported by the length of time that had passed since the CTS surgeries, the type of and the quantity of work that the employee did after 1995, and specifically while working at the same time for U Haul and his own business.

The employer-insurer also cites the opinions of Susan Shea in support of their position that the employee is PTD due to a combination of pre-existing disabilities and the disabilities from the accident of April 3, 2002. The Court believes that Ms. Shea's testified that the employee is PTD as a result of the last accident alone. Ms. Shea discusses this subject on pages ten and eleven of her deposition. On page ten Ms. Shea is asked, "In regard to Mr. Stoffregen's employability, do you think that is as a result of his accident of April 3<sup>rd</sup> of 2002 or the combination of that accident and the pre-existing conditions?" Ms. Shea answered, "I believe it is as a combination of the limitations from the combination of injuries". She is then asked, "Do you have an opinion as to whether or not his conditions from the accident of April 3<sup>rd</sup> of 2002 would have rendered him unemployable?" Ms. Shea answered the question on page eleven and stated, **"I'm just reviewing the situation from the**

**last injury before I answer. I do think the limitations from the, from the most recent injury would keep him from returning to work in any capacity. And that is partially based on the severity of the pain that he has from that injury.”**

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 State of Missouri*, 964 S.W.2d 541 (Mo.App.1998). The medical evidence and the testimony of the employee and his wife support a finding that the last injury to the employee's neck, right arm, left hip and leg, and body as a whole, in and of itself, has caused the employee to be permanently and totally disabled. Although the employee had other pre-existing CTS problems, it is clear that the reason he is not working is because of the severe pain he is experiencing in his neck and left hip, leg and body as a whole.

The Court does not believe that Dr. Berkin had all of the evidence to consider when he gave his opinion that the employee's PTD was caused by a combination of disabilities as opposed to disabilities from the last injury alone. In the Court's opinion, this lack of information dilutes the value of that aspect of his opinion. Ms. Shea initially says that the employee is PTD due to a combination of injuries and then immediately afterwards states that the employee is PTD as a result of the last injury alone and then indicates why she has that opinion. The Court believes that it is Ms. Shea's opinion that the employee is PTD due to the last injury alone.

The Second Injury Fund argues that if the employee is PTD, he is PTD due to the disabilities from the last injury alone.

After considering all of the evidence, the Court finds that given the employee's situation and condition, he is not able to compete in the open labor market. The Court further finds that no employer in the usual course of business would reasonably be expected to hire the employee in his present physical condition. The Court further finds that the disabilities resulting from the pre-existing CTS surgeries are minor and did not combine with the disabilities caused by the accident of April 3, 2002 to make the employee PTD. The Court finds and believes from the totality of all the evidence that the employee is permanently and totally disabled as a result of his April 3, 2002 accident alone, and the resulting surgeries and the disabilities that resulted there from.

The parties stipulated that the employee's last temporary total disability benefit was paid through July 26, 2005 and that he reached maximum medical improvement on the same date. The employer-insurer is therefore directed to pay to the employee the sum of \$329.33 per week for permanent total disability commencing on July 26, 2005 and continuing for the remainder of the employee's life, or until suspended if the employee is restored to his regular work or its equivalent as provided in Section 287.200 RSMo.

#### **Future Medical Care-**

Under Section 287.140.1 RSMo., “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).

The employer-insurer did concede, and the evidence is clear that the employer-insurer is responsible for future medical care. It is clear that at a minimum, the employee will need follow up check ups and appropriate prescription medications for pain maintenance for an indefinite period. There is no evidence to the contrary. What is uncertain is whether the employee will need further surgery as a result of his accident. Dr. Burns indicated that the employee might need total hip replacement in the future. During his course of treatment, Dr. Kapp was of the same opinion.

After considering all of the evidence, the Court finds that the employee has offered credible medical evidence that leaves no doubt that he is and will be for an indefinite time into the future needing additional or future medical care. The Court orders the employer-insurer to provide such future medical care as is necessary to cure and relieve the employee from the effects of his accident. It is the Court's opinion that at a minimum the employer-insurer shall provide appropriate prescriptions and check ups for pain maintenance. In addition, should it be determined that the employee needs additional hip surgery or surgeries to cure and relieve the effects of his injury, the employer-insurer shall provide the same as long as they are determined to flow from and be medically causally related to the accident.

Based on the employer-insurer's obligation to provide additional medical care, this award shall be deemed a temporary or partial award for the limited purpose of resolving all issues and disputes that may arise under Section 287.140 RSMo. In addition to the selection and possible changes in treating physicians, the parties might also need assistance in resolving disputes as to travel expenses, medical fee disputes with healthcare providers or other rights and obligations under chapter 287.140 RSMo. It should also be noted that since the employee has been awarded permanent total disability benefits against the employer-insurer, Section 287.200.2 mandates that the Division "shall keep the file open in the case during the lifetime of any injured employee who has received an award of permanent total disability". This provision was included to allow the Division to resolve disputes related to the suspension of permanent total disability payments as provided under Section 287.200.2.

Based on this section and the provisions of 287.140 RSMo., the Division and Commission should maintain an open file in the employee's case for purposes of resolving medical treatment issues and reviewing the status of the employee's permanent disability pursuant to Sections 287.140 and 287.200 RSMo.

#### **ATTORNEY'S FEE**

Chris N. Weiss, 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:

\_\_\_\_\_  
Gary L. Robbins  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Ms. Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*