

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

Injury No.: 00-020686

Employee: Ronald W. Ward
Employer: Wal-Mart 2221
Insurer: American Home Assurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This 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 modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to resolve the following issues: (1) whether employer is liable for employee's previously incurred medical expenses; (2) whether employer is liable for employee's future medical expenses; (3) whether employee was temporarily partially disabled or temporarily totally disabled from September 8, 2000, through September 23, 2000, and May 4, 2001, through August 15, 2005; (4) whether employee is permanently and totally disabled, and if so, whether employer or the Second Injury Fund is liable; (5) the liability, if any, of the employer and Second Injury Fund for permanent partial disability benefits; (6) whether employer is responsible for payment of a Medicaid lien; and (7) whether employer is liable for employee's attorney's fees and expenses.

The administrative law judge rendered the following findings and conclusions: (1) employer is liable for employee's previously incurred medical expenses; (2) employer is liable for employee's future medical expenses; (3) employee sustained a 40% permanent partial disability of the body as a whole referable to the low back as a result of the last injury; (4) employer is liable for temporary partial disability benefits from September 23, 2000, to May 4, 2001; (5) employer is liable for temporary total disability benefits from September 8, 2000, through September 23, 2000, and from May 4, 2001, through August 15, 2005; (6) employee is permanently and totally disabled as a result of the last injury in combination with his preexisting conditions of ill such that the Second Injury Fund is liable for permanent total disability benefits; (7) employer is liable for the Medicaid lien; and (8) employer is liable for any unpaid amount of attorney's fees awarded in the Temporary Award.

Employee filed a timely Application for Review with the Commission alleging employer, rather than the Second Injury Fund, is liable for permanent total disability benefits.

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The issue presently before us is whether employer or the Second Injury Fund is liable for employee's permanent total disability.

Findings of Fact

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact on the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modification herein.

The last injury considered in isolation

From the credible testimony of employee and his wife, and employee's Exhibits H and I, we find the following facts regarding the effects of the work injury upon employee.

Employee experiences pain with ambulation and walks with a cane. He is unable to lift anything heavier than a gallon of milk. Employee can't do any work below his waist or above his head. Employee can't dress himself. Employee can't drive for more than 15 to 20 minutes before having to stop and walk around. Employee can't go hunting or fishing anymore. Employee can't participate in his sons' sports activities or even sit through one of their ball games. Employee can only sleep for 2 to 3 hours at a time before he has to get up and move around. Employee can't run and can't walk more than 200 yards. Employee can't climb stairs unless he takes one or two at a time and rests. Employee can't mow his own yard or do any kind of yard work. Employee has to frequently alternate between sitting and standing and has to lie down 3 to 4 times per day due to pain. Employee takes Hydrocodone and Tramadol for pain. Employee has gained 60-65 pounds owing to inactivity. Employee takes Effexor and Xanax for anxiety and depression; employee is depressed because he can't do anything owing to his limitations following the work injury.

Susan Shea, the vocational expert, opined that employee's physical limitations, the fact that it is painful for him to ambulate, his need for pain medication, his depression, and his inability to sit or stand for any length of time, combined with his lack of transferable skills that might allow him to move to lighter work, have the effect that it is not feasible to expect any typical employer to even consider an individual such as employee for hire. We credit this opinion. Ms. Shea ultimately opined that employee is not employable as a result of "his past and present injuries." *Transcript*, page 285. In light of Ms. Shea's admission that she was unaware of anything that kept employee from being able to compete in the open labor market owing to his 1997 back surgery, we do not find credible or adopt this portion of Ms. Shea's testimony.

Permanent total disability

We agree with and adopt the administrative law judge's finding that employee is permanently and totally disabled. We have carefully reviewed the evidence as to employee's permanent total disability and its possible causes.

We note employee's credible testimony that he had no problems with his back before the work injury. We note also the evidence that treating doctors released employee to

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return to work with no restrictions following the 1997 surgery, and that Dr. Gornet, who performed the fusion surgery following the primary injury, related all of employee's disability and impairment directly to the primary injury and 0% to the 1997 injury.

On the other hand, we have an opinion from Dr. Volarich that employee suffered a 20% preexisting permanent partial disability of the body as a whole referable to the 1997 low back injury and surgery. In his report, Dr. Volarich indicated he provided this rating for "preexisting back pain and any lost motion." *Transcript*, page 226. Employee credibly testified that he did not even take over-the-counter medications such as Advil or Tylenol for back pain before the primary injury. We find employee's own testimony as to the nature of his preexisting condition more credible on this point than Dr. Volarich's opinion or rating. We find employee did not suffer any preexisting permanent partial disability referable to the 1997 low back injury and surgery.

We do find credible Dr. Volarich's testimony that employee is permanently and totally disabled, but we disagree with the administrative law judge's reading of Dr. Volarich's ultimate opinions. In his report, Dr. Volarich offered his opinion that employee is permanently and totally disabled as a result of the primary injury in combination with "preexisting lumbar syndrome." In his testimony, however, Dr. Volarich did not even mention "lumbar syndrome," nor did he describe any combination of the work injury with any identifiable preexisting disability. Rather, he explained employee's permanent total disability is a result of a combination of the primary injury "and [employee's] preexisting discectomy." *Transcript*, page 201. Dr. Volarich explained that employee's low back was more susceptible to severe injury owing to the preexisting post-surgical condition at L5-S1. Because of this preexisting post-surgical condition, employee needed a bi-level fusion after the primary injury. Ultimately, employee's need for this surgery (and his bad result following that surgery) is the source of employee's permanent total disability, according to Dr. Volarich; Dr. Volarich testified that this is the sole basis of his "combination total" opinion.

In our view, Dr. Volarich has not offered an opinion that employee's primary injury has combined with any preexisting disability referable to the low back. Rather, Dr. Volarich appears to believe that the asymptomatic, non-disabling condition of employee's back referable to the preexisting discectomy helps to explain why the work injury was so severe. We credit Dr. Volarich to the extent that his testimony explains why the work injury was so severe. We do not, however, credit his ultimate opinion that employee is permanently and totally disabled owing to a combination of the work injury and any preexisting permanent partial disability.

Conclusions of Law

Section 287.220.1 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent total disability benefits, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with the prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1

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requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). If employee is permanently and totally disabled due to the last injury considered in isolation, the Fund has no liability. *Id.*

We have credited employee and employee's wife as to the effects of the last injury. That testimony strongly suggests that the work injury, considered in isolation, is the source of employee's permanent total disability. We have found that employee's preexisting asymptomatic and non-disabling condition at L5-S1 helps explain why the work injury was so severe, but this finding alone cannot shift liability for employee's permanent total disability from employer to the Second Injury Fund. To the contrary, well-settled principles of applicable case law require that employer is liable in these circumstances:

Preexisting conditions are not denominated 'disabilities' as of the date of the second injury simply because, at some point in the future, they combine with that injury to render the claimant permanently disabled. As between the employee and *employer*, a preexisting but non-disabling condition does not bar recovery of compensation if a job-related injury causes the condition to escalate to the level of disability. If substantial evidence exists from which the Commission could determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties, there is sufficient competent evidence to warrant a finding that the claimant's condition was aggravated by a work-related injury.

Portwood v. Treasurer of Missouri-Custodian of the Second Injury Fund, 219 S.W.3d 289, 293 (Mo. App. 2007) (citations omitted) (emphasis in original).

We have found that employee did not suffer any preexisting permanent partial disability referable to the low back. We have found that the work injury, considered in isolation, results in limitations that Ms. Shea credibly opined would take employee out of competition for normal employment in the open labor market. It follows that employee is permanently and totally disabled owing to the effects of the work injury considered alone.

We conclude that employer, not the Second Injury Fund, is liable for permanent total disability benefits.

Award

We modify the award of the administrative law judge as to the issue whether employee is permanently and totally disabled due to the effects of the last injury considered alone. The employee is permanently and totally disabled, but it is employer, not the Second Injury Fund, that is liable to employee for permanent total disability benefits. In all other respects, we affirm the award.

We direct employer to pay to employee a permanent total disability benefit in the amount of \$157.60 per week, beginning August 16, 2005, the day after employee achieved maximum medical improvement, to continue for employee's lifetime, or until modified by law.

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The award and decision of Administrative Law Judge Maureen Tilley, issued December 23, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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 24th day of August 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Ronald W. Ward Injury No.: 00-020686
Employer: Wal-Mart 2221
Insurer: American Home Assurance Company
Additional party: Second Injury Fund
Hearing Date: September 29, 2011 Checked by: MT/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? February 25, 2000.
5. State the location where the accident occurred or occupational disease contracted:
Dunklin County, Missouri.
6. Was the Employee in the employ of above Employer at the time of the alleged incident or occupational disease? Yes.
7. Did the Employer receive proper notice? Yes.
8. Did the accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was a Claim for Compensation filed within time required by law? Yes.
10. Was the Employer insured by the Insurer? Yes.
11. Describe the work that the Employee was doing and how the accident happened or occupational disease contracted: The Claimant, while in the course and scope of his

employ, was using a wrench to remove the fill-plug to check the fluid in the rear differential of a vehicle when the wrench slipped, twisting his back and causing his injury.

12. Did the accident or occupational disease cause death? No.
13. Part of the body injured by the accident or occupational disease: Low back – body as a whole.
14. Nature and extent of any permanent disability: See findings.
15. Compensation paid to date for temporary total disability: \$4,709.40.
16. Value necessary medical aid paid to date by employer-insurer: \$191,761.66.
17. Value necessary medical aid not furnished by employer-insurer: \$11,850.45.
18. Employee's average weekly wage: \$234.40.
19. Weekly compensation rate: \$157.60.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See findings.
22. Second Injury Fund liability: See findings.
23. Future requirements awarded: None.

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: Daniel Rau.

FINDINGS OF FACT AND RULINGS OF LAW

On September 29, 2001, the employee, Ronald Ward, appeared in person and with his attorney, Daniel Rau, for a hearing for a final award. The employer was represented at the hearing by its attorney, Maurice Early. The Second Injury Fund was represented by Gregg Johnson. 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. That the Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was fully insured.
2. That on February 25, 2000, the Employee was an employee of Wal Mart 2221, in Dunklin County, Missouri, and was working under the Workers' Compensation Act.
3. That on or about February 25, 2000, the Employee sustained an accident arising out of and in the course of his employment.
4. That the Employer had notice of the Employee's accident.
5. That the Employee's claim was filed within the time allowed by law.
6. That the Employee's average weekly wage was \$234.40 and the TTD, PPD and PTD rate is \$157.60.
7. Medical causation: Employee's injury was medically causally related to accident or occupational disease.
8. That the medical aid furnished by the Employer/Insured totaled \$191,761.66.
9. That the temporary total disability paid by the Employer/Insured is \$4,709.40 or 24 and 3/7th weeks from February 29, 2000 to August 18, 2000.

ISSUES

1. Whether the Employee is entitled to payment of previously incurred medical bills in the amount of \$11,850.45.
2. Whether the Employee is entitled to future medical aid.
3. Whether the Employee is entitled to additional TTD benefits from September 8, 2000 to September 23, 2000, in the amount of \$315.20, with TPD benefits from September 23, 2000 to May 4, 2001 in the amount of \$1,395.70 with TTD benefits from May 4, 2001 to August 15, 2005 (should the Employer only be liable for PPD) in the amount of \$35,932.80.
4. Whether the Employee is entitled to permanent total disability benefits from and after May 4, 2001, against the Employer/Insurer or in the alternative against the Second Injury Fund.
5. Whether the Employee is entitled to Permanent Partial Disability Benefits against the Second Injury Fund or in the Alternative against the Employer/Insurer.
6. Whether the Employer/Insurer is responsible for payment of the Medicaid Lien.
7. Whether the Employer/Insurer is responsible for the award of Attorney's Fees and expenses awarded in the July 12, 2004, Temporary Award.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

- A. Deposition of Dr. Volarich with exhibits.
- B. Deposition of Susan Shea with exhibits.
- C. Medical records and medical bills.
- D. Medication list.
- E. Stipulation for Compromise Settlement Injury No. 97-005546.
- F. Stipulation for Compromise Settlement Injury No. 97-005547.
- G. Medical Report of Dr. Parisoon.
- H. Employee's list of things he can no longer do.
- I. Employee's wife's list of things that Employee can no longer do.
- J. Medicaid Lien.

Employer/Insurer's Exhibits:

- 1. Deposition of James England.
- 2. Deposition of Dr. Donald deGrange.
- 3. Deposition of the Employee.
- 4. Medical records of Dyersburg Clinic.

Second Injury Fund Exhibits:

None.

FINDINGS OF FACT AND RULINGS OF LAW

Employee's Testimony

Pre-Existing Injury

Employee testified that on January 23, 1997, while he was working for Bluff City Beer he was moving a whiskey rack when he felt a sharp pain in his low back and left shoulder. Subsequent to this injury he received little or no medical care for his left shoulder complaints but had a left L5-S1 partial hemilaminectomy and microdiscectomy due to a left L5 herniated nucleus pulposus. Employee testified that he recovered from this work injury and returned to work at a heavy manual labor level of work. On September 12, 1997, Employee settled his work injury case from July 23, 1997, for 1% of the left shoulder and 17.5% of the body as a whole referable to the low back.

Work History

Employee testified that he had a high school education with no college or trade school education. His work history consisted of farm work, vending machine repair, factory work, beer delivery, propane delivery and mechanic work.

Employee began working for Employer in the summer of 1999 and he worked as a technician in the tire and lube area. Employee's principle job duties included performing oil changes, replacing batteries and installing tires on a variety of passenger vehicles.

Primary Injury

On February 25, 2000, Employee sustained a work related injury while employed for Employer. The injury occurred when he was underneath a vehicle in the pit turning a wrench to check the fluid in the differential of a vehicle being serviced. The wrench slipped causing an injury to Employee's low back with symptoms radiating into his left lower extremity. Employee went to see Dr. Martinez who documented the work injury, prescribed medication and ordered a MRI. The MRI was conducted on March 2, 2000, and showed a herniated disk at L4-5. As a result of the MRI, Dr. Martinez took Employee off work and referred him to a neurosurgeon. Employee saw Dr. Brophy on March 27, 2000, and the doctor noted that Employee had returned to full duty work past his surgery in 1997 and as a result of the 2000 work injury he kept Employee off work and scheduled an injection.

The first lumbar epidural steroid injection was performed on April 4, 2000. When Employee returned to Dr. Brophy after the first injection, Dr. Brophy noted that Employee did not have improvement with the injection and wanted to try another. The second injection was a block and it was performed on April 24, 2000. After the second injection, Employee returned to see Dr. Brophy and it was noted the he did not have improvement. Dr. Brophy reviewed the injection procedure with the anesthesiologist and then scheduled Employee for back surgery on May 12, 2000. The surgery on May 12th was a left L4-L5 discectomy.

Post surgically, Employee had some improvement in his left lower extremity complaints but on June 21, 2000, Dr. Brophy noted that the left lower extremity complaints were increasing. In spite of this, Dr. Brophy began work hardening physical therapy on July 3, 2000. Shortly thereafter Dr. Brophy terminated the physical therapy on July 31st after the continued increase in left lower extremity complaints and Employee's inability to perform the prescribed therapy tasks due to back pain with complaints radiating into his left lower extremity. Dr. Brophy then offered a second LESI (lumbar epidural steroid injection). On August 7, 2000, the second LESI was performed. With limiting pain and complaints in the low back and left lower extremity Employee was placed on sedentary work limitations on August 16, 2000. Employer did not return to Employee to work until Dr. Brophy had lifted the work restrictions from sedentary to a 40 pound restriction. On September 23, 2000, Employee returned to work for Employer as a greeter in the lawn and garden department when the work restriction was lifted to 40 pounds. Employee testified that he was severely limited in the work that he could do. Employee stated that he could not bend and lift and that he required frequent position changes. He was also

limited in the hours that he could work. Employee also stated that Employer accommodated his leaving work early due to complaints in his low back that radiated into his left lower extremity.

During the time that Employee had returned to light duty work with Employer, his medical care was transferred to Dr. Miller. The initial visit with Dr. Miller was on October 12, 2000. After that visit, Employee was continued on light duty and not thought to be a surgical candidate. Dr. Miller initially did not want any further injections, however on November 9, 2000, Dr. Miller prescribed another block. This block was not approved by Employer/Insurer until April 18, 2001. Dr. Cicala refused to do the block as the prescription was six months old. At this point in time, Employer/Insurer offered no other medical care and treatment. Instead, Employer/Insurer obtained a disability rating from Dr. Brophy who found Employee to have a permanent partial disability rating of 10% of the body as a whole and a permanent restriction of 40 pounds lifting. Also, on May 4, 2001, Employee ceased working light duty as he could not do the work due to persistent complaints in his low back and left lower extremity. As a result of the lack of medical treatment and continued complaints in the low back and left lower extremity, Employee saw Dr. Matthew Gornet on July 6, 2001.

Dr. Gornet opined that Employee's problems did not resolve with the surgery performed by Dr. Brophy and he offered a fusion surgery to resolve some of the complaints in Employee's low back and left lower extremity. Dr. Gornet offered a causation opinion on July 16, 2001, stating that Employee would require further surgical intervention to adequately treat his problems and that this was medically causally related to the work injury. In spite of the same Employer/Insurer continued to refuse to provide Employee with any medical care and treatment.

On February 19, 2004, a hearing for a temporary award was held with Employee requesting further medical care and an assessment of attorney's fees and expenses pursuant to §287.203 RSMo. Employer/Insurer requested an award of permanent partial disability. On July 21, 2004, the Division issued a Temporary Award awarding Employee the medical treatment that was prescribed by Dr. Gornet as is necessary to cure and aid the work related injury. The Division also awarded the sum of \$500 for attorney's fees.

The medical care provided pursuant to the Temporary Award consisted of a subsequent MRI that was conducted on April 28, 2004. The MRI showed L4 nerve root impingement and problems at L4-5 and L5-S1. Dr. Gornet then performed a L4-S1 fusion surgery on August 18, 2004. Dr. Gornet continued Employee off work and placed him at a light duty restriction of 10 pounds with alternating position changes on March 14, 2005. Also, on this date, Dr. Gornet placed Employee at MMI. On August 15, 2005, Dr. Gornet stated that the restrictions were permanent and the he would need future medicine therapies. On August 24, 2006, Dr. Gornet placed Employee on a sedentary work restriction of 10 pounds with alternating position about every 20 minutes. Dr. Gornet also gave a 50-60% body as a whole rating. Dr. Gornet stated that all disability and impairment was related to the February 25, 2000 injury and not the 1997 injury. Dr. Gornet stated that Employee was working in a laboring type job after the 1997 injury and prior to the 2000 work injury. He also stated that Employee would not be able to be gainfully employed in a laboring type position.

Employee testified that subsequent to the release from Dr. Gornet, he continued to seek treatment from his family care physician and Advanced Pain Center. Employee testified that he requires assistive devices in and around the house and uses a cane to get about. Employee has not returned to any work since May 5, 2001. Also, offered into evidence at the hearing is the list of things that Employee says that he can no longer do after the work injury of February 25, 2000. The same was corroborated by the testimony of Employee's wife and her list of things that Employee cannot do after the work injury and that he could do all of those things prior to the work injury. Further, a list of Employee's current medications was taken into evidence with his testimony as to the needs for the same including the depression that has come with the pain and dealing with the inability to provide for his family.

After Employee was placed at MMI by Dr. Gornet he was evaluated by Dr. David Volarich, Ms. Susan Shea and Dr. deGrange. Also, at the request of Employer/Insurer Mr. England did a records review to prepare a vocational assessment.

Dr. David T. Volarich

Dr. David T. Volarich testified on behalf of Employer by deposition. The doctor testified that the work accident that occurred on February 25, 2000 is the substantial contributing factor as well as prevailing or primary factor causing the new disc herniation at L4-5 to the left that required discectomy as well as requiring the subsequent anterior and posterior fusions at L4-5 and L5-S1 because of persistent post-laminectomy syndrome and left leg radiculopathy. The doctor testified that Employee has achieved MMI with all treatment provided, but still requires pain management. Dr. Volarich stated that Employee would require ongoing care for his pain syndrome using modalities including but not limited to narcotics and non-narcotic medications (NSAID's), muscle relaxants, physical therapy and similar treatments.

Dr. Volarich testified that Employee sustained 75% PPD of the body as a whole as a result of the work accident. In regards to Employee's pre-existing back injury, Dr Volarich assessed 20% PPD of the body as a whole.

Dr. Volarich testified that based on his medical assessment alone, it is his opinion that Mr. Ward is permanently and totally disabled as a result of the work-related injury of 2000 and in combination with his pre-existing lumbar syndrome. Dr. Volarich testified that had it not been for the pre-existing L5-S1 discectomy that placed his back in a weakened condition, he would not have likely required a two-level anterior and posterior fusion after his February 25, 2000 accident.

Dr. Donald deGrange

Dr. Donald deGrange testified on behalf of Employer. The doctor testified that he reviewed all of the medical records as well as examined Employee on February 14, 2011. After his review of medical records and his examination, the doctor concluded that he could find no anatomical or physiological basis for finding of a permanent total disability in this particular Employee. Dr. deGrange testified that Employee could perform in a light physical demand

capacity. The doctor testified that Employee, on an occasional basis, may lift or carry 11 to 20 pounds on a frequent basis up to 10 pounds, and should have a frequency change of position, including sitting, standing or walking, and may also engage in constant pushing and pulling of either hand or leg controls. Dr. deGrange testified that in his opinion, Employee did not need to take frequent breaks to lie down because that is not supported by any objective anatomical or physiological findings on either physical examination or diagnostic testing. Dr. deGrange testified that Employee's fusion is solid and that he did not need to undergo any additional treatment. Dr. deGrange testified that all of his opinions have been within a reasonable degree of medical certainty.

Dr. deGrange concluded that Employee sustained 15% PPD pre-existing for his prior low back injury and 30% PPD for his most recent back injury.

Vocational Testimony

Susan Shea

Ms. Shea, a vocational expert, had a chance to review the medical records, medical report of Dr. Volarich and met with Employee for purposes of completing a complete vocational assessment. Ms. Shea found Employee to be permanently and totally disabled. She has stated that the permanent and total disability was as a result of the 1997 and 2000 work injuries but testified that there was no hindrance to Employee's employability after the 1997 work injury but there certainly was after the 2000 work injury.

Jim England

Jim England, a vocational expert, did not have an opportunity to interview Employee, but did have an opportunity to review medical records, and Employee's deposition testimony before giving his testimony. Mr. England testified that although it does not appear Employee would be physically capable of returning to any of his past work based on Dr. Gornet's restrictions, Employee should still be capable of some type of entry level, sedentary employment, including some security positions either working as an alarm monitor or as a security officer in an office building sitting. Mr. England also testified that Employee could potentially work as a parking lot attendant and as a cashier in settings where a stool is provided for him to alternately change positions during the day. In addition, Mr. England testified that with some basic keyboarding skills Employee would also qualify for employment in sitting, such as customer service work.

Finally, Mr. England testified that even if Employee were permanently and totally disabled, it would be as a result of a combination of his prior injuries and current injuries.

During cross-examination, Mr. England did admit that Employee would have a difficult time finding the types of jobs that he suggested in the rural setting in which Employee lives. Mr. England admitted that Employee would probably have to move to a more metropolitan area in order to obtain those types of jobs.

The Second Injury Fund offered no witnesses or expert reports/depositions.

APPLICABLE LAW

The burden is on the employee to prove all material elements of his claim. *Melvies v. Morris*, 422 S.W.2d 335 (Mo.App. 1968). The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo. as follows:

“All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to received compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of the employee’s disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.”

The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section

287.200 out of a special fund known as the “Second Injury Fund” hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

Section 287.020.7 RSMo. provides the following:

The term “total disability” as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident. The phrase “the inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992). Total disability means the “inability to return to any reasonable or normal employment.” *Brown v. Treasurer of the State of Missouri*, 795 S.W.2d 479, 483 (Mo.App. 1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo.App. 1993).

RULINGS OF LAW:

Issue 1. Whether Employee is entitled to payment of previously incurred medical bills in the amount of \$11,850.45.

To be entitled to payment of past medical bills incurred by Employee, Employee must show that the medical treatment was necessary to cure and aid the work injury and that the same is medically causally related to the work injury. In this case, Employee has submitted medical bills for treatment to his low back. For Employer/Insurer to be held responsible for these bills, Employee must show that the medical care “flows from the accident.” *Crowell v. Hawkins*, 68 S.W. 3d 432 (Mo.App. 2001). The record indicates that the medical bills submitted are those that are for the treatment recommended by Dr. Brophy, Dr. Gornet and Dr. Volarich. Of the outstanding bills submitted into evidence, those owed to St. Francis Hospital-Memphis, Washington University Physicians and Medical Anesthesia Group were for authorized medical care at the direction of Dr. Brophy and then Dr. Gornet. Thus, I find those bills were necessary to cure and aid the work injury and flowed from the accident as the same arise from authorized medical care.

The medical bills owed to Advanced Pain Center submitted into the record would be for medical care in line with the opinions of both Dr. Gornet and Dr. Volarich. Dr. Gornet in his report dated March 14, 2005, stated that Employee had continued left leg pain and would probably require permanent medication to help with that pain. In Dr. Volarich's report he states that Employee would require ongoing care for his pain syndrome using modalities including but not limited to narcotics and non-narcotic medications (NSAID's), muscle relaxants, physical therapy and similar treatments. Thus, I also find that the medical bills submitted into evidence from Advanced Pain Center are medically causally related to the work injury and was necessary to cure and aid the work injury. Further, I find that the same flowed from the accident.

Although I find that the medical treatment that has been provided to Employee by Advanced Pain Center is necessary to cure and aid the work injury and is medically causally related to the work injury of February 25, 2000, the inquiry does not end there as it relates to the medical bills from Advanced Pain Center¹. For Employer/Insurer to be responsible for payment of the medical bills, Employer/Insurer has to have notice that Employee needed medical treatment and that it then failed to provide the medical treatment. Jones v. Dan D. Services LLC, 91 S.W.3d 214 (Mo. App. W.D. 2002). The record reflects that after the release from Dr. Gornet Employee continued to seek medical care from his own physicians and later at Advanced Pain Center. The bills at Advanced Pain Center are at issue here as they were the only bills submitted at the hearing for which there is an alleged balance owed and are for medical care and treatment after the end of the authorized medical care. The Division of Workers Compensation minute entries related to this case indicate that as early as May 11, 2006, there were issues with regard to payment of medical bills. Also, prior to this date there is evidence that Employer/Insurer disputed certain medical bills that were submitted by Employee for payment. Further, Employee's deposition was taken on August 1, 2006, and he testified that he was seeing a doctor on his own for his pain medication after his release from Dr. Gornet (Exhibit 3 Pg. 39 Ln. 5 – Pg. 40 Ln. 4 and Pg. 66 Ln. 14 – Pg 67 Ln. 1).

Therefore, the record is clear that Employer/Insured had notice of the need for additional medical care and declined to offer the treatment. Therefore, I find that the medical bills submitted at the hearing in the sum of \$11,850.45 were necessary to cure and aid the work related injury. Also, I find that the medical services provided that gave rise to the bills are medically causally related to the work injury of February 25, 2000. Furthermore, I find that Employer/Insurer had notice of the claim for medical care.

Issue 2: Whether Employee is entitled to future medical aid.

Employee is requesting an award of future medical aid. To be entitled to future medical aid, Employee must establish that it is a reasonable possibility that he will need future medical care. Forshee v. Landmark Excavating and Equipment, 165 S.W. 3d 533 (Mo.App. E.D. 2005). To satisfy this requirement, Employee offered the medical opinion of Dr. Gornet and the medical opinion of Dr. Volarich. As described above Dr. Gornet in his report dated March 14, 2005,

¹ This analysis for the medical bills from St. Francis, Washington University and Medical Anesthesia was not necessary because this was authorized medical care. Notice is satisfied when the care is authorized.

stated that Employee had continued left leg pain and would probably require permanent medication to help with that pain. In Dr. Volarich's report he states that Employee would require ongoing care for his pain syndrome using modalities including but not limited to narcotics and non-narcotic medications (NSAID's), muscle relaxants, physical therapy and similar treatments. Employee's medical evidence clearly demonstrates that in order for Employee to maintain his current state, he requires ongoing pain management, physical therapy and similar treatments under a physician's care.

The medical evidence on this issue submitted by Employer/Insurer also demonstrates that Employee would need additional medical care. Although the need for future medical is not specifically addressed by Dr. deGrange he does state that Employee would need to be weaned off of the narcotic medicines as he believes they are counter-productive. This contemplates some form of future medical care to get him off of the narcotic pain medicines and that there be some alternative to the narcotic medicines.

I find that the medical care referred to by Dr. Volarich is medical care that is necessary to cure and aid the work related injury. It is also of the same nature of the medical care that Employee has undergone since the date of his release from Dr. Gornet. I find that the medical report of Dr. Gornet and the report and deposition of Dr. Volarich establish that there is a reasonable possibility that Employee will continue to need future medical care to cure and aid the work related injury. Furthermore, I find that the opinion of Dr. Volarich on the issue of future medical care is more credible than the opinion of Dr. deGrange on this issue. It is therefore a reasonable possibility that Employee will need future medical care to cure and aid his work related injury and that Employer and/or Insured is directed to provide future medical care consistent with the opinion of Dr. Volarich and Dr. Gornet.

Issue 4: Whether Employee is entitled to permanent total disability benefits from and after May 4, 2001 against Employer/Insurer or in the alternative, against the Second Injury Fund. AND Issue 5: Whether Employee is entitled to Permanent Partial Disability Benefits against the Second Injury Fund or in the alternative, against Employer/Insurer.

Given the nature of this claim and the evidence submitted, the issues in this case can be addressed together: What is the nature and extent of Employee's permanent partial or permanent total disability and what is the liability of the Second Injury Fund?

Based on a comprehensive review of the substantial and competent evidence described above, including Employee's testimony and the testimony of the other witnesses, the expert medical opinions, testimony, and reports, and the medical records, as well as based upon the applicable laws of the State of Missouri, I find the following:

The first question that must be addressed is whether Employee is permanently and totally disabled. If Employee is permanently and totally disabled, then it must next be determined whether the permanent total disability was caused by a combination of Employee's pre-existing injuries and the injury of February 25, 2000. Under Section 287.220.1, the pre-existing injuries

must also have constituted a hindrance or obstacle to the Employee's employment or re-employment.

Employee testified that he requires assistive devices in and around the house and uses a cane to get about. In exhibit H, Employee gave a list of things he can no longer do. Exhibit I was a list compiled by the employee's wife. This also stated various activities Employee can no longer do. Based on all of the evidence presented, I find that Employee was a credible witness. Furthermore, Employee's testimony supports a conclusion that Employee will not be able to compete in the open labor market. With his physical limitations, it is unlikely any employer would reasonably be expected to hire Employee in his present physical condition.

Dr. Gornet state that a sedentary work restriction of 10 pounds with alternating position about every 20 minutes was permanent. Dr. Gornet also gave a 50-60% body as a whole rating. Dr. Gornet stated that all disability and impairment was related to the February 25, 2000 injury and not the 1997 injury. Dr. Gornet stated that Employee was working in a laboring type job after the 1997 injury and prior to the 2000 work injury. He also stated that Employee would not be able to be gainfully employed in a laboring type position.

Dr. Volarich testified that based on his medical assessment alone, it is his opinion that Mr. Ward is permanently and totally disabled as a result of the work-related injury of 2000 and in combination with his pre-existing lumbar syndrome. Dr. Volarich testified that had it not been for the pre-existing L5-S1 discectomy that placed his back in a weakened condition, he would not have likely required a two-level anterior and posterior fusion after his February 25, 2000 accident.

Dr. Volarich testified that Employee sustained 75% PPD of the body as a whole as a result of the work accident. In regards to Employee's pre-existing back injury, Dr Volarich assessed 20% PPD of the body as a whole.

Ms. Shea, a vocational expert, had a chance to review the medical records, medical report of Dr. Volarich and met with Employee for purposes of completing a complete vocational assessment. Ms. Shea found Employee to be permanently and totally disabled. She has stated that the permanent and total disability was as a result of the 1997 and 2000 work injuries but testified that there was no hindrance to Employee's employability after the 1997 work injury but there certainly was after the 2000 work injury.

Dr. Donald deGrange testified that he reviewed all of the medical records as well as examined Employee on February 14, 2011. After his review of medical records and his examination, the doctor concluded that he could find no anatomical or physiological basis for finding of a permanent total disability in this particular Employee. Dr. deGrange testified that Employee could perform in a light physical demand capacity. The doctor testified that Employee, on an occasional basis, may lift or carry 11 to 20 pounds, on a frequent basis up to 10 pounds, and should have a frequency change of position, including sitting, standing or walking, and may also engage in constant pushing and pulling of either hand or leg controls. Dr. deGrange testified that in his opinion, Employee did not need to take frequent breaks to lie down

because that is not supported by any objective anatomical or physiological findings on either physical examination or diagnostic testing. Dr. deGrange testified that Employee's fusion is solid and that he did not need to undergo any additional treatment. Dr. deGrange testified that all of his opinions have been within a reasonable degree of medical certainty.

Dr. deGrange concluded that Employee sustained 15% PPD pre-existing for his prior low back injury and 30% PPD for his most recent back injury.

Jim England, a vocational expert, did not have an opportunity to interview Employee, but did have an opportunity to review medical records, and Employee's deposition testimony before giving his testimony. Mr. England testified that although it does not appear Employee would be physically capable of returning to any of his past work based on Dr. Gornet's restrictions, Employee should still be capable of some type of entry level, sedentary employment, including some security positions either working as an alarm monitor or as a security officer in an office building sitting. Mr. England also testified that Employee could potentially work as a parking lot attendant and as a cashier in settings where a stool is provided for him to alternately change positions during the day. In addition, Mr. England testified that with some basic keyboarding skills, Employee would also qualify for employment in sitting, such as customer service work.

Finally, Mr. England testified that even if Employee were permanently and totally disabled, it would be as a result of a combination of his prior injuries and current injuries.

Based on a review of all the evidence, I find that the opinions of Dr. Volarich and Ms. Shea are credible regarding whether Employee is permanently and totally disabled than Dr. deGrange and Mr. England. Dr. Gornet gave Employee permanent work restrictions and states that the employee could not be gainfully employed in a laboring type position however he did not specifically address the issue of whether Employee was permanently and totally disabled.

Based on the credible testimony of Employee and the supporting medical and vocational expert evidence, I find that no employer in the usual course of business would reasonably be expected to employ Employee in his present condition and reasonably expect Employee to perform the work for which he is hired. I find that Employee is unable to compete in the open labor market and is therefore permanently and totally disabled.

Liability of Second Injury Fund

Next, I must determine whether the February 25, 2000 work injury alone was enough to make him permanently and totally disabled.

The February 25, 2000 injury was a substantial factor in causing Employee to have a new disc herniation at L4-5 to the left that required discectomy as well as subsequent anterior and posterior fusions at L4-5 and L5-S1 because of persistent post laminectomy syndrome and left leg radiculopathy.

The opinions of Dr. Volarich and Ms. Shea attributed Employee's permanent and total disability to the combined effect of the February 25, 2000 injury and his pre-existing conditions. Although Mr. England testified that there were some jobs that Employee could possibly perform, he also stated that if Employee were permanently and totally disabled, it would be as a result of a combination of his prior injuries and current injuries.

Based upon the evidence, I find that as a direct result of the last injury Employee sustained a permanent partial disability of 40% of the body as a whole referable to the low back. I find that the last injury alone did not cause Employee to be permanently and totally disabled.

Based on a review of the evidence, I find that Employee's pre-existing disabilities and conditions regarding his left shoulder and low back (L5-S1) constituted a hindrance or obstacle to his employment or to obtaining re-employment.

I find that the prior injuries to Employee's low back and left shoulder combined synergistically with the primary injury to the low back to cause Employee's overall condition and symptoms. Based on all of the evidence presented, I find that Employee is permanently and totally disabled as a result of the combination of his pre-existing injuries and condition and the February 25, 2000 injury and condition.

Based on the evidence presented, I find that Employee reached maximum medical improvement on August 15, 2005. Employer-Insurer's permanent partial disability payments would therefore have commenced on August 16, 2005, and would have continued for 160 weeks through September 9, 2008.

The permanent partial disability rate and the permanent total disability rate are both \$157.60; therefore, the Second Injury Fund is not liable for this specific time period.

The Second Injury Fund is liable for the full amount of the permanent total disability benefits commencing on September 10, 2008. The Second Injury Fund is therefore directed to pay the employee the sum of \$157.60 per week commencing on September 9, 2008 and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of the employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is restored to her regular work or its equivalent as provided in Section 282.200.2.

Issue 3: Whether Employee is entitled to additional TTD benefits from September 8, 2000 to September 23, 2000, in the amount of \$315.20, with TPD benefits from September 23, 2000 to May 4, 2001 in the amount of \$1,395.70 with TTD benefits from May 4, 2001 to August 15, 2005 (should Employer only be liable for PPD) in the amount of \$35,932.80.

To be entitled to temporary total disability benefits Employee must show that he is unable to compete in the open labor market. Further, TTD benefits are to cover Employee during the healing period. Tilley v. USF Holland Inc., 325 S.W.3d 487 (Mo. App. E.D. 2010). In this case, Employee is claiming temporary total disability benefits from September 8, 2000 to September

23, 2000. At this time, Employee was under the care of Dr. Brophy. On September 8, 2000, Dr. Brophy put Employee on a light duty medical restriction with no lifting over 25 pounds. Employer would not provide work for Employee under this restriction. However, it was Dr. Brophy's opinion that as of September 25, 2000, Employee could work with a 40 pound permanent weight restriction. Employer returned Employee to work on September 23, 2000. Therefore, during this time Employee was under active medical care with continued complaints and was placed on a light duty medical restriction. Thus, during this time, Employee had not concluded with the healing period and was severely limited in his work activities. Taking all of this into consideration I do not believe that an employer in the normal course of its business would reasonably be expected to hire Employee during this period. Thus, during the period from September 8, 2000 to September 23, 2000 Employee was entitled to temporary total disability benefits in the amount of \$315.20.

To be entitled to temporary partial disability benefits Employee must show that he was not able to earn what he could have earned if not for the disability. Williams v. Pillsbury Company, 694 S.W.2d 488 (Mo. App. 1985). In this case, Employee is claiming temporary partial disability benefits from September 23, 2000, to May 4, 2001. During this period of the time Employer was accommodating Employee's light duty medical restriction. Also, the undisputed evidence at the hearing was that Employer was accommodating Employee by working him only a portion of the work day and work week. The evidence offered at the hearing was that due to having to leave work early or his hours being limited by Employer due to the medical restrictions Employee missed a total of 354.24 hours of work. This missed work kept Employee from earning what he could have had it not been for the disability. At Employee's rate this yields \$1,395.70 in temporary partial disability benefits. I find that the same is justified and award the same to be paid by to Employee by Employer/Insurer.

Regarding the issue of temporary total disability benefits from May 4, 2001 to August 15, 2005, as stated above I must look to whether Employee was unable to compete in the open labor market at this time and that this time was during the healing period. Tilley supra. Based upon the totality of the circumstances and the evidence at the hearing, I find that Employee was unable to compete in the open labor market during this period of time and that the healing period was not complete. At the beginning of this time, Employee was under the care of Dr. Gornet and had to pursue additional medical care by way of a Temporary Award that resulted in his being awarded the medical care and treatment he sought. Dr. Gornet opined on July 6, 2001, that Employee was in need of a spinal fusion. The spinal fusion surgery did not take place until August 18, 2004. I do not believe that a person who was placed on light duty medical restrictions and is in need of a multi-level spinal fusion surgery is able to compete in the open labor market. No employer in the normal course of its business would reasonably be expected to hire a person waiting for a multi-level spinal fusion surgery. Also, Employee was not released to MMI until August 15, 2005. Thus, the healing period had not concluded until August 15, 2005.

Therefore, I find that Employee is entitled to TTD benefits from September 8, 2000 to September 23, 2000 in the amount of \$315.20; TPD benefits from September 23, 2000 to May 4, 2001, in the amount of \$1,395.70; and, TTD benefits from May 4, 2001, to August 15, 2005, in the amount of \$35,932.80.

Issue 6: Whether Employer/Insurer is responsible for payment of the Medicaid Lien.

The Medicaid Lien in evidence contains multiple dates of service (Employee's Exhibit J). As stated herein, I find that Employer-Insurer responsible for the past medical bills in Issue 1, herein. Therefore, as I find that the medical treatment rendered to Employee that is described in the Medicaid Lien and medical records is medically causally related to the work injury, was necessary to cure and aid the work injury, was paid for by Medicaid; the Medicaid Lien is to be satisfied by Employer and/or Insurer.

Issue 7: Whether Employer/Insurer is responsible for the award of Attorney's Fees and expenses awarded in the Temporary Award July 12, 2004.

The Temporary Award in this case awarded \$500.00 in attorney's fees and expenses. The award of attorney's fees was consistent with §287.203 RSMo. There was no evidence offered at the hearing that the award of attorney's fees in the Temporary Award was inappropriate, nor that the same violated the law. Further, there was no evidence that the award of attorney's fees has been paid to-date. Therefore, to the extent that the award of attorney's fees awarded in the Temporary Award has not been paid the same is ordered to be paid.

ATTORNEY'S FEE

Daniel Rau, 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.

Employee: Ronald Ward

Injury Number 00-020686

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation