

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

Injury No.: 01-125679

Employee: Timothy Tucker
Employer: Alstom Power
Insurer: American Zurich Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we affirm the order of the administrative law judge by separate opinion. The award and decision of Administrative Law Judge Matthew W. Murphy, issued January 13, 2011, is attached solely for reference and is not incorporated by this decision.

Preliminaries

The issues stipulated at the hearing were: (1) medical causation; (2) employer's liability for additional and future medical treatment; (3) permanent total disability; (4) permanent partial disability; (5) Second Injury Fund liability; and (6) overpayment of temporary total disability benefits.

The administrative law judge appears to have made the following findings: (1) employee proved medical causation; (2) employee is not entitled to future medical care; (3) employee suffered a 35% permanent partial disability of the body as a whole referable to his lumbar spine for the injury of October 3, 2001; (4) employee is permanently and totally disabled due to the combination of his primary injury and preexisting conditions; (5) the Second Injury Fund is liable for permanent total disability benefits; and (6) employer's claim for temporary total disability overpayment is denied. We note that the administrative law judge's award contains no findings of fact or resolution of the conflicting expert opinions presented in this matter, but rather proceeds from a brief "summary of evidence" to ultimate conclusions on the issues; given this dearth of analysis and explanation, certain of the foregoing findings are only inferentially apparent.

The Second Injury Fund submitted a timely Application for Review with the Commission alleging the administrative law judge erred by failing to consider the opinions of the vocational expert Terry Cordray and the testimony from Drs. Koprivica, Swaim, and Belz.

For the reasons set forth in this award and decision, the Commission affirms the award of the administrative law judge by separate opinion.

Findings of Fact

Preexisting conditions

In 1966, employee seriously injured his left leg when he jumped off a retaining wall after drinking at a party. Employee underwent 15 surgeries over the course of 3 years in

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connection with that injury. Employee's left leg is shorter than his right, he walks with a limp, and he wears a shin guard on the left leg to protect from further injury. Employee became interested in welding as a career so he wouldn't have to stand and walk so much. Employee's union was aware of his left leg condition and would not call him out on jobs requiring extensive walking.

In 1989, employee sustained a right shoulder injury after a slip and fall at work. Doctors diagnosed a rotator cuff tear and performed a surgical repair. Employee missed almost a year of work as a result of this injury. Employee initially experienced a good result after surgery but suffered a gradual loss of strength and function in his shoulder beginning in 2001. Employee turned down jobs because of his right shoulder.

In July 2001, employee saw a chiropractor for shooting pain in his lower back. The chiropractor noted radiographic findings of mild degeneration, spinal instability, and articular joint narrowing with subluxation from L3 to L5, and recommended employee try a back brace.

Primary injury

On October 3, 2001, employee was working for employer as a welder and boilermaker when he injured his low back. The job that day involved cutting up sections of a boiler. Employee and a coworker were catching panels of the boiler tube as they were cut out of the boiler. Employee and the coworker then carried the panels to a knee-high wall and hoisted them over. The individual panels weighed between 150 and 200 pounds. At one point, employee's coworker walked off the job. Employee tried to carry on by himself. When employee was lifting a panel, he heard a pop and felt something give in his back.

Employee was able to complete his shift on October 3, 2001, and several subsequent shifts, but his back complaints worsened steadily until he sought medical treatment. Diagnostic studies revealed lumbar spine abnormalities including herniations at L4-5 and L5-S1. Most treating doctors did not consider surgery a viable option for employee and recommended conservative treatment and pain management. Employee tried working various jobs through his union for a few months after the primary injury, but has not worked since January 17, 2002.

Employee suffered some additional mild injuries following the primary injury of October 3, 2001. In April 2002, employee rolled about ten feet down an embankment after his leg gave out; employee suffered an aggravation of his chronic back pain and minor abrasions to his right flank and right elbow and a contusion to his right chest wall. Also in 2002, employee was beat up by two cellmates while in jail; employee suffered multiple contusions and was kicked in the back, but contemporary diagnostic studies were negative for new structural injury to employee's low back following this incident.

Expert medical and vocational evidence

Dr. P. Brent Koprivica provided an expert medical opinion for employee and opined that employee is permanently and totally disabled as a result of the October 3, 2001, injury in and of itself. Dr. Koprivica believed employee had preexisting degenerative disc disease that was asymptomatic, and that the primary injury aggravated this condition

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and resulted in employee's permanent and total disability. But Dr. Koprivica admitted on cross-examination that his opinion on causation was premised on his (incorrect) impression that employee's lumbar spine condition was asymptomatic prior to the October 2001 injury. Dr. Koprivica also acknowledged he was not provided records related to employee's preexisting left leg and right shoulder conditions and surgeries and did not have the records from Dr. Hawkins (employee's treating doctor for the back following the primary injury).

Dr. Truett Swaim provided an expert medical opinion for employee. Dr. Swaim opined that employee suffered a 40% preexisting permanent partial disability of the left knee, a 30% preexisting permanent partial disability of the right shoulder, and that as a result of the work injury, employee suffered a 50% permanent partial disability of the body as a whole referable to the low back. Dr. Swaim opined that employee is permanently and totally disabled due to the effects of the work injury considered in isolation, but like Dr. Koprivica, Dr. Swaim indicated that employee denied any significant preexisting low back complaints.

Dr. Michael Carl provided an expert medical opinion for the employer. Dr. Carl diagnosed lumbar degenerative disc disease with three-level positive discogram and bilateral lumbar radiculopathy, and rated employee's low back at 15% permanent partial disability of the body as a whole. Dr. Carl did not provide any opinion as to employee's ability to work following the primary injury.

Dr. William Reynolds provided an expert medical opinion for the employer. Dr. Reynolds found that employee's overall back condition was a combination of preexisting degenerative disc disease and aggravation from the work injury. Specifically, he testified that "it's a combination of things. It's not one thing. It's not all genetic, and it's not all work. But it's a combination of the two."

Dr. Norbert Belz provided an expert medical opinion for the employer. Dr. Belz rated employee's preexisting left leg condition at 30% permanent partial disability and his preexisting right shoulder condition at 12.5%, and opined that both conditions constituted hindrances and obstacles to employment. Dr. Belz assigned 20% permanent partial disability of the body as a whole referable to the low back to employee's preexisting low back condition, with an additional 5% resulting from the primary injury, and 10% resulting from injuries sustained in the 2002 jail beating and fall down an embankment. Dr. Belz opined employee reached maximum medical improvement from the work injury on March 12, 2002. With regard to permanent total disability, Dr. Belz believed employee is rendered unemployable due to a combination of his preexisting, primary, and subsequent injuries, including the 2002 jail beating and fall. Dr. Belz also opined, however, that if one looks at employee's ability to function after the last injury without considering the subsequent injuries, employee may be considered permanently and totally disabled as a result of a combination of the primary injury and previous conditions.

Terry Cordray provided an expert vocational opinion for employee. Mr. Cordray opined that employee is permanently and totally disabled from any job due to his need for pain medications and the doctors limiting him to sedentary-level activity. Mr. Cordray specified that employee is permanently and totally disabled due to a combination of his

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left leg, right shoulder, and low back conditions. Mr. Cordray testified, however, that he was unaware of any significant preexisting back complaints or disability, and was further unaware of employee's subsequent low back injuries in 2002, and admitted that, given this new information, he was "stymied" and could not say whether employee was permanently and totally disabled due to the back injury alone or rather some combination of preexisting conditions, the primary injury, and subsequent injuries.

Clearly, the expert medical and vocational opinions in this matter suffer greatly from employee's failure to provide a consistent and accurate medical history, and because many of these experts were not provided a complete set of relevant medical records. Dr. Koprivica, Mr. Cordray, and, to some extent, Dr. Swaim all acknowledged that their opinions relied on the incorrect belief that employee's preexisting degenerative disc disease was asymptomatic. Faced with this record, we believe Dr. Belz provides the most reliable expert opinion evidence.

Dr. Belz's initial interview and evaluation of employee lasted in excess of four hours and, as his multiple reports reveal, his analysis was subject to numerous updates and corrections as new or more accurate information was revealed to him. In our view, Dr. Belz had the most clear picture of employee's medical history, and we have more confidence in his opinions as a result. We adopt Dr. Belz's ratings that employee suffered 30% preexisting permanent partial disability of the left leg, 12.5% of the right shoulder, and 20% of the body as a whole referable to the low back as of October 3, 2001. We find Dr. Belz's rating as to the work injury overly conservative, especially given that employee was under no work restrictions and had only sought treatment once before the work injury for low back complaints. Rather, we find the administrative law judge's finding to be a fair and reasonable measure of the permanent disability resulting from the work injury. Accordingly, we find that employee's work was a substantial factor resulting in a 35% permanent partial disability of the body as whole referable to the low back. We find that employee reached maximum medical improvement from the work injury on March 12, 2002.

