

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

Employee: Robert L. Stonecipher Injury No.: 02-055128
Employer: Poplar Bluff R-1 Schools
Insurer: Missouri United School Insurance c/o Gallagher Bassett
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: June 7, 2002
Place and County of Accident: Poplar Bluff, Butler 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. Pursuant to Section 286.090 RSMo, subsequent to reviewing the evidence and considering the entire record, the Commission modifies the award and decision of the administrative law judge dated March 1, 2005. The award and decision of Administrative Law Judge Michael Moroni issued March 1, 2005, is attached and incorporated by this reference.

As to the liability of the employer, the administrative law judge awarded the following amounts of compensation payable: unpaid medical expenses of \$48,886.36; additional temporary total disability benefits of 17 2/7 weeks amounting to \$5,857.61; 140 weeks of permanent partial disability amounting to \$46,118.80; and allowed the employer a credit of \$5,000.00 for payments advanced to the injured employee.

As to the liability pertaining to Second Injury Fund, the administrative law judge determined that the employee was permanently totally disabled commencing March 19, 2003, by concluding that the disability attributable to the last injury occurring June 7, 2002, when combined with the employee's pre-existing disabilities, resulted in the employee being permanently totally disabled.

The employer filed an Application for Review with the Commission alleging the award of the administrative law judge was erroneous based on the following: (1) the award of 140 weeks of permanent partial disability against the employer was excessive; (2) the award of past medical expenses in the sum of \$48,886.36 was inappropriate due to the fact that the medical expenses incurred were: (a) unauthorized and (b) were neither reasonable nor necessary to cure and relieve the injured employee from the effects of the injury; (3) the award of future medical expenses against the employer was inappropriate due to the fact that the competent and substantial medical evidence reflected that the employee was at maximum medical improvement and additional medical care and treatment in the future was not necessary to cure and relieve employee from the effects of his injuries; and (4) the awarding of temporary total disability for an additional 17 2/7 weeks subsequent to the temporary total disability paid through November 18, 2002, was inappropriate since the employee had achieved maximum medical improvement as of November 18, 2002; consequently, the employee's condition at that time was one of permanency, in lieu of a temporary condition.

The Second Injury Fund did not appeal the award of the administrative law judge, nor did the employee.

The facts, issues and summary of the evidence were recounted in the award of the administrative law judge, and will not be repeated in the Commission award except where pertinent to emphasize the Commission's findings of fact and conclusions of law modifying the award of the administrative law judge.

I. Principles of Law

Once a final award is issued by an administrative law judge, a party may apply for review by the Commission

within twenty (20) days from the date of the award. Review by the Commission results in a modified trial de novo. The Commission has plenary authority to review the decision of the administrative law judge. Where appropriate, the Commission determines the credibility of witnesses and the weight of their testimony, resolves any conflicts in the evidence, and reaches its own conclusions on factual issues independent of the administrative law judge. Upon its own motion or upon the application of any party of interest, the Commission may end, diminish, or increase the compensation awarded by the administrative law judge in the Commission's final award. The Commission is not limited to a review of the errors complained of by the moving party. *Waterman v. Chicago Bridge & Ironworks*, 41 S.W.2d 575 (Mo. 1931); *Smith v. International Shoe Company*, 49 S.W.2d 233 (Mo. App. 1993); *Shaw v. Scott*, 49 S.W.3d 720 (Mo. App. 2001); and *Champ v. Doe Run Co.*, 84 S.W.3d 493 (Mo. App. 2002).

The ultimate determination of credibility of witnesses rests with the Commission, however, the Commission should take into consideration the credibility determinations made by an administrative law judge. When reviewing an award entered by an administrative law judge the Commission is not bound to yield to his or her findings including those relating to credibility, and is authorized to reach its own conclusions. An administrative law judge is no more qualified than the Commission to weigh expert credibility from a transcript or deposition. *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865 (Mo. App. 2004).

It is the employee's burden to prove the nature and extent of his disability to a reasonable certainty. *Davis v. Brezner*, 380 S.W.2d 523 (Mo. App. 1964); *Matzker v. St. Joseph Minerals*, 740 S.W.2d 362 (Mo. App. 1987). The determination of a specific amount or percentage of disability to be awarded an injured employee is a finding of fact within the unique province of the Commission. *Landers v. Chrysler*, 963 S.W.2d 275 (Mo. App. 1998). In making this determination, the Commission can consider all the evidence in the record and draw all reasonable inferences from that evidence. *Id.* The Commission is not bound by the percentage estimates of the medical experts and is free to assess a disability either higher or lower of that expressed in the medical or vocational testimony. *Id.*

Pursuant to Section 287.140 RSMo, an employer is required to furnish such medical treatment as is necessary to cure and relieve the employee from the effects of a work related injury. It is the employee's burden to prove that he is entitled to receive compensation for past medical expenses or future medical care. *Sams v. Hayes Adhesive*, 216 S.W.2d 815 (Mo. App. 1953). For past medical expenses to be awarded, such medical care and treatment must flow from a work related accident. *Modlin v. Sunmark*, 699 S.W.2d 5 (Mo. App. 1985). The medical expenses for which reimbursement is sought must be reasonable and necessary to treat a work related injury. *Jones v. Jefferson City School District*, 801 S.W.2d 486 (Mo. App. 1990). For future medical care to be awarded, the medical care must, of necessity, flow from the accident, via evidence of a medical causal connection between the compensable accident and the medical condition for which treatment is sought. *Bock v. Broadway Ford*, 55 S.W.3d 427 (Mo. App. 2001).

Under Section 287.140 RSMo, an employer is charged with the duty of providing an injured employee with medical care, but the employer is also given control over the selection of the medical provider. *Blackwell v. Puritan-Bennett*, 901 S.W.2d 81 (Mo. App. 1995). While an employee has the right to hire his own physician at his own expense, that right does not necessarily carry with it an obligation on the part of the employer to pay that physician. *Hawkins v. Emerson Electric*, 676 S.W.2d 872 (Mo. App. 1984).

Pursuant to Section 287.170 RSMo, compensation must be paid to an injured employee during the continuance of temporary total disability. The burden of proving entitlement to temporary total disability lies with employee. *Boyles v. USA Rebar Placement*, 26 S.W.3d 418 (Mo. App. 2000). Workers' compensation benefits for temporary total disability are intended to cover an employee's healing period from a work related injury. *Schuster v. Division of Employment Security*, 972 S.W.2d 377 (Mo. App. 1998). The act contemplates that temporary total disability is to be paid prior to the time when the employee can return to work, his condition stabilizes, or his condition has reached the point of maximum medical progress. *Id.*

II. Findings of Fact and Conclusions of Law

(A) Permanent Partial Disability Attributable to the Accident Occurring June 7, 2002

The administrative law judge concluded that employee sustained 35% permanent partial disability of the body as a whole attributable to the accident occurring June 7, 2002. Of this amount, 30% permanent partial disability was attributable to employee's lumbar spine injury and 5% attributable to depression. After reviewing the entire record the Commission finds this amount of compensation payable for permanent partial disability is excessive and modifies the award as follows: 5% permanent partial disability of the body as a whole referable to the lumbar spine; and 5% permanent partial disability of the body as a whole referable to aggravation of the employee's pre-existing somatoform disorder. Consequently, the amount of compensation payable for residual permanent partial disability attributable to the accident occurring June 7, 2002, is 40 weeks of permanent partial disability or a lump sum amount of \$13,176.80 (40 weeks x \$329.42 per week). Furthermore, as previously determined by the administrative law judge, this amount of permanent partial disability is subject to a \$5,000.00 credit in favor of the employer due to its advancement to the employee leaving a net due employee of \$8,176.80 for permanent partial disability.

In reaching this conclusion and modification of the permanent partial disability awarded, the Commission has relied on the testimony of Dr. Lange, Dr. Mirkin, Dr. Graham, and Dr. Stillings. The Commission determines that these four medical experts and the respective opinions rendered by each, are the most credible, persuasive, and trustworthy. At the trial no expert testified live and the Commission is well qualified and statutorily authorized to weigh each expert's credibility from their respective deposition testimony.

In summary fashion and as pertains only to the non-psychiatric injury, the testimony of Dr. Lange, Dr. Mirkin, and Dr. Graham convinces the Commission the employee did not sustain any acute pathology on account of the accident occurring June 7, 2002, nor was a severe injury sustained.

Dr. Lange, a board certified orthopedist, was not able to render a particular anatomical diagnosis for the employee, such as a lumbar strain, lumbar sprain, etc. regarding any injury that employee may have sustained from the June 7, 2002, event. During Dr. Lange's examination, employee had aspects to his neurological presentation that could not be explained by any known neurological anatomy; in the opinion of Dr. Lange the employee's diagnostic studies were benign and showed no obvious significant pathology in the lumbar spine; there was no unusual pathology in the lumbar spine specifically at L5-S1 above and beyond congenital anatomy and post-operative scarring; employee's prior fusion was solid and his hardware intact; and since employee's fusion prevented any movement in the disc, the likelihood of any significant injury, such as a herniation, at the lumbosacral junction, would, in the opinion of Dr. Lange, be next to impossible. Dr. Lange did not reach any conclusions concerning permanent disability on account of the accident occurring June 7, 2002. However, in the opinion of Dr. Lange, the employee was able to work at the medium demand level.

Dr. Mirkin concluded that employee sustained a lumbar strain from the June 7, 2002, accident. Dr. Mirkin was of the opinion it was extremely unlikely that employee had sustained a disc protrusion or herniation. The lumbar myelogram that Dr. Mirkin ordered did not show any bony fractures or hardware problems. Based upon Dr. Mirkin's exam and the FCE results, Dr. Mirkin found that employee could work within the light duty capacity with a 20-35 pound weight limit, with occasional squatting, bending and stooping. Dr. Mirkin opined that employee sustained a 2% permanent partial disability based upon subjective symptomatology and the lumbar strain he sustained attributable to the June 7, 2002, accident.

Dr. Graham opined that employee did not sustain any acute pathology related to the accident occurring June 7, 2002, even including a lumbar strain. Like Dr. Mirkin, Dr. Graham found that employee displayed signs of functional overlay and symptom magnification. Given the inconsistencies employee showed on his physical exam, as well as his varying descriptions of the accident and his leg complaints, Dr. Graham questioned the sequencing of employee's symptoms and the validity of the history he provided. Dr. Graham agreed with the assessment of Dr. Lange that since employee had a solid fusion, the likelihood of any significant injury at the lumbosacral junction would be next to impossible. In Dr. Graham's opinion, employee did not sustain any permanent partial disability attributable to the accident occurring June 7, 2002, and could work at the medium demand level, with a 40 pound weight restriction.

Relying on these medical opinions, including the diagnostic studies performed subsequent to the accident occurring June 7, 2002, the Commission is convinced that the employee did not sustain any new disc injury from the accident occurring June 7, 2002. Employee's fusion remains solid and his hardware intact. The medical

evidence, which the Commission finds to be the most credible, demonstrates that the employee sustained nothing more than a back strain, which resulted in a subjective aggravation of his pre-existing back condition and some low back pain. The Commission concludes that the administrative law judge's assessment of 30% permanent partial disability of the body as a whole referable to the lumbar spine was excessive.

In addition, the Commission's review of the testimony of the employee, and Mr. Garrett Deem as well as Mr. Kenneth Marler, further convinces the Commission that the amount of permanent partial disability awarded by the administrative law judge was excessive. Despite the employee's self-serving complaints and self-serving limitations imposed subsequent to the accident, employee has continued to participate in deer and turkey hunting throughout the calendar years 2002 and 2003. Witness Marler indicated that he and employee would participate in hunting 4 or 5 days a week during deer and turkey season. Witness Marler observed employee participating in several deer kills and employee being able to field dress deer. According to witness Marler, the only difficulty employee experienced while hunting was the need to catch his breath, which was not remotely related to the accident sustained June 7, 2002.

Furthermore the employee admitted that he spends some 6 to 8 hours per day at a business known as Deem Rentals. Deem Rentals is a business which provides and services heating and air conditioning. A side business is the selling of Argo amphibious vehicles. Employee admits that he holds himself out as a sales associate of Wildwood Argo; that he distributes business cards (Exhibit No. 7) containing his home and personal cell phone numbers; that he distributes pamphlets concerning the Argo vehicle; that he power washes Argos, greases them, changes oil and replaces tires; and as of the date of trial he has probably assisted in the sale of 8 or 9 Argos in the preceding 12 to 15 months. Employee denied receiving remuneration for the services, however, a fact which the Commission finds non-determinative as to any issue of employability and/or disability.

The relevant finding to be gleaned from the testimony of employee and the two lay witnesses is employee freely and voluntarily participates in levels of activity outside the courtroom in a significantly greater degree than his courtroom testimony portrays. The level of activity outside the courtroom buttresses and is consistent with the medical findings and opinions of Dr. Lange, Dr. Mirkin, and Dr. Graham, i.e., the injury sustained June 7, 2002, was indeed minor in nature.

Accordingly, the Commission modifies the residual permanent partial disability for the non-psychiatric injury to 5% permanent partial disability of the body as a whole referable to the lumbar spine as discussed above.

As to any residual psychiatric disability the Commission agrees with the finding of the administrative law judge that there was an aggravation of the employee's pre-existing somatoform disorder resulting in disability of 5% permanent partial disability of the body as a whole. The Commission finds the testimony and opinions of Dr. Stillings credible as to this issue as Dr. Stillings rated the employee's psychiatric disability on account of the injury at approximately 3% PPD of the body as a whole.

(B) Issues of Past Unpaid Medical Treatment and Future Medical Treatment

The administrative law judge awarded employee additional past medical expenses in the amount of \$48,886.36 which represented medical expenses incurred under the auspices of Dr. Soeter. The administrative law judge also awarded future medical treatment, including expenses of maintaining employee's morphine pain pump, which was inserted by Dr. Soeter.

The Commission modifies this portion of the award of the administrative law judge as the Commission determines and concludes that the additional past medical expenses awarded in the amount of \$48,886.36, were not authorized by the employer, and the treatment rendered by Dr. Soeter was not reasonable and necessary to cure and relieve the employee from the effects of the injury sustained June 7, 2002. Consequently, the employer is not liable for any past due medical expenses nor is the employer liable for any future medical care and treatment on account of this injury.

As with the issue of nature and extent of permanent partial disability, the Commission finds the most credible testimony concerning the issues of past medical expenses and future medical care and treatment, to be the testimony rendered by the following three experts: Dr. Lange, Dr. Mirkin, and Dr. Graham. When the Commission

compares and contrasts all expert opinions given concerning these issues, the opinions of Dr. Lange, Dr. Mirkin, and Dr. Graham are the most credible, reliable and trustworthy.

The employer provided employee with substantial medical care and treatment, including diagnostic studies and conservative care, following the accident occurring June 7, 2002. Employer provided and selected treatment under the auspices of Dr. Mirkin, Dr. Lange, and Dr. Graham.

None of these three physicians recommended surgical treatment for employee's back complaints. The recommendation for conservative treatment was rendered by all three, as at best, according to these three medical experts, the employee merely sustained a minor back strain on account of the June 7, 2002 accident. All three testified that pain management treatment was not medically indicated for this minor injury.

Instead of following the recommendation for conservative care employee chose to treat with Dr. Soeter. The employer did not authorize treatment with Dr. Soeter. Employee had the right to treat with Dr. Soeter at his own expense. That right does not carry with it an obligation on the employer's behalf to pay Dr. Soeter.