Dr. Belz believed employee is permanently and totally disabled as a result of his preexisting, primary, and subsequent injuries, but acknowledged that, for purposes of workers' compensation liability, employee may be considered permanently and totally disabled as a result of the last injury in combination with his preexisting conditions. We note that Dr. Belz placed considerable emphasis on injuries subsequent to the primary injury and on a degenerative condition he diagnosed with respect to employee's knees (a condition Dr. Belz diagnosed without the benefit of any diagnostic films), but we also note that Dr. Belz clearly misunderstood the mechanism of injury in the April 2002 rolling incident, and believed employee was injured far more extensively in the 2002 jail beating than contemporaneous medical records reflect. With regard to the April 2002 incident, Dr. Belz thought employee fell from a height of ten feet onto his side, but employee actually fell on his side and then rolled approximately ten feet down an embankment. With regard to the jail beating, Dr. Belz believed employee suffered permanent injuries because he was prescribed narcotic medications soon after the incident, but Dr. Belz also admitted that employee had previously been on narcotics and the prescription of narcotics does not, in and of itself, establish a permanent injury.

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Accordingly, for purposes of our analysis, we are most persuaded by Dr. Belz's testimony that employee may be considered permanently and totally disabled as a result of the last injury in combination with his preexisting disabling conditions. We so find.

Conclusions of Law

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

We are convinced that employee's preexisting disabilities were serious enough to constitute hindrances or obstacles to employment for purposes of § 287.220 RSMo. Employee provided evidence of preexisting left leg, right shoulder, and low back conditions. Each of these conditions had the potential to combine with future work-related injuries so as to cause greater disability than would have resulted in the absence of these conditions. The facts of this case reveal that this is especially true with regard to the low back. Dr. Belz rated employee's preexisting left leg condition at 30% permanent partial disability, right shoulder at 12.5%, and low back at 20% of the body as a whole and opined that employee's preexisting conditions amounted to hindrances or obstacles to employment, and we have found these opinions of Dr. Belz to be credible. We conclude that at the time he sustained the October 3, 2001, work injury, employee suffered from preexisting left leg, right shoulder, and low back conditions, each of which constituted hindrances or obstacles to his employment or reemployment.

We now proceed to the question whether employee met his burden of establishing entitlement to compensation from the Second Injury Fund. Section 287.220.1 RSMo provides, in relevant part, as follows:

If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, ... 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 employer at the time of the last injury is liable is less than the 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

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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" ...

The foregoing section requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, and not the Second Injury Fund, is responsible for the entire amount of compensation. See *ABB Power T & D Co. v. Kemper*, 236 S.W.3d 43, 50 (Mo. App. 2007).

We have found that, as a result of the last injury, employee sustained a 35% permanent partial disability of the body as a whole referable to the low back. Dr. Belz opined that employee is not permanently and totally disabled as a result of the work injury considered alone, but that he may be considered permanently and totally disabled as a result of the work injury in combination with employee's preexisting conditions of ill, and we have found this testimony from Dr. Belz credible. We conclude that the injury of October 3, 2001, considered in isolation, did not render employee permanently and totally disabled, but that employee is disabled due to a combination of his preexisting disabilities and conditions of ill as they existed on October 3, 2001, in combination with the injuries sustained on that date.

We conclude, therefore, that employee has met his burden of establishing Second Injury Fund liability under § 287.220.1. We conclude that the Second Injury Fund is liable for permanent total disability benefits.

Conclusion

Based upon the foregoing, we affirm the award of the administrative law judge with this separate opinion.

Employer is ordered to pay to employee permanent partial disability benefits at the rate of \$329.42 for 140 weeks, beginning March 12, 2002.

The Second Injury Fund is ordered to pay to employee weekly payments of \$299.48, the difference between employee's permanent total disability rate (\$628.90) and employee's permanent partial disability rate (\$329.42) for 140 weeks (the extent of employer's liability for the work injury) beginning March 12, 2002 (employee's date of maximum medical improvement). Thereafter, the Second Injury Fund is liable to employee for weekly permanent total disability benefits in the amount of \$628.90 for his lifetime, or until modified by law.

This award is subject to a lien in favor of John R. Stanley, Attorney at Law, in the amount of 25% for necessary legal services rendered.

We advise the parties that Division of Workers' Compensation (Division) records reveal that on April 23, 2003, the Division, in accordance with § 454.517.5 RSMo, mailed to the parties a copy of a Notice of Lien of Workers' Compensation Benefits in favor of Theresa M. Lane.

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Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Matthew W. Murphy, issued January 13, 2011, is attached solely for reference and is not incorporated by this decision.

Given at Jefferson City, State of Missouri, this 11th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Timothy Tucker

DISSENTING IN PART

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 employee is permanently and totally disabled due to the last injury alone.

I disagree with the decision of the majority to rely on Dr. Belz to find Second Injury Fund liability. I gather that in characterizing Dr. Belz's opinion as concluding that employee "may" be considered permanently and totally disabled as a result of the last injury combined with his preexisting conditions, the majority is referring to the following testimony from Dr. Belz:

If he is permanently and totally disabled by the factfinder alone after the injury of 10/3/01, then that permanent and total disability would not be by 10/3/01 acting alone. That permanent and total disability would require a combination in excess of simple sum of all prior diagnoses and the last injury of 10/3/01 ... Alternatively, if the legal community finds that he is permanently and totally disabled by the back acting alone, then—and that being after 10/3/01 and not counting the subsequent back, if the legal community finds he is permanently and totally disabled by the back as a single body part existing as it exists after 10/3/01, then that permanent and total disability referencing the back as it exists after 10/3/01 must include and would include the prior back and the last back disabilities, combining considerably in excess of simple sum.

Transcript, page 362.

I do not read the foregoing as indicative of an actual opinion by the doctor in favor of Second Injury Fund Liability. Rather, the doctor is indicating that "if the legal community" determines that employee is permanently and totally disabled and ignores the subsequent events (which Dr. Belz made clear were a necessary part of his overall permanent total disability opinion) then we cannot, according to Dr. Belz, find that it was the primary injury acting alone, but that such a finding will "require a combination." The doctor was simply saying that he doesn't think the primary injury was permanently and totally disabling in itself. He was not offering an opinion supportive of a finding of Second Injury Fund liability, and when one considers his testimony in its entirety, it is clear Dr. Belz's opinion is actually antithetical to such a finding.

Besides the fact I don't read Dr. Belz's testimony as providing support for the majority's choice, I further find Dr. Belz's overall opinion lacking credibility. Employer has taken a stray treatment record from a sole visit to a chiropractor in July 2001 and paraded it as evidence that employee suffered a significant preexisting permanent partial disability of his low back. Employer and Dr. Belz even go so far as to read the chiropractor's suggestion that employee try a back brace as somehow indicative that employee's back pain was so bad that he was a candidate for a lumbar fusion surgery before the work injury. Setting aside the lack of any evidence that employee ever obtained or used a back brace after that visit to the chiropractor, the employer and Dr. Belz ignore the

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uncontested facts that employee was not under regular care by any physician for back pain, was under no work restrictions, was not taking pain medications and was working full time doing extremely physically demanding work as a boilermaker before his injury in October 2001. On the other hand, after that injury, employee is on Percocet, Gabapin, and Celebrex for chronic low back pain and shooting pains in his right leg, and has to use a cane to stand upright. Employee credibly testified that he only went to the chiropractor at his girlfriend's insistence, that he never went back, and that he didn't have any significant back pain prior to October 3, 2001. I don't think the chiropractor's treatment note provides any support for a finding employee suffered preexisting permanent partial disability of his low back, let alone 20% of the body as a whole, when it's uncontested employee was regularly lifting as much as 75 pounds at work with no problems before the primary injury.

After carefully considering each of the expert opinions, I find the testimony of Drs. Koprivica and Swaim most persuasive. At his deposition, Dr. Koprivica acknowledged that he was unaware of the chiropractor visit in July 2001, but did not indicate that evidence of this visit changed his overall opinions as to causation. To the contrary, Dr. Koprivica had previously acknowledged that employee had preexisting degenerative disc disease, but opined that the injury of October 3, 2001, caused a permanent aggravating injury including annular injury at three disk levels with disc herniation at L5-S1, with the result that employee now has chronic multi-level low back pain and ultimately is rendered unemployable due to that injury alone. I find it compelling that Dr. Swaim, who was well aware of the chiropractor visit and gave appropriate weight to what was obviously a one-time visit for non-disabling back pain, similarly opined that employee is permanently and totally disabled due to the work injury. I find the testimony from these doctors more reliable than that provided by Dr. Belz. I find that the injury of October 3, 2001, was a substantial factor causing permanent aggravation of employee's degenerative disc disease and the chronic pain he now experiences, and that employee is permanently and totally disabled as a result of that injury.

In sum, I would modify the award to find that employer, rather than the Second Injury Fund, is liable to employee for permanent total disability benefits.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Curtis E. Chick, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Timothy Tucker Injury No.: 01-125679
Dependents: N/A
Employer: Alstom Power
Additional Party: Missouri State Treasurer as
Custodian of the Second Injury Fund
Insurer: American Zurich Insurance Co.
Appearances: Employee in person and by Attorney John R. Stanley
Employer by Attorney William Lemp
Second Injury Fund by AAG Eileen Krispin
Hearing Date: October 7, 2010 Checked by: MM/rf

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? October 3, 2001.
5. State location where accident occurred or occupational disease contracted: Jefferson 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 was contracted: Employee injured his back while carrying large panels of tubes.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Body as a whole (back).
14. Nature and extent of any permanent disability: 35% PPD of the body as a whole (back).
15. Compensation paid to date for temporary total disability: \$71,456.60 through July 29, 2001.
16. Value necessary medical aid paid to date by employer-insurer: \$46,748.56.
17. Value necessary medical aid not furnished by employer-insurer: None.
18. Employee's average weekly wage: \$1,437.31.
19. Weekly compensation rate: \$628.90 for TTD and PTD, \$329.42 for PPD.
20. Method wages computation: Stipulation.
21. Amount of compensation payable: Employer is ordered to pay \$46,118.80 for PPD benefits owed.
22. Second Injury Fund liability: The Fund is ordered to pay Employee weekly PTD benefits in the amount of \$628.90 beginning on July 29, 2004 and continuing for the remainder of his life pursuant to RSMo. §287.200 (2000). The Fund is entitled to a credit of \$329.42 per week for the first 140 weeks.
23. Future requirements awarded: No order for future medical care is made. The Fund is ordered to pay PTD benefits pursuant to §287.200 (2000).

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: John R. Stanley.

FINDINGS OF FACT AND RULINGS OF LAW

On October 7, 2010, the employee, Tim Tucker, appeared in person and by his attorney, John R. Stanley, for a hearing for a final award. The employer was represented at the hearing by its attorney, Williams Lemp. The Missouri State Treasurer as Custodian of the Second Injury Fund (Fund) was represented at the hearing by its attorney, Eileen Krispin. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. **Covered Employer** - Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Law, and liability was fully funded by: American Zurich Insurance Company.
2. **Covered Employee** - On or about the date of the alleged accident disease, the employee was an employee of Alstom Power and was working under the Missouri Workers' Compensation Law.
3. **Accident** - On or about Wednesday, October 03, 2001 the employee sustained an accident arising out of and in the course of his employment.
4. **Notice** - Employer had notice of employee's accident.
5. **Statute of Limitations** - Employee's claim was filed within the time allowed by law.
6. **Average Weekly Wage and Rate** - Employee's average weekly wage rate was \$1,437.31. The rate of compensation for temporary total disability and permanent total disability was \$628.90. The rate for permanent partial disability was \$329.42.
7. **Medical Aid Furnished** - Employer/Insurer has paid medical aid in the amount of \$46,748.56.
8. **Temporary Total Disability Paid** - Employer/Insurer has paid \$71,456.60 as temporary total disability benefits through July 29, 2004.
9. **Previously Incurred Medical** - There is no claim for previously incurred medical.
10. **Mileage or other medical (287.140 RSMo)** - There is no claim for mileage or other medical expenses under 287.140 RSMo.
11. **Additional TTD or TPD** - There is no claim for additional TTD or TPD benefits.

ISSUES

1. **Medical Causation** - There is a dispute as to whether the employee's injury was medically causally related to the accident.
2. **Additional or Future Medical** - Employee is claiming additional or future medical aid.
3. **Permanent Total Disability** - Employee is claiming permanent total disability benefits.
4. **Permanent Partial Disability** - Employee is claiming permanent partial disability benefits.
5. **Second Injury Fund Liability** - Employee is claiming benefits against the Fund pursuant to §287.220 (2000).
6. **TTD Overpayment** - Employer is claiming an overpayment of TTD alleging an MMI date of March 12, 2002.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee’s Exhibits

Identifier	Description
A	Dr. Koprivica Deposition
B	Dr Swaim Deposition
C	Terry Cordray Deposition
D	Dr. Carl Deposition
E	Dr. Reynolds Deposition
F1	Dr. Belz Deposition

Employer-Insurer’s Exhibits

Identifier	Description
F1	Dr. Belz Deposition
2	Hulsey Chiropractic Records
3	St. John Sapulpa Records
4	Dr. Hawkins Records
5	Dr. Kinney Records

Second Injury Fund Exhibits

No Exhibits Identified

SUMMARY OF EVIDENCE

Employee testified live at the hearing of this matter. Employee is currently unemployed. He has not been employed since 1/17/2002. He has a 12th grade education.

Following high school, Employee suffered a severe break to his left leg. This injury required more than ten surgeries over a period of five (5) years, bone grafts, skin grafts and extended hospital stays. Employee testified that his left leg is ¾” shorter than his right leg as a result of this injury. Employee testified that he had a good recovery from the injury and “they couldn’t have done a better job” repairing his leg.

Employee also suffered a right shoulder injury prior to the primary injury giving rise to this claim. He underwent a surgery to repair his right shoulder. While he had a fairly good result from the shoulder surgery, he testified that he did have to turn down union jobs that involved overhead work with his right arm.

Employee's claim involves an injury that he testified he suffered on October 3, 2001 while working at the Rush Island Power Plant in Festus, MO. Employee testified that he was cutting out panels of tubes. Each section weighed 150 to 200 lbs. Employee was working with another employee catching panels as they were being cut by a third employee and then hoisting them over a knee high wall. The individual that was catching panels with Employee decided that he was being worked too hard and walked off the job. Employee tried to keep up with the workload on his own.

On this day, Employee began to experience back pain that was shooting down his right leg. Employee reported these symptoms to the safety man. Employee was eventually sent to a doctor and placed on light duty. Employee tried to work within the restrictions but found that he could not perform the duties assigned to him. He tried a couple of other jobs that he thought he could perform, however these did not work out.

Employee was seen by several surgeons/physicians and diagnosed with disc injury at three levels. Each medical expert opined that Employee was not a surgical candidate because the injury involved three levels. Employee continues to submit to pain management treatment including prescription pain-killers.

Employee's typical day is rather sedentary. He wakes up early. He rides along with his wife while she performs errands. He watches a significant amount of T.V. And, he periodically visits his mother in the nursing home.

Employee took a Percoset prior to the hearing of this matter. He was a terrible historian. Employee demonstrated throughout the hearing that he was in pain. He used a cane. He testified that he felt the cane helped him and he had several canes of his father's available to him to use.

FINDINGS OF FACT AND RULINGS OF LAW:

Issue 1. Medical Causation

There is a dispute as to whether the employee's injury was medically causally related to the accident. Having reviewed the medical evidence, the testimony of the experts and the testimony of Employee, I find that Employee's back injury, specifically, the disk abnormalities at L3/4, L4/5, and L5/S1.

Issue 2. Additional or Future Medical

Employee is claiming additional or future medical aid. Having reviewed the opinions of the experts, I find that Employee's work related injury does not necessitate and he is, therefore, not entitled to any additional or future medical care the cure and relieve the back injury of October 3, 2001.

Issues 3 and 4. Permanent Total Disability and Permanent Partial Disability

Having reviewed the testimony of Employee, the opinions of the experts and the medical records, I find that Employee has suffered a 35% permanent partial disability to the body as a whole referable to his lumbar spine for the injury he received on October 3, 2001. I further find that Employee is permanently and totally disabled due to the combination of his primary (10/3/2001) injury and the pre-existing leg and shoulder injuries.

Employee is ordered to pay Employee $(0.35 * 400 * \$329.42 =)$ \$46,118.80 for PPD benefits.

Issue 5. Second Injury Fund Liability

I find that Employee reached maximum medical improvement on July 29, 2004. Having previously found that Employee is permanently and totally disabled due to a combination of his primary and pre-existing injuries, the Fund is ordered to pay Employee weekly PTD benefits in the amount of \$628.90 beginning on July 29, 2004 and continuing for the remainder of his life pursuant to RSMo. §287.200 (2000). The Fund is entitled to a credit of \$329.42 per week for the first $(0.35 * 400 =)$ 140 weeks.

Issue 6. TTD Overpayment

I find that Employee reached maximum medical improvement on July 29, 2004. Employer paid TTD benefits through that date. Employers claim for TTD overpayment is denied.

ATTORNEY'S FEE

Attorney John R. Stanley, 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.

Made by:

Matthew W. Murphy
Administrative Law Judge
Division of Workers' Compensation

Employee: Timothy Tucker

Injury No. 01-125679

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

Date: _____