More specifically, Dr. Lange did not recommend and would not recommend pain management treatment. Dr. Lange explained that given employee's symptoms and findings on clinical examination, pain management was not medically indicated. Dr. Lange would not recommend a morphine pump. Dr. Lange explained employee had no specific anatomical diagnosis as his primary issue was back pain and right lower extremity symptoms. Dr. Lange testified that patients with musculoskeletal conditions of a degenerative variety such as employee presented, do not usually have pain at a level requiring a morphine pump. Superimposed on this was the fact that employee had non-organic issues and signs of symptom magnification. Given these factors, employee's level of function, and results of an FCE, Dr. Lange was firmly of the opinion that a morphine pump was not medically indicated. Dr. Lange took issue with the findings of Dr. Soeter: Dr. Soeter's conclusions were lacking in many respects; as stated by Dr. Lange, "Dr. Soeter missed the forest for the trees"; Dr. Soeter misinterpreted the myelograms; and Dr. Soeter tended to pay very little attention to the perceptions of levels of pain in the employee. Dr. Lange further stated it was odd that Dr. Soeter did not question an ambulatory patient, like employee, who presented with a pain level of 10, when such perceptions in a non-hospitalized patient suggested symptom magnification.

Dr. Mirkin concluded that the high dose morphine was inappropriate for the employee. Treating the employee with morphine was inappropriate since it was addictive, would disable employee, and all the while employee exhibited symptom magnification behavior. Dr. Mirkin clearly was of the opinion that use of a morphine pump was neither reasonable nor necessary as a result of the June 7, 2002 accident. The employee had symptom magnification behavior that was not sufficient to substantiate use of a chronic morphine therapy. Such treatment went far beyond what was necessary for employee's condition.

Dr. Graham further agreed that implantation of a morphine pump was not reasonable or necessary as a result of the June 7, 2002 accident. Dr. Graham was of the opinion there was no indication for use of a morphine pump implant. Dr. Graham explained there was no evidence of an acute injury from the June 7, 2002 event or evidence of any new pathology arising from that incident. Moreover, Dr. Graham explained that one of the specific prerequisites to the use of a morphine pump was an appropriate psychological evaluation which employee did not have before the pump was implanted. Dr. Graham's psychological testing and exam revealed that employee had findings consistent with symptom magnification which is a contra-indication for placement of a morphine pump.

The testimony of Dr. Lange, Dr. Mirkin, and Dr. Graham demonstrate that pain management treatment, in particular, use of a morphine pump, was neither reasonable nor necessary to cure and relieve the employee's minor back injury sustained June 7, 2002. The Commission finds this medical expert testimony the most cogent and credible, and since the competent and substantial medical evidence reveals that the use of a morphine pump was not medically indicated to treat employee's back injury, the administrative law judge erred in awarding employee the past medical expenses incurred while treating under the auspices of Dr. Soeter and that part of the award is reversed.

For the same reasons, the administrative law judge's award of future medical treatment, including the expense of maintaining employee's morphine pain pump, must be reversed and set aside.

III. Issue of Additional Temporary Total Disability Benefits

The administrative law judge determined that employee reached maximum medical improvement on March 18, 2003, and that the employer's last temporary total disability benefit was paid November 18, 2002. Accordingly the administrative law judge determined that employee was owed an additional 17 2/7 weeks of temporary total disability benefits (TTD). This additional interval for the TTD benefits was the period during which the employee received treatment under the auspices of Dr. Soeter. The Commission sets aside and reverses the administrative law judge's award of additional TTD.

As discussed above the competent medical evidence which the Commission has found to be the most credible, the testimony and opinions of Dr. Lange, Dr. Mirkin, and Dr. Graham, demonstrate that employee did not require pain management treatment subsequent to November 18, 2002. Dr. Mirkin concluded that employee obtained maximum medical improvement on November 18, 2002, on account of this injury, and the Commission agrees. The pain management treatment under the auspices of Dr. Soeter, including the use of a morphine pump, was neither reasonable nor necessary to cure and relieve the employee from the minimal back injury sustained June 7, 2002. Consequently, employer was under no obligation under section 287.170 RSMo to pay additional temporary total disability benefits to the employee while the employee was under the care of Dr. Soeter.

IV. Issue of Total Disability and Liability of Second Injury Fund

As stated by the administrative law judge, total disability means the inability to return to any employment, not just the employment the employee was engaged in at the time of the accident. 287.020.7 RSMo. Basically, the test for permanent total disability is whether, given the employee's situation and condition, an employer in the usual course of business would reasonably be expected to hire employee in his present physical condition, reasonably expecting employee to perform work for which he is hired. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.2d 879 (Mo. App. 2001).

The Commission has found that employee is not totally disabled solely attributable to the accident occurring June 7, 2002. The Commission has found the disability to be 10% PPD of the body as a whole referable to the injury occurring June 7, 2002.

In a case of permanent total disability involving the Second Injury Fund, the Commission must make three findings respecting disability. First, the Commission must determine the percentage of disability resulting from the last injury standing alone; second, the Commission must find that there was pre-existing permanent disability that was a hindrance or obstacle to employment or re-employment; and third, the Commission must determine that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled within the meaning of the workers' compensation law.

The administrative law judge made all three findings and indeed awarded permanent total disability against the Second Injury Fund in combination with the permanent partial disability attributable to the accident occurring June 7, 2002.

However, the Commission disagrees, and modifies the finding of the administrative law judge pertaining to this issue, by determining that all of the injuries and conditions combined, including the last injury, have not resulted in the employee being permanently and totally disabled within the meaning of the workers' compensation law. Four medical experts, who the Commission has found to be credible, reliable, persuasive, and trustworthy, are of the opinion that employee is able to work in the open labor market. The results of the FCE also are reliable and indicate that employee is able to perform work in the open labor market. The administrative law judge principally relied on the testimony of the employee's vocational expert, James England, in determining employee was totally disabled. The Commission does not find the testimony of Mr. England persuasive given the fact that Mr. England relied on employee's self-imposed limitations concerning his ability to sit or stand and his alleged need to take naps or lie down. Dr. Lange, Dr. Mirkin, Dr. Graham, and Dr. Stillings did not impose such limitations. The evidence at trial established that employee's actual level of activity outside the courtroom far exceeds that described in his courtroom testimony and the self-serving histories he provided to his litigation experts. In light of the foregoing, the Commission is convinced that employee's self-imposed limitations are not realistic or

necessary.

The Commission finds and determines that employee could perform employment at the medium demand level if he so desired. The evidence clearly indicates that the employee has the capability, background, and experience to perform medium demand employment, as well as being able to fulfill activity levels so required.

Since the Commission finds that employee is not totally disabled, and since the Commission finds that the disability attributable to the work related accident occurring June 7, 2002, is less than 50 weeks compensation, the minimum statutory threshold to trigger Second Injury Fund liability is not met, and there is no Second Injury Fund liability concerning this workers' compensation injury. Section 287.220 RSMo. Accordingly, the award of liability against the Second Injury Fund is set aside and reversed as the Second Injury Fund has no statutory liability on account of the injury occurring June 7, 2002.

V. Conclusion

Based on the above modifications, employee is awarded the following amounts of compensation payable: 10% permanent partial disability to the body as a whole referable to the lumbar spine and aggravation of employee's somatoform disorder (\$13,176.80); less employer's credit of \$5,000.00 for advancement of PPD; resulting in a net amount due to employee of \$8,176.80.

Employer is not liable for any unpaid medical expenses; and is not liable for any additional TTD benefits.

The Second Injury Fund has no liability concerning this workers' compensation injury.

The award and decision of Administrative Law Judge Michael Moroni dated March 1, 2005, as modified, is attached and incorporated by reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 _____ day of March 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no

involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in the decision of Commissioner Bartlett to modify the award and decision of the administrative law judge.

William F. Ringer, Chairman

DISSENTING OPINION

I must respectfully dissent from the award and decision of the majority of this Commission modifying the award and decision of the administrative law judge. I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the award and decision of the administrative law judge should be affirmed.

Like the administrative law judge, I am persuaded by the credible testimony of Dr. Cohen. Based upon his testimony, the administrative law judge concluded that employee suffered a 30% permanent partial disability to the body as a whole referable to his lumbar spine and right hip and 5% permanent partial disability to the body as a whole referable to his depression.

Dr. Cohen explained in detail how the blow to employee's chest and his subsequent fall resulted in nerve root compression and how the compression of the nerve root produced employee's right lumbar radiculopathy. Dr. Cohen also explained the mechanism by which employee's act of favoring his right leg due to the radiculopathy put extra weight or pressure on his right hip area, resulting in bursitis. Finally, Dr. Cohen explained how employee's depression is a consequence of the low back injury.

Dr. Cohen also explained employee's preexisting disabilities: 30% permanent partial disability to the body as a whole related to lumbar spine; 25% permanent partial disability at the level of the right shoulder; 30% permanent partial disability at the level of the left knee, and 10% permanent partial disability to the body as a whole referable to coronary artery disease.

Dr. Cohen testified employee's primary injury combines synergistically with his preexisting disabilities to create a greater overall disability than their simple sum. Specifically, Dr. Cohen believes employee is permanently and totally disabled. This opinion is reiterated by Mr. England who believes it unlikely any employer in the open labor market would hire employee in his current condition. The testimony of Dr. Cohen and Mr. England support the administrative law judge's award of permanent total disability against the Second Injury Fund.

Dr. Cohen believes that pain management for employee's condition as directed by Dr. Soeter is reasonable and necessary and that pain management will be needed for the remainder of employee's life. Employer was aware of this need but failed to provide pain management. I would affirm the award of past medical expenses for the pain management provided by Dr. Soeter, temporary total disability for the initial period of pain management, and future medical care in the form of pain management.

Because I would affirm the award and decision of the administrative law judge, I must respectfully dissent from the decision of the majority of the Commission to greatly reduce the compensation awarded to this injured worker.

John J. Hickey, Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

DECISION OF ASSOCIATE ADMINISTRATIVE LAW JUDGE

Employee: Robert L. Stonecipher

Injury No. 02-055128

Dependents: N/A

Employer: Poplar Bluff R-1 Schools

Additional Party: Second Injury Fund

Insurer: Missouri United School Insurance c/o Gallagher Bassett

Appearances: Jeffrey P. Gault, Esq. for Employee; Robert Haeckel, Esq. for Employer-insurer; Debbie Ledgerwood, Esq. for Second Injury Fund.

Hearing Date: December 8, 2004

Checked by: MM:sm

FINAL AWARD AND 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? June 7, 2002.
5. State location where accident occurred or occupational disease contracted: Poplar Bluff, Butler 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: Employee was struck in the chest by a backhoe bucket and knocked to the ground.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Low Back, body as a whole.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid-to date for temporary total disability: \$8,151.40.
16. Value necessary medical aid paid to date by employer-insurer? \$18,936.15.

17. Value necessary medical aid not furnished by employer-insurer? \$48,886.36.
18. Employee's average weekly wage: \$508.31.
19. Weekly compensation rate: \$338.87 for permanent total and temporary total disability; \$329.42 for permanent partial disability.
20. Method wages computation: By stipulation.
21. Amount of compensation payable:

Unpaid medical expenses:	\$48,886.36
17 2/7 weeks of temporary total disability	\$ 5,857.61
140 weeks of permanent partial disability	\$46,118.80
<u>Less credit of \$5000.00 advanced</u>	<u>\$ (5,000.00)</u>
Total due from employer-insurer	\$95,862.77

22. Second Injury Fund liability: Permanent total disability beginning March 19, 2003, payable at the rate of \$9.45 per week for the first 140 weeks and \$338.87 per week beginning on November 23, 2005.
23. Future requirements awarded: The employer-insurer shall provide such additional medical treatment that is necessary to cure and relieve the effects of the injury, which includes but is not limited to treatment for the morphine pump and for psychiatric care. The Division of Worker's Compensation specifically retains jurisdiction over this issue.

Said payments to begin (see findings) and 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 (excluding future medical benefits) in favor of the following attorney for necessary legal services rendered to the claimant:

Attorney: Jeffrey P. Gault

FINDINGS OF FACT AND RULINGS OF LAW

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 a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

Stipulation 1. Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Missouri United School Insurance c/o Gallagher Bassett Insurance.

Stipulation 2. On or about the date of the accident the employee was an employee of Polar Bluff R-1 Schools and was working under the Workers' Compensation Act.

Stipulation 3. On or about June 7, 2002 the employee sustained an accident arising out of and in the course of his employment.

Stipulation 4. Employer had notice of the accident.

Stipulation 5. Employee's claim was filed within the time allowed by law.

Stipulation 6. Employee's average weekly wage was \$508.31 with a workers' compensation rate of \$338.87 for temporary and permanent total disability and \$329.42 for permanent partial disability.

Stipulation 7. The employer-insurer paid \$18,936.15 in medical costs.

Stipulation 8. The employer-insurer paid \$8,151.40 in TTD benefits for 23 weeks from June 8, 2002 to November 18, 2002.

ISSUES:

Issue 1. Whether the employee's injury was medically causally related to the accident?

Issue 2. Whether an advance made by the employer-insurer of \$6,588.40 should be counted as TTD benefits or PPD benefits of 5% of the body as a whole?

Issue 3. Whether the employee is entitled to an additional \$65,575.25 for previously incurred medical benefits?

Issue 4. Whether the employee is entitled to future medical benefits?

Issue 5. Whether the employee is permanently and totally disabled?

Issue 6. Whether the Second Injury Fund is liable for permanent total or partial disability?

Issue 7. Whether the Second Injury fund is responsible for second job lost wages? This was place before the ALJ as an issue by the employee, but upon the objection of the Second Injury Fund that it was not listed in the amended claim, it was denied. All evidence pertaining to that issue was received as an offer of proof.

SUMMARY OF THE EVIDENCE:

The following is a summary of the evidence received. It is made for the help of the reader and is not the Findings of Fact.

LIVE TESTIMONY:

Robert Stonecipher. Mr. Stonecipher is the claimant in this case. He was born on December 9, 1962. He is a lifelong resident of the Poplar Bluff area. He is married and has five children. He finished his freshman year in high school and does not have a GED. He has a Class A operator's license and is a licensed journeyman plumber. He is eligible to take the master plumber exam. He worked as a plumber and maintenance worker for the employer for approximately five years. He last worked for the school district on June 7, 2002. During the time he worked for the school district, he also worked for Butler County doing yard and maintenance work on a contract basis and did independent plumbing, electrical and heating and air conditioning work in his spare time. Previous employment consisted of hanging drywall, driving a truck, farming, grocery store managing, and working as a towboat deck hand and oiler. The accident occurred on June 2, 2002. On that date, his crew was repairing a broken water main to the school showers. The main had to be dug out with a backhoe. He was watching the backhoe while leaning on his shovel. The backhoe hit him in the chest, knocking him back from five to seven feet and to the ground. At that time he continued to work and felt pain ad pressure in his back and chest. He went home after work and sat in his hot tub. He hurt that night and did not sleep well. The next day (Saturday) he went back to work. He could not get in the trench and had to instruct the crew on what to do. When the job was finished he went home.

Because of continued and worsening pain, his wife took him to the emergency room. He was x-rayed, and medication was prescribed. The employer sent him to Dr. Till the following week. Dr. Till ordered physical therapy and a CAT scan. Based upon the CAT scan and continuing pain, Dr. Till referred him to Dr. LeCorps, a local

orthopedic surgeon.

Dr. LeCorps ordered a myelogram and an epidural steroid injection. When the epidural was given, some of the medication got in his spinal canal causing some temporary paralysis. As a result he stayed hospitalized over night.

The insurer then transferred his care to Dr. Mirkin in St. Louis. Dr. Mirkin believed that he was taking too many drugs and took him off painkillers and ordered additional physical therapy. He ultimately had an additional myelogram and CAT scan performed. Dr. Mirkin did not believe surgery would help and ordered a functional capacity exam and released him with a 20-pound weight restriction. He felt that Dr. Mirkin was rude.

The employer then sent him to Dr. Lange. Dr. Lange also felt that surgery was not necessary. He thought Dr. Lange was considerate. The physical therapist in Poplar Bluff told him that he should see a pain doctor. He asked the insurance company about this but they said he should not do it.

He ultimately treated with Dr. Soeter, a pain doctor in Poplar Bluff. Dr. Soeter performed trigger point injections, a trial dorsal column stimulator implantation, and finally a morphine pump implantation. The employer and insurance company knew of his treatment with Dr. Soeter. In addition to the morphine pump, he takes narcotic pain medications. The medications and pump ease the level of his pain.

In addition to pain treatment, he has also seen a psychiatrist for depression. This helped his mood such that he can get out and hunt and fish again. He currently takes no medication for depression.

Past injuries include right shoulder surgery, right knee surgery and back fusions with plates and screws. He shoulder was injured while working in a grocery store, and he received a settlement for the injury. His back and knee were injured while working on the towboat. He received a substantial settlement from that injury and still receives benefits. Because of the vibration on the boat he could not go back to that work after his back healed. Vibration also keeps him from truck driving. His knee is stiff. In 1999, he had a light heart attack. He had angioplasty which he said the doctor described to him as being "roto-rooted." The heart condition makes him short of breath. He has not worked any job since June 7, 2002. He does not sleep well at night. He often has to lie down during the day because of pain.

He does go to Deems rental, and drinks coffee and piddles around. He also helps sell Argos for his friend, Dr. Brummett. In the past year he might have initiated the sale of up to ten of these vehicles. He also washed these vehicles on occasion with a power washer.

He was involved in an auto accident in July 2004, but this did not cause him any additional disability.

On cross-examination he admitted to being an avid hunter and fisherman. He said that his ability to hunt and fish is now limited. He still has killed seven or eight deer in the last two years from a combination of crossbow and rifle. He has a special department of conservation permit which allows him to hunt out of his truck.

Gary Deem. Mr. Deem testified on behalf of the employee. Mr. Deem is the owner of Deem Rental and Deem Heating and Air Conditioning in Poplar Bluff, Missouri. He has known the claimant as a friend for about ten years. His business is sort of a meeting place for people. The claimant frequents the place and often lies down in a recliner. He says he often thought of the claimant as a "loafer." He does not pay the claimant and as far as he knows the claimant does not work for anyone. He says the claimant is not in good health. He does fish with the claimant on occasion, and he met the claimant at Sardis Lake in Mississippi in May or June of 2004 for a fishing trip.

Kenneth Marler. Mr. Marler testified on behalf of the employee. He is a retired school administrator. He has known the claimant for 6 or 7 years. He hunts with the claimant in deer and turkey season. He says that the claimant is able to walk about a quarter of a mile without getting out of breath. He saw the claimant kill and field dress deer, but never carry a deer out of the woods. He said the claimant has hunted out of a deer stand since the accident. He has also fished with the claimant. The claimant usually runs the trolling motor but only does that about thirty minutes at a time. He never noticed the claimant having any difficulty working prior to the 2002

accident.

EXHIBITS:

The following exhibits were offered and, with the exception of exhibit U, admitted into evidence:

Employee's Exhibits

Exhibit A: Medical Records from Three River's South. On June 8, 2002 the claimant was seen in the emergency room complaining of back pain and left side pain. He reported that he had been hit by a backhoe at work. X-rays of his ribs were negative. He was diagnosed with a thoracic spine strain and acute myofascial pain. He was given Percocet. The exhibit also contains physical therapy notes from June 14 through July 10, 2002. Dr. Till ordered the therapy, and some decrease in back pain was noted. The exhibit contained a CT report of 6-19-02 which showed abnormalities of his low back. The radiologist also suggested a myelogram. In July 1999, the claimant was treated for cardiac complaints. In September 1999 a polysomnogram was performed which showed no significant sleep disturbances.

Exhibit B: Medical records from Kneibert Clinic. Included are medical records from 1977 through June 24, 2002. Of significance to this case is treatment for a back strain beginning June 10, 2002 with a referral to an orthopedic surgeon on June 24, 2002. Past significant conditions were cardiac treatment in July 1999. A DOT physical was performed in September 1996, which cleared him to drive a truck. In June 1991, he was treated for back pain resulting from a barge accident. In April 1988, he was treated for a shoulder condition. Treatment for that condition continued through April 1989 when he was released back to full duty. In the early 1980s he received considerable treatment for a groin injury.

Exhibit C: Medical records from Dr. LeCorps. On June 28, 2002, Dr. LeCorps first examined the claimant and diagnosed an L4-5 radiculopathy and ordered a myelogram. On July 3, 2002, the claimant received a myelogram. It shows a possible disc herniation at L5-S1. On July 9, the doctor reviewed the myelogram. He found a possible nerve root amputation at L5 due to swelling. He also considered removing the hardware from the claimant's back. On July 12, he performed facet joint injections that migrated to the claimant's spinal canal and caused temporary paralysis.

Exhibit D: Medical records from Three Rivers Health Care North. These records contain radiology reports of the June 19, 2002 CT scan and the July 3, 2003 myelogram. The records of the July 12 facet joint injection and paralysis are also included.

Exhibit E: Medical records from St. Anthony's Medical Center. The claimant underwent a myelogram on August 14, 2002. The report shows lumbar spine abnormalities that include a L5-S1 fusion and effacement of the right S1 nerve root. An epidural blood patch was performed to treat a post myelogram headache.

Exhibit F: Physical therapy records from Ozark Physical Therapy. These contain general therapy records from July and August 2002. A copy of a fax from Dr. Mirkin dated July 17, 2002 places the claimant on a 20-pound weight restriction. Dr. Mirkin stated that he should get off of narcotic drugs and undergo conditioning therapy.

Exhibit G: Medical records from Three Rivers Healthcare South. These contain physical therapy records. They also contain notes from Dr. Soeter. On October 10, 2002, Dr. Soeter examined the claimant. He found a positive straight leg raise on the right. He noted that he was not a surgical candidate and gave him steroid injections. He returned to Dr. Soeter on October 18. At that time, he was diagnosed with post-laminectomy syndrome, and spinal cord stimulator trial was scheduled. The trial stimulator was implanted on November 6, 2002.

Exhibit H: Medical records from Dr. Soeter. The records begin December 30, 2002, with follow-up treatment for a morphine pump. The records continue through June 29, 2004. They document continued treatment regarding the morphine pump and show that the claimant received pain relief from the pump.

Exhibit I: Billing records from Three Rivers Health Care. Total bills submitted were \$59379.25. Objections were made that there was no evidence that he remained liable for the bills and that some of the bills were unrelated to the case. The objections were taken with the case and are now overruled as to foundation.

Exhibit J: Billing records from Dr. Soeter. Total charges of \$6,196.00. A foundational objection was made and it is now overruled.

Exhibit K: Letters from Claimant's attorney demanding treatment. On October 8, 2002, the claimant's attorney notified the employer-insurer's attorney that the claimant was seeking pain management treatment in Poplar Bluff. On October 10, 2002, the employer-insurer's attorney was notified that the claimant was receiving pain management treatment in Poplar Bluff. On December 26, 2002, the employer-insurer's attorney was again notified that the claimant was being treated by Dr. Soeter.

Exhibit L: Medical records from Dr. Gordon Eller. The claimant treated for back and knee complaints from March 1992 through August 1993. Dr. Eller performed an L5-S1 fusion in July 1992 and performed a revision fusion with instrumentation in March 1993.

Exhibit M: Medical records from Christian Hospital Northwest. The claimant had arthroscopic right knee surgery in August 1991.

Exhibit N: Medical records from St. Francis Medical Center. In August 1999, an angiogram was performed by Dr. Talbert. The diagnoses was idiopathic cardiomyopathy with secondary possible associated coronary vasospasm and associated angina pectoris. On February 27, 1993 the patient appeared at the emergency room with severe back pain. He was admitted and Dr. Eller picked up his treatment. On March 8, 1993, Dr. Eller performed a fusion at L5-S1 with rods and screws. On July 17, 1992, Dr. Eller performed a fusion at L5-S1 without fixation. Dr. Eller also performed knee surgery on his right knee in October 1993 for patellar femoral mal-alignment.

Exhibit O: Compromise Lump Sum Settlement. In January 1990, the claimant settled a case involving his left shoulder against Piedmont Wholesale Grocer for \$7,811.69. The percentage of disability and disability rate are unclear.

Exhibit P: Deposition of Dr. Benjamin Soeter. Dr. Soeter is board certified in anesthesiology and pain management. He practices medicine in Poplar Bluff, Missouri. His practice consists primarily of nonmalignant pain management. Based upon a reasonable degree of medical certainty the accident was a substantial factor in causing the claimant's back pain. The claimant was initially treated with epidural steroid injections, which did not help. A spinal cord stimulator was tried next. It did not help. An intrathecal pump, "morphine pump" was tried next. It gave relief so a permanent pump was implanted. He believed that the claimant was sincere and was not seeking secondary gain. After a pump is installed, a person has about a 5% chance of returning to work. The claimant is restricted to lifting no more than 10 or 20 pounds, and he may have difficulty sitting or standing one place for an extended length. He will need long-term pain management. He testified that his bills were reasonable and necessary. On cross-examination the necessity and reasonableness of the treatment was attacked. An MMPI was not performed, but an abbreviated psychological test was performed.

Exhibit Q: Deposition of Dr. Jay Liss. Dr. Liss is a board certified psychiatrist. He examined the claimant once on behalf the claimant's lawyer. He believed that the claimant suffered from post-traumatic stress disorder, anxiety, depression and therapeutic morphine intoxication. He rated the claimant's psychiatric disability at 75% of the whole person. He did not perform an MMPI test because that test is not useful to a psychiatrist.

Exhibit R: Deposition of Dr. Raymond Cohen. Dr. Cohen examined the claimant one time on behalf of his attorney. Based upon a reasonable degree of medical certainty he found that the accident caused right lumbar radiculopathy, depression, and right hip bursitis from an altered gait. His pre-existing disabilities were status-post two lumbar fusions at L5-S1; status-post right shoulder surgery for impingement; status-post right knee surgery for lateral meniscus tear; and coronary artery disease requiring angioplasty. He rated the claimant at 60% of the lumbar spine of which 30% was pre-existing; 15% of the body as a whole for depression; 10% of the right hip;

25% of the right shoulder; 30% of the left knee; 10% of the body a whole due to the heart condition. He found a synergistic effect in the injuries. The pre-existing conditions were a hindrance or obstacle to employment. He believed the claimant to be permanently and totally disabled. He believed the claimant should get another surgical consultation and that pain management would be required for life. On cross-examination he testified that the claimant was at maximum medical improvement approximately three months after the implantation of the morphine pump.

Exhibit S: Deposition of James England. Mr. England is a vocational expert. He examined the claimant on behalf of his attorney. He found the claimant permanently and totally disabled. He believed that the claimant might be able to work if Dr. Mirkin and Lange's restrictions were believed. The claimant read and did math at a third grade level. This would disqualify him from any sedentary jobs. He also felt that it was unlikely that employers in the open labor market would hire someone intoxicated by morphine even though it was therapeutic. The prior disabilities were a hindrance or obstacle to employment.

Exhibit T: Deposition of Dr. Ravdeep Khanuja. Dr. Khanuja is a board certified psychiatrist practicing in Poplar Bluff, Missouri. As part of his practice he treated the claimant for major depression resulting from the injury. On cross-examination he testified that an MMPI was useful to psychiatrists.

Exhibit U: Questionnaire from Attorney General's Office. Based upon the objection of the Second Injury Fund, this exhibit was excluded from the record and is included as an offer of proof on the issue of second job wage lose.

Employer-Insurer's Exhibits

Exhibit 1: Deposition of Dr. David Lange. Dr. Lange is a board certified orthopedic surgeon specializing in spine care. He examined the claimant one time on behalf of the employer-insurer on September 12, 2002. At that time Dr. Lange did not believe that the claimant was a surgical candidate. He believed the claimant was magnifying his symptoms. He thought the claimant could return to work possibly in his occupation as a plumber. He did not believe that Dr. Soeter's treatment was proper, although he would not testify that it violated any standard of care. He noted that he would never use a morphine pump in someone with non-cancerous back pain. He declined to treat the claimant on a pain management basis on January 30, 2003.

Exhibit 2: Deposition of Dr. Peter Mirkin. Dr. Mirkin is an orthopedic surgeon specializing in spine surgery. He treated the claimant on behalf of the employer-insurer. His initial treatment took place on July 17, 2002. At that time the claimant complained of back pain and right leg pain. He performed a repeat myelogram. He thought the claimant was on too much morphine and should get into a PT program. He last examined the claimant on August 21, 2002. At that time he ordered a functional capacity evaluation (FCE). Based on that evaluation he wrote a report finding the claimant suitable for light work. He felt that he had a 20% disability to the body as a whole with a 2% due to the last accident. He did not think that a spinal column stimulator or a morphine pump was necessary. He does not think that a morphine pump is ever indicated for failed back surgery. He believed the claimant was magnifying his symptoms. He testified that the claimant should use anti-inflammatory medications if he truly is in pain. Further, he would not use morphine because among other reasons, "[I]t will disable him."

Exhibit 3: Deposition of Dr. John Graham. Dr. Graham is a pain management specialist. He evaluated the claimant one time on behalf of the employer-insurer on March 5, 2003. At that time he found lots of inconsistencies in the claimant's complaints and treatment. He said he was capable of medium demand level work. He testified: "There was no evidence of any acute injury from the June 2002 injury date. There was no evidence of any new pathology that was not pre-existing." He did not believe that the claimant was a candidate for either the dorsal column stimulator or the morphine pump. However, he indicated that in some instances they were useful.

Exhibit 4: Deposition of Dr. Wayne Stillings. Dr. Stillings is a board certified psychiatrist practicing in St. Louis, Missouri. He examined the claimant on behalf of the employer-insurer one time on September 9, 2004. At that time he felt that the claimant suffered some psychiatric injury in the accident. Basically this was a worsening of a pre-existing somatoform disorder. He did not think he suffered from depression, but thought that the treatment and care he received from Dr. Kanaju was appropriate. He noted that in clinical practice a diagnosis of

depression was often given when technically it was something else. In the clinical setting, the main focus is not the precise diagnosis but treatment to make the person feel better. He vehemently disagreed with Dr. Liss' diagnosis of post-traumatic stress disorder. He also noted that the MMPI was a valuable tool for psychiatrists. He thought that the claimant suffered a 2 to 3% disability to the body as a whole resulting from the worsening somatoform disorder. He believed that the claimant needed further psychiatric treatment because of the injury. The pre-existing disorder was an obstacle or hindrance to his employment. He noted that the somatoform disorder causes people to express more pain. He thinks that this is really what was causing the symptom magnification noted by the other physicians. The claimant had normal intellectual ability, although there was some evidence that he had had special assistance in spelling and reading when he was in school.

Exhibit 5: Deposition of Robert Stonecipher. The employer-insurer took the claimant's deposition on November 1, 2002. The testimony is basically the same as that outlined above. However, some points stick out. First, the claimant testified that he was to undergo the spinal cord stimulator trial on November 6, 2002. He also noted that he asked the school district to send him to pain management. They told him to call the comp carrier. He talked to a nurse case manager, but never heard back from her. He scheduled the treatment on his own.

Exhibit 6: Functional Capacity Evaluation. This evaluation was performed at the request of Dr. Mirkin on September 24, 2002. The evaluation found the claimant in the light to medium demand level and recommended that he possibly seek pain management. The report also noted symptom magnification.

Exhibit 7: Wildwood Argo business card. A business card contains the claimant's phone number.

Exhibit 8: Wildwood Argo business cards and brochure. These cards and brochure given out by the claimant. An Argo is a type of amphibious hunting/fishing vehicle.

FINDINGS OF FACT

Based upon a careful review of all of the evidence presented, the following findings of fact are made.

1. All stipulations are approved and incorporated herein by reference.
2. On Friday June 7, 2002, the claimant was working for the employer on a plumbing crew that was digging out a water line with a backhoe. The backhoe bucket swung and hit the claimant, knocking him backward and to the ground. He continued to work that day and the next day in order to get the waterline fixed so that there was water in the locker rooms. During those two days he was not as active and spent a lot of time sitting down supervising. The pain got worse in his low back as time progressed.
3. On June 8 he went to the emergency room at Three Rivers Healthcare South complaining of back and rib pain. His ribs were x-rayed and found normal. He was given Percocet and Lorcet and released with instructions to follow with his primary physician. On Monday, June 10, 2002, he reported going to the emergency room to the employer. The employer sent him to see Dr. Till on that same day. Dr. Till noted that he was complaining of back pain and right leg numbness. He prescribed Lorcet and Vioxx. He returned to Dr. Till on June 12. At that time Dr. Till was concerned about a possible disc condition in his low back. He ordered a CAT scan and referred him to Dr. Winters, an orthopedic surgeon. He continued the Vioxx and Lorcet and ordered physical therapy. The claimant received physical therapy from June 14 through July 8, 2002. The claimant did not see Dr. Winters. On June 24 he returned to Dr. Till. Dr. Till suspected some neurological impingement and again referred the claimant to Dr. Winters. On June 28, the referral was changed to Dr. LeCorps, also an orthopedic surgeon.
4. On June 28, Dr. LeCorps ordered a myelogram and continued the claimant on therapy. The myelogram was performed on July 3, 2002. On July 9, Dr. LeCorps reviewed the myelogram with the patient and found what he believed to be a L5 nerve root amputation due to swelling. He also believed that the hardware from the previous fusion was not centered correctly and might have to be removed. He ordered epidural steroid injections to try to decrease the nerve root swelling. On July 12, Dr. LeCorps performed the injections. Some of the medicine got in the spinal canal and caused temporary paralysis.

5. The employer-insurer then changed treatment to Dr. Mirkin. Dr. Mirkin treated the claimant from July 17, 2002 through August 21, 2002. He performed a repeat myelogram but found that the claimant was not a surgical candidate. He ordered a functional capacity evaluation, which was performed on September 24, 2002. He did not see the claimant after the evaluation, but still released him back to light duty work.
6. Dr. Lange evaluated the claimant on behalf of the employer-insurer on September 12, 2002. He concurred that the claimant was not a surgical candidate. Both Dr. Lange and Dr. Mirkin felt the claimant was magnifying his symptoms and was taking too much medication.
7. The therapist that performed the FCE recommended that the claimant seek pain management. The claimant asked the employer to send him to pain management. The employer told him to talk to his nurse case manager. He talked to her, but she never got back to him with approval. His attorney notified the employer-insurer by phone and letter on October 8, 2002 that he was going to seek treatment on his own if they did not provide it. The employer-insurer did not provide any pain management. The claimant went to Dr. Soeter on his own for that treatment beginning on October 10, 2002. On that date Dr. Soeter performed epidural injections. The employer insurer was again notified of the treatment on that date. It did nothing again. Ultimately Dr. Soeter scheduled a spinal cord stimulator trial for November 6, 2002. The employer-insurer took the claimant's deposition on November 1, 2002. At that time the claimant testified that he was treating with Dr. Soeter and that he was scheduled for the procedure. Again the employer-insurer did nothing. The spinal cord stimulator did not help. Dr. Soeter then implanted a morphine pump on December 18, 2002.
8. He has been followed by Dr. Soeter on regular basis since that time. It is specifically found that the claimant has benefited from the implantation of the pump because it makes his pain tolerable. Dr. Cohen testified that he reached maximum medical improvement 3 months after the implantation of the pump. Based upon that testimony it is found that he reached maximum medical improvement on March 18, 2003.
9. On December 26, 2002, the claimant's attorney again demanded pain management treatment. On or about January 30, 2003, the employer-insurer asked Dr. Lange to take up the pain management treatment. He refused to do so. On March 5, 2003, the employer-insurer sent the claimant to Dr. Graham for a pain management evaluation. Dr. Graham basically thought the claimant was faking his complaints and did not relate the condition to accident and did not think the pump was medically necessary.
10. Beginning in May 2003, the claimant was treated for depression by Dr. Khanuja. The doctor felt that the condition was related to the accident. He treated for the depression through October 1, 2003. Dr. Stillings thought that this was a worsening of a somatoform disorder rather than depression, but still found the worsening related to the accident. The claimant was born on December 9, 1962. At the time of the injury he was 39 years old. He is married with five children. Three of them live in his home. His youngest are 13 and seventeen years of age.
11. He has not engaged in gainful employment since the accident.
12. He suffers from a somatoform disorder that was worsened by the accident. This manifests itself in slight depression, which causes some listlessness and trouble concentrating.
13. Because of pain, he has to frequently lie down and rest during the workday.
14. He is on high doses of morphine to control his pain and as such suffers from morphine intoxication.
15. He reads and does math on a third grade level due to a pre-existing learning disability.
16. He is able to hunt and fish as long as he does not have to walk over a quarter of a mile or sit for more than an hour or two. He is able to climb a tree stand to deer hunt, but mainly hunts on the ground because of back pain. He does not have the ability to carry a deer out of the woods.

17. He is able to go to local business and answer the phone and visit with friends. He is able to help sell Argo vehicles on occasion. He cannot do these things on a full-time basis. He is not compensated for doing these things.

RULINGS OF LAW:

Issue 1. Whether the employee's injury was medically causally related to the accident?

RULE OF LAW: The claimant has the burden of proving a causal connection between the accident and his injuries. White v. Henderson Implement Co., 879 S.W.2d 575 (Mo. App. W.D. 1994). This does not have to be proven to an absolute certainty, but rather by a reasonable probability. Id. Probable means founded upon reason and experience but with room to doubt. Id. Medical evidence is not required when injuries and disability are within lay understanding. Irving v. Missouri State Treasurer, 35 S.W.3d 441, 445 (Mo. App. W.D. 2000); "In line with the general tendency of administrative law to recognize the expertise of specialized tribunals, compensations boards may rely to a considerable extent on their own knowledge and experience in uncomplicated medical matters, and in such cases awards may be upheld without medical testimony or even in defiance of the only medical testimony." Ford v. Bi-State, 677 S.W.2d at 904. However, in cases of sophisticated injury such that surgery or other highly scientific techniques for diagnosis are necessary, expert testimony is necessary, even for an administrative tribunal. Knipp v. Nordyne, Inc., 969 S.W.2d 236 (Mo. App. 1998); Pemberton v. 3M Co., 992 S.W.2d 365, 369-70 (Mo. App. W.D. 1999); see generally, Schroeder, Courtroom Handbook on Missouri Evidence, sect. 702.6.b (2001). The accident need not be the sole cause of the injury, but it must be a substantial factor in the injury. RSMo. 287.020.2.

ANALYSIS: The claimant presented evidence that he was able to work and go about his life with relatively little difficulty before the accident. He has not worked since the accident. The medical testimony of Dr. Cohen, Dr. Mirkin, and Dr. Soeter all indicate that the claimant's current pain complaints are medically causally related to the accident. While Dr. Mirkin certainly does not agree with the treatment given by Dr. Soeter for the pain, he does not dispute the causal relationship. Regarding the mental condition, Dr. Cohen, Dr. Liss, Dr. Stillings and Dr. Khanuja all find a mental disorder resulting from the accident. While the doctors disagree on the exact diagnosis, they do not dispute causation. All other opinions to the contrary are not persuasive.

RULING OF LAW: The claimant's back pain and depressive symptoms are medically causally related to the accident.

Issue 2. Whether an advance made by the employer-insurer of \$6,588.40 should be counted as TTD benefits or PPD benefits of 5% of the body as a whole?

RULE OF LAW: The employee bears the burden of proving that he is entitled to temporary total disability. TTD is intended to only cover the healing period. It should end when either the claimant has reached maximum medical improvement or finds employment. Boyles v. USA Rebar Placement, Inc., 26 S.W.3d 418 (Mo. App. W.D. 2000).

ANALYSIS: The claimant has not gone back to work. He reached maximum medical improvement on March 18, 2003. His last TTD benefit was paid on November 18, 2002. He is owed an additional 17 2/7 weeks of TTD. At his rate of \$338.87, he is owed TTD of \$5,857.61. The payment was for then partially TTD. The balance of \$730.79 is a credit against PPD.

RULING OF LAW: The advance of payment was for 17 2/7 weeks of TTD, with the balance of \$730.79 being a credit against PPD benefits.

Issue 3. Whether the employee is entitled to an additional \$65,575.25 for previously incurred medical benefits?

RULE OF LAW: The employer is responsible for all medical expenses necessary to cure and relieve the effects of an injury. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App. W.D. 2001). The employer does have the right to

authorize medical treatment. However, the employer loses the right to authorize medical treatment when the employer denies a claim or refuses to provide treatment. Offut v. Travelers Ins. Co., 437 S.W.2d 127 (Mo. App. 1968); Herring v. Yellow Freight Systems, 914 S.W.2d 816, 822 (Mo.App. W.D. 1995). In that case the claimant is justified in seeking his own treatment and recovering his cost from the employer-insurer. Herring, 914 S.W.2d at 822.

ANALYSIS: The claimant has submitted bills for pain management treatment. The total submitted are \$65,575.25. Initially, under Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818 (Mo. 2003), the employee is not entitled to claim that portion of bills that are part of a reduction taken by the collateral source if it is shown that the claimant is not liable for those reductions. In this case from reading the bills it is obvious that Three Rivers Health Care reduced the bills by \$16,688.89 and that the claimant is not responsible for those reductions. Therefore the total amount of charges at issue is \$48,886.36. The employer- insurer defends by arguing that the bills were for unauthorized treatment and for treatment that was unnecessary. They also argue that the charges were unreasonable. These arguments all fail. First, the employer-insurer knew of the treatment. It knew that the claimant was embarking on a costly and risky course of treatment at the suggestion of one of its authorized healthcare providers. It is now too late to complain when it had the ability to authorize the treating doctor. Second, the employer-insurer now after the fact argues that the treatment was unnecessary. Again, it could have directed the treatment but chose not to do so. It is disingenuous after the fact to basically argue that Dr. Soeter committed malpractice when no physician will state that the standard of care was violated. Dr. Soeter's testimony that the bills were reasonable and related to the injury is found persuasive. Further, it appears that the hospital bills have been paid which is proof of reasonableness.

RULING OF LAW: The employer-insurer shall pay the claimant \$48,886.36 for unpaid medical expenses.

Issue 4. Whether the employee is entitled to future medical benefits?

RULE OF LAW: As stated above, the employer-insurer is responsible for treatment necessary to cure and relieve the effects of the injury. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App. W.D. 2001).

ANALYSIS: The morphine pump has to be serviced on a continuing basis. It has been found to be work related; therefore, the employer-insurer is responsible for these costs and other pain management costs. Additionally, the claimant presented evidence that he needs psychiatric treatment. That evidence is credible.

RULING OF LAW: The employer-insurer shall provide such additional medical treatment that is necessary to cure and relieve the effects of the injury, which includes but is not limited to treatment for the morphine pump and for psychiatric care. The Division of Workers' Compensation specifically retains jurisdiction over this issue.

Issue 5. Whether the employee is permanently and totally disabled?

RULE OF LAW: Total disability means the inability to return to any employment not just the employment the employee was engaged in at the time of the accident or disease. RSMo. 287.020.7. A long line of cases have defined what this statute means. Basically the test for permanent total disability is whether given the claimant's situation and condition, an employer in the usual course of business would reasonably be expected to hire claimant in his present physical condition, reasonably expecting claimant to perform work for which he is hired. Sullivan v. Masters Jackson Paving Co., 35 S.W.2d 879, 884 (Mo. App. S.D. 2001). The employee has the burden of proving that his or her injury was caused by a work-related accident. Tangblade v. Lear Corporation, 58 S.W.3d 662, 666 (Mo. App. W.D. 2001). Mental injuries are compensable if the accident was a substantial factor in causing the mental condition. Id., 58 S.W.3d at 667. "Although there is no bright-line test or formula which sets out the requirements for what constitutes a substantial factor in determining causation in workers' compensation claims, it is well settled that a causative factor may be substantial even if it is not the primary or most significant factor in causing the injury." Id. 58 S.W.3d at 669. (citation omitted).

ANALYSIS: The claimant presented the testimony of Mr. James England. Under the limitations found above, Mr. England believed the claimant to be disabled. That opinion is persuasive. It is also noted that Dr. Mirkin stated that morphine addiction is disabling. The fact that the claimant is not totally inert and can do some fishing and hunting and "loaf" around a business does not disqualify him from total disability benefits. The bottom line is that no employer is going to hire a depressed, morphine addicted man that reads and does math on a third grade level that is unable to sit or stand all day and frequently has to take naps or lie down.

RULING OF LAW: The claimant is permanently and totally disabled beginning March 18, 2003 when he reached maximum medical improvement.

Issue 6. Whether the Second Injury Fund is liable for permanent total or partial disability?

RULE OF LAW: Knowing that partially disabled employees were more likely to become more severely or totally disabled in an accident, the legislature created the Second Injury Fund, RSMo. 287.220, to encourage employers to hire such workers. The second injury fund limits the employer's liability in an accident to that portion of the disability attributable to the last accident. In order to establish second injury fund liability for total disability, the claimant must show that the last injury combined with pre-existing disabilities to cause the total disability. The pre-existing disability must create an obstacle or hindrance to employment. It must be an actual or measurable disability. If the last injury by itself causes permanent total disability, the second injury fund has no liability. Gassen v. Lienengood and Second Injury Fund, 134 S.W.3d 75 (Mo. App. W.D. 2004).

ANALYSIS: This is the classic case of SIF involvement. The claimant had at least three significant disabilities before his last injury. First, his back had been fused twice. Second, his right knee had been operated on twice. Third, he had an operated shoulder impingement. The back injury kept him from working as a deck hand or driving a truck because of the vibrations. The knee injury affected his ability to crawl and squat. The shoulder injury affected his ability to use his arm. The injury received in the accident was in and of itself not severe enough to be permanently and totally disabling. It was when combined with these pre-existing conditions that he could not work. This is consistent with the testimony of Dr. Cohen and Mr. England. Based upon all of the evidence presented, it is found that the employer is responsible for 30% of the body as a whole for the back injury, which includes any injury to his hip and 5% of the body as a whole for the depression. The Second Injury Fund is responsible for the rest of the disability.

RULING OF LAW: The employer-insurer shall pay 140 weeks of permanent partial disability at the rate of \$329.42 per week beginning March 19, 2003 for a total of \$46,118.80. The Second Injury Fund shall pay permanent total disability at the rate of \$338.87 per week. For the first 140 weeks of this disability, the Second Injury Fund is liable for the difference in the PPD and PTD rates of \$9.45 per week. Beginning November 23, 2005, the Second Injury Fund shall be liable for the entire permanent total disability of \$338.87 per week.

ATTORNEY'S FEE:

Jeffrey P. Gault, attorney at law, is allowed a fee of 25% of all sums awarded (exclusive of future medical benefits) 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:

Michael Moroni
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation