

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

Injury No.: 97-406714

Employee: Michael Webb

Dependents: Valerie Webb, spouse; Amy Webb, Tracy Webb and Derek Webb, dependent children

Employer: United Parcel Service (Settled)

Insurer: Liberty Mutual Fire Insurance Company (Settled)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 29, 2009. The award and decision of Administrative Law Judge Edwin J. Kohner, issued July 29, 2009, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 4th day of February 2010 .

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Michael Webb Injury No.: 97-406714
Dependents: Valerie Webb, Amy Webb, Tracy Webb, & Before the
Derek Webb **Division of Workers'**
Employer: United Parcel Service (Settled) **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Liberty Mutual Fire Insurance Company (Settled)
Hearing Date: May 27, 2009 Checked by: EJK/ch

FINDINGS OF FACT AND RULINGS OF LAW

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: March 14, 1997
5. State location where accident occurred or occupational disease was contracted: St. Charles 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 occurred or occupational disease contracted:
The employee slipped and fell on ice while attaching a trailer.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: abdominal area
14. Nature and extent of any permanent disability: 60% permanent partial disability to the abdominal area
15. Compensation paid to-date for temporary disability: \$2,854.82
16. Value necessary medical aid paid to date by employer/insurer: \$5,846.67

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$612.96
- 19. Weekly compensation rate: \$408.64/\$268.72
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Prior Settlement

- 22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$139.92) payable by SIF for 240 weeks beginning
August 9, 2000, and, thereafter, \$408.64 for Claimant's lifetime

TOTAL:

Indeterminate

- 23. Future requirements awarded: As above

Said payments to begin August 9, 2000, and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dean L. Christianson, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Michael Webb	Injury No.: 97-406714
Dependents:	Valerie Webb, Amy Webb, Tracy Webb, & Derek Webb	Before the Division of Workers'
Employer:	United Parcel Service (Settled)	Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Liberty Mutual Fire Insurance Company (Settled)	Jefferson City, Missouri Checked by: EJK/ch

This workers' compensation cases raises several issues arising out of work related injuries in which the claimant injured his abdominal area on March 14, 1997, when he slipped on ice, as well as work related injuries in which the claimant injured his abdominal area on March 23, 1998 when he slipped while pulling a pallet jack. The issues for determination are (1) accident arising out of and in the course of employment, (2) Causation, (3) permanent disability, (4) liability of the Second Injury Fund, (5) dependency.

At the hearing the claimant testified in person and offered depositions of Raymond Cohen, D.O., Wayne Stillings, M.D., and Samuel Bernstein, Ph.D., as well as voluminous medical records. The Second Injury Fund offered depositions of Patrick Hogan, M.D., and Christine Kelly.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accidents occurred in Missouri.

SUMMARY OF FACTS

This forty-six year old claimant, a driver for United Parcel Service, has a tenth grade education with no GED and no other training, other than on-the-job training in truck driving. He has not served in the U.S. military. Most of his past employment has involved the operation of heavy trucks.

March 14, 1997 Occurrence

The claimant injured his abdominal area on March 14, 1997, when he slipped and fell on ice while he was hooking a trailer to his tractor. The device he was operating then ran into his back and head. While on the ground, he felt pain and a lump in his abdomen. After a few days he received medical care from Dr. Meadows on several occasions and received medication, before consulting a surgeon, Dr. Altepeter, who performed a surgical hernia repair procedure. The claimant was off work for seven weeks after the injury but did not do well after the surgery. He testified that he might even have been worse. However, he returned to work on a regular

duty status. In returning to work, he had difficulty performing his job but his co-workers helped him with heavier work such as hooking trailers to his truck. However, he was able to drive.

Because of claimant's ongoing pain he returned to Dr. Meadows and Dr. Altepeter. An abdominal CT scan of his abdomen was performed but then no additional care was provided. He went to Dr. Mantese for a second opinion. All of these doctors told him that he simply needed to give it more time. His complaints, however, did not change.

March 23, 1998 Occurrence

On March 23, 1998, the claimant was pulling a pallet of paper with a pallet jack when he slipped and fell. He felt an increase in pain at that time. He returned to Dr. Meadows, who referred him to Dr. Bennett. Dr. Bennett examined the claimant, referred him to a pain physician, Dr. Tate. Dr. Tate performed several nerve blocks upon him and provided pain medication. The blocks helped him for short periods, such as an hour, but his symptoms returned. Dr. Mackinnon evaluated him and scheduled a surgical procedure, which was performed together with Dr. Thompson. During the surgery a nerve in his abdominal area was removed. He thereafter developed an infection and was hospitalized for two weeks. He did not feel he received any relief from this surgery. Dr. Mackinnon then referred him to Dr. Sicard who he saw on one occasion for a surgical consultation. He was then referred to Dr. Soper, who he described as a hernia specialist. Dr. Soper performed a CT scan of his abdomen and then recommended a surgical procedure. This was done to repair another hernia. After this surgery he described himself as being weak and still very much in pain.

February 1, 1999 Occurrence

After Dr. Soper's surgery to repair the hernia, the claimant began receiving physical therapy at HealthSouth. During this treatment he was working on a treadmill and became dizzy and light-headed. He attributed this to the medication he had been taking for his symptoms. He stepped off the treadmill and tried to sit down on a bench. However, he missed the bench and fell against a pole, striking his left side. He then fell to the ground, landing on his buttocks and his back. After this he went to Dr. Hogan and received medication, which he described as not being helpful. He testified that the medication caused him to see things, such as bugs. When Dr. Hogan had nothing further to offer him, he consulted Dr. Gornet for neck pain. He testified that his neck pain began following the 1997 injury and that continues to this date. Dr. Gornet performed a fusion on his neck and, thereafter, gave him medications and physical therapy. Dr. Gornet also referred him to Dr. Miller for left shoulder pain. Dr. Miller performed a surgical procedure on his left shoulder and installed a pain pump that was later removed. Since then his treatment has been through his family physician, Dr. Joftus. He has also received psychological care.

Dr. Cohen

Dr. Cohen diagnosed the claimant with several medical conditions which he attributed to the accidents with employer. First, he diagnosed: status-post inguinal hernia repair and subsequent severe ilioinguinal and iliohypogastric neuralgia requiring two subsequent surgeries. See Dr. Cohen deposition, page 11. He testified that this diagnosis was caused by the accident of 3/14/97, and then significantly aggravated by the accident of 3/23/98. Second, he diagnosed:

status-post cervical surgery for cervical radiculopathy and status-post left shoulder surgery, along with severe depression. He opined that the physical therapy accident in February 1999 caused these conditions. Dr. Cohen rated the disability as 45% of the body referable to the accident of 3/14/97; 20% of the body referable to the accident of 3/23/98; and 35% of the body plus 45% of the left shoulder due to the accident in February of 1999. See Dr. Cohen deposition, pages 12-13. He also opined that the claimant is permanently and totally disabled due to the combination of these disabilities. He did not find that claimant had any pre-existing disability before the 1997 accident. Dr. Cohen opined that the claimant's left arm and neck condition resulted from a herniated disc in the cervical spine. See Dr. Cohen deposition, pages 44-45.

Dr. Stillings

Dr. Stillings diagnosed the claimant with a number of pre-existing psychiatric problems: dysfunctional family of origin (5% disability); parent-child relational problem, emotionally abusive mother, emotionally and physically abusive father, lack of love and nurturance (5% disability); dysthymia, early onset (10% disability); partner relational problem, abuse of first wife and chronic marital discord (5% disability); alcohol abuse and dependence (5% disability); pain disorder associated with both psychological factors and a general medical condition referencing the three work injuries in 1997, 1998, and 1999. See Dr. Stillings deposition, pages 8-12. He also found a personality disorder, which he termed: personality disorder not otherwise specified, with depressive, dependent, antisocial, and avoidant personality traits (5% disability). He concluded that claimant has a Global Assessment of Functioning of 45. He testified that these pre-existing conditions were a hindrance or obstacle to employment, and that overall the claimant is permanently and totally disabled. See Dr. Stillings deposition, pages 13-14.

Dr. Bernstein

Dr. Bernstein testified that the claimant is not employable in the open labor market and attributed this to the totality of claimant's problems related to his abdomen, neck, left shoulder and psychiatric condition. See Dr. Bernstein deposition, page 27. His testing revealed that the claimant functions in the "mentally deficient" range. See Dr. Bernstein deposition, page 38. He testified that while the claimant is of average intelligence, his scores are lowered by the effects of depression, anxiety, and pain. He also found claimant to have memory problems. See Dr. Bernstein deposition, page 43. He described claimant's background as unskilled with a limited education. See Dr. Bernstein deposition, page 61.

Dr. Hogan

Dr. Hogan, a neurologist, evaluated claimant and arrived at a diagnosis of post herniorrhaphy pain of undetermined etiology, possibly neuritic. See Dr. Hogan deposition, page 8. He provided claimant with medication, which provided intermittent and partial relief. He testified that claimant did not make complaints to him of problems with the neck or shoulders, however, he also testified that he was not treating neck or shoulder problems. See Dr. Hogan deposition, page 11. He last examined the claimant in 2003 and at that time reviewed the claimant's neck and shoulder condition. He testified that he would not have recommended the neck surgery, and that the claimant's findings on examination were non-organic. He opined that the claimant did not suffer a stroke. Dr. Hogan found permanent disability of 3% of the body as a whole referable to subjective pain in the abdominal area. See Dr. Hogan deposition, page 20.

He opined that the claimant was either sub-consciously or consciously making up his complaints. Dr. Hogan was unaware that claimant had three separate workers' compensation claims pending. See Dr. Hogan deposition, page 25. He testified that he never evaluated the claimant's neck or shoulders.

Christine Kelly

Ms. Christine Kelly, a physical therapist, testified that she treated the claimant at HealthSouth Physical Therapy in 1998 and 1999. Her records show that claimant complained of dizziness on March 4, 1999. See Kelly deposition, page 17. Subsequent visits revealed the same. She did not remember claimant having fallen during his visits. See Kelly deposition, page 22. A copy of her records were attached to the deposition, but she testified that the records were not complete and that only half of them were attached. See Kelly deposition, page 26. She also testified that other therapists worked with the claimant. See Kelly deposition, page 28. Some of the records indicate that the claimant could not complete his therapy due to dizziness.

DISCUSSION

This case involves a determination of the Second Injury Fund liability in a case in which the claimant settled with the employer in 2005. The claimant produced copies of the stipulations for settlement with the employer and insurer on all three of the injuries in question. See Exhibit X. The injuries were settled as follows: 3/14/97 accident, 20% of the body as a whole (groin); 3/23/98 accident, 40% of body as a whole (groin); and 2/1/99 accident, 40% of body as a whole (cervical spine) and 35% of the left shoulder. See Exhibit X. In addition, the parties submitted forensic medical opinion evidence. Dr. Cohen rated the disability as 45% of the body referable to the 1997 occurrence; 20% of the body referable to the 1998 occurrence; and 35% of the body plus 45% of the left shoulder due to the 1999 occurrence. See Dr. Cohen deposition, pages 12-13. Dr. Hogan found permanent disability of 3% of the body as a whole referable to the abdominal area, but he did not determine which accident was the cause of the disability. See Dr. Hogan deposition, page 20.

The first essential question in this case is whether the three occurrences are three compensable events or whether the three occurrences are continuances of the claimant's 1997 accident. Dr. Cohen opined that the events were separate accidents and created separate permanent partial disabilities. The settlements with the employer and insurer suggest the same. On the other hand, the treating physician, Dr. Meadows prepared a summary of the claimant's treatment on April 12, 1999, and opined that the claimant suffered a pain syndrome from the 1997 accident and that the subsequent occurrences "just accelerated the workup to try and resolve the original pain following the herniorrhaphy of 1997." See Exhibit Y.

Mr. Michael Webb was in my office on 4/2/99 in regards to an injury that dates back to March of 1997. At that time he was diagnosed as having a left inguinal hernia and referred to Dr. Altepeter who performed a left inguinal herniorrhaphy on the patient. The patient returned to work following that injury but then was referred to my office again on 3/23/98 stating that while pulling on a palette (sic) jack with another employee, he felt pain again in the left groin. He was seen in my absence and a diagnosis of a possible femoral hernia was made. However, when I saw the patient on 3/30/98, my history indicated that the patient woke up

from his initial surgery in 1997 with this same pain in the left inguinal and femoral area. Mr. Webb stated that the 3/23/98 incident just increased the pain in the same area. The patient stated he would awaken four to five times a night due to the pain, and any type of activity would increase the pain, dating back to the surgery of 1997.

My initial exam indicated no recurrent hernia, though the patient had pain on palpation in the inguinal area and some mild tenderness on external rotation of the hip. There is also pain on palpation of the herniorrhaphy scar with radiation distally down the thigh. Apparently, the patient had been told by his original surgeon that these symptoms would resolve, and therefore had not followed up at my office from the original injury.

Following my exam, I referred the patient to Kenneth Bennett, M.D., a surgeon who specializes in general surgery and herniorrhaphies. Dr. Bennett felt the patient had an ilioinguinal nerve injury which was also one of my possible diagnoses after my initial exam. He offered four solutions including observation, injections of cortisone, surgery to see if there was a neuroma which could be excised, and radical surgery to try and possibly redo the original left inguinal herniorrhaphy. Multiple physicians have suggested this possibility but have declared it to not be a suggested treatment because it would leave Mr. Webb with a huge defect in the lower abdomen which would cause further problems including probably recurrent hernias.

The next step in this long and extended workup was to have the patient seen by Dr. Sandra Tate, a physiatrist, who with the suggestion of Dr. Susan McKinnon, (sic) a surgeon at Washington University, injected the ilioinguinal area to see if she could get resolution of the patient's symptom even on a short term basis. The injection of this nerve was carried out at two different times by Dr. Tate who felt that the ilioinguinal nerve was indeed the problem.

Following that part of the workup, a CT scan was done which indicated the possibility of a "mass" in the area of surgery. This CT scan may have well been done prior to all the patient's recurrent complaints, because I spoke with Dr. Altepeter who felt the "mass was scar tissue". I also asked Dr. Altepeter if he felt the ilioinguinal problem could be present, and he did not think so, though he felt if Dr. Tate's injections were successful, that it would be "easy to just clip that", meaning the ilioinguinal nerve.

Then, on 6/22/98, Dr. McKinnon, (sic) with a second physician, took the patient to surgery for division of the ilioinguinal nerve. We had not seen the patient for three months, and he returned to my office stating that following that surgery he had a serious infection and was in Barnes for some time, and he was still taking Cipro when I saw him on 9/8/98. This second surgery did not resolve the patient's symptoms, and by 10/8, Dr. McKinnon (sic) stated there was nothing more she could do.

As the workup progressed, the patient was seen by Dr. Seacord (sic), a specialist at Washington University, who said there was nothing he could do, so he referred the patient to Dr. Sulfur who did laparoscopic surgery following a repeat CT scan. Dr. Sulfur took the patient to surgery on 11/24/98 and repaired what apparently was a second hernia near the initial repair; however, the initial repair was never broken down because no one thought that would help the case.

Since the last surgery of 11/98, I believe that patient has moved better and seems to be in less pain, but he has not resolved his pain problems in his left inguinal and thigh area. He still has essentially the same complaints he had in 1997 following the initial surgery. A trial of pain treatment under Dr. Hogan, a neurologist, utilizing Tegretol and Elavil was a failure. Therefore, I believe the patient is probably at maximum medical improvement.

The exam itself does not reveal a lot of abnormalities. The patient does have a 27 cm long scar over the left abdomen to the left flank from the ilioinguinal nerve surgery. His left inguinal herniorrhaphy scar is, of course, down in the inguinal area and is essentially that of a simple herniorrhaphy. The patient complains of pain on palpation in the left pubic and inguinal areas. There is no gross swelling or erythema of the testicle or scrotal area. The testicle itself is nontender. The abdomen is somewhat protuberant but soft. There does not seem to be any asymmetry or organomegaly on palpation of the abdomen. Pin testing was inconsistent, but tends to be decreased below the inguinal area and over the medial aspect of the thigh. The decreased sensation tends to end at about the middle thigh. By inconsistent, there are areas just above the ilioinguinal scar where the sensation appears to be about the same as it is over the lateral aspect of the thigh. He does have full range of motion of the left thigh and hip, though he has tenderness on internal rotation and extension of the hip. The patient does not walk with a gross limp.

In conclusion, I believe that unfortunately the patient has reached maximum benefit from active treatment for his injury of 1997 with a recurrent problem dated 3/23/98. It is my history, though, that the patient's pain is now the same as it was in 1997, and the incident of 1998 actually just accelerated the workup to try and resolve the original pain following the herniorrhaphy of 1997. The patient is incapacitated and is unable to carry on with his normal activity as a mechanic for UPS. He is also limited in his activities at home including social and marital. Therefore, I would rate the patient's permanency at 18% of the person as a whole. See Exhibit Y.

The legal standard to determine this issue was established by our Supreme Court in Hall v. Spot Martin, 304 S.W.2d 844, 852 (Mo. 1957), when the Court considered a case involving this type of situation:

A general rule often applied in cases of this nature is that "a subsequent incident, or injury, may be of such a character that its consequences are the natural result of the original injury and may thus warrant the granting of compensation therefor as a part of that injury, but that, on the other hand, the facts

and circumstances may be such as to establish the second injury as an independent, intervening cause, the effects of which cannot be included in computing the compensation allowable for the original injury, the determination of the question in each case being one of fact to be decided on the evidence." ... If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. This group also includes the kind of case in which a man has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culmination in a second period of disability precipitated by some lift or exertion. Id.

Under this test, the 1998 and 1999 occurrences would be independent intervening causes of disabilities if Dr. Cohen's findings are utilized. On the other hand, if Dr. Meadows' findings are utilized, the 1998 and 1999 occurrences appear to be merely recurrences of the 1997 occurrences and not independent, intervening causes of the claimant's condition and disabilities. Both Dr. Cohen and Dr. Meadows are physicians licensed to practice medicine in this state with knowledge of our state Workers' Compensation system. Dr. Meadows' findings are more credible, because he had a first row seat in the claimant's medical care and treatment and had the opportunity to examine the claimant many times from March 1997 to April 1999. See Exhibit Y. Dr. Cohen examined the claimant on two occasions in May 2001 and November 2002. In some cases, one can complain that the treating physician has tunnel vision and cannot see other aspects of the case or has bias due to employment by the insurance company. In this case, Dr. Meadows obtained extensive consulting medical and surgical opinions from other qualified experts in their field. The physician's employment by the employer and insurance company does not appear to be a factor, because the findings are adverse to the interests of the employer and insurer.

For these reasons, the 1998 and 1999 occurrences were recurrences of the 1997 occurrence, and did not contribute even slightly to the causation of the claimant's disabling pain syndrome.

The second essential question in this case is whether the disability from the 1997 accident caused the claimant to be unemployable in the open labor market and therefore permanently and totally disabled. The standard for determining this question has been stated on many occasions by our courts:

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in '[a]ll cases of permanent disability where there has been previous disability.'" For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the

last injury was sustained shall then be determined...."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

The test for permanent, total disability is the worker's ability to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 48 (Mo.App. W.D. 2007).

Five forensic medical experts offered opinion evidence on the claimant's condition. First, Dr. Cohen testified that the claimant was permanently and totally disabled as a result of the claimant's pain syndrome, operated neck, left shoulder injury, and severe depression that he testified resulted from all three occurrences. He opined that the claimant's permanent partial disabilities from the combined disabilities exceeded 400 weeks. Second, Dr. Meadows opined that the claimant was employable in the open labor market if he could be retrained for a different occupation and that the claimant suffered an 18% permanent partial disability from his pain syndrome from the occurrences. See Exhibit Y. Third, Dr. Hogan opined that the claimant suffered a 3% permanent partial disability from the occurrences. See Dr. Hogan deposition, page 20. Fourth, Dr. Bernstein opined that the claimant was unemployable in the labor market as a result of his age, education, past relevant work history, major depression, post herniorrhaphy pain, impingement syndrome, left shoulder subacromial bursitis, and cervical radiculopathy. See Dr. Bernstein deposition, pages 25, 26. He did not opine the extent of major depression from the 1997 accident and the extent of any preexisting psychiatric disorders.

Finally, Dr. Stillings examined the claimant on October 29, 2008, and opined that the claimant suffered from dysfunctional family of origin (5% disability); parent-child relational problem, emotionally abusive mother, emotionally and physically abusive father, lack of love and nurturance (5% disability); dysthymia, early onset (10% disability); partner relational problem, abuse of first wife and chronic marital discord (5% disability); alcohol abuse and dependence (5% disability); pain disorder associated with both psychological factors and a general medical condition referencing the three work injuries of 3/14/97, 3/22/98 and 2/1/99 injuries. See Dr. Stillings deposition, pages 8-12. He also found a personality disorder, which he termed: personality disorder not otherwise specified, with depressive, dependent, antisocial, and avoidant personality traits (5% disability). He concluded that claimant has a Global Assessment of Functioning of 45. He testified that these preexisting conditions were a hindrance or obstacle to employment, and that overall the claimant is permanently and totally disabled. See Dr. Stillings deposition, pages 13-14

Comparing the analyses of the five experts, Dr. Meadows opined that the claimant was employable, based on his physical condition only if he could be vocationally retrained. However, Dr. Bernstein, Dr. Cohen, and Dr. Stillings opined that the claimant was unemployable

in the open labor market when the claimant's psychiatric conditions are combined with the claimant's physical limitations. Dr. Hogan didn't discuss the claimant's ability to work or his employability. The weight of the evidence compels a finding that the claimant is not employable in the open labor market and is totally and permanently disabled based on a combination of his severe physical disabilities and his psychiatric disabilities. Dr. Hogan and Dr. Meadows didn't consider the claimant's psychiatric disabilities and are, therefore, less credible on this question. The conclusion, based on the evidence submitted, is that the claimant is unemployable in the open labor market and therefore, permanently and totally disabled based on a combination of the claimant's permanent partial disabilities from his physical pain syndrome and his psychiatric disabilities.

The third essential question in this case is whether the claimant's total disability resulted solely from the disabilities from the claimant's 1997 accident and the aggravations resulting from the claimant's 1998 and 1999 occurrences, or whether the claimant's total disability resulted from a combination of the claimant's 1997 accident and either preexisting permanent partial disabilities or after acquired permanent partial disabilities. Dr. Cohen and Dr. Bernstein opined that the claimant's psychiatric disabilities combined synergistically with the claimant's physical disabilities from the accident at work to render the claimant totally and permanently disabled. They examined the claimant in 2001 and 2002, but did not specify whether the claimant's psychiatric disabilities preexisted the 1997 accident or were a product of the 1997 accident or a subsequent occurrence.

On the other hand, Dr. Stillings examined the claimant in 2008 and opined that claimant had a set of preexisting psychiatric permanent partial disabilities, including chronic dysthymia and a personality disorder, that were chronic and were a hindrance or obstacle to his employment before the 1997 accident. He opined, "The three work injuries were substantial factors in causing Mr. Webb to experience a pain disorder associated with both psychological factors and a general medical condition." See Dr. Stillings deposition, page 10. In his report, Dr. Stillings opined, "The aforementioned work injuries combine synergistically with Mr. Webb's pre-existing psychiatric disorders/disabilities, rendering him permanently and totally disabled from gainful employment. The pre-existing psychiatric disabilities were a hindrance/obstacle to employment/reemployment." See Exhibit B, Exhibit 2. Thus, Dr. Stillings was the only forensic medical expert to opine whether the claimant's psychiatric disorders were pre-existing or a result of the accident at work. In addition, he was the only forensic medical expert to opine whether the claimant's permanent and total disability resulted from a combination of the preexisting permanent partial disabilities and the permanent disabilities from the work related injuries.

If the permanent disability from the last injury alone is so severe that the claimant is permanently and totally disabled from gainful employment solely as a result of those disabilities, then the Second Injury Fund bears no liability for the disability benefits, because the employer and its insurer have exclusive liability for the permanent total disability benefits. The record discloses no forensic evidence supporting a finding that the disabilities from the last injury alone caused the claimant to be permanently and totally disabled. None of the experts were asked to opine. Dr. Meadows opined that the claimant was employable given the physical disabilities from the last injury alone, if he received vocational rehabilitation. See Exhibit Y. Dr. Hogan opined that the claimant had a 3% permanent partial disability from the last injury and did not offer any other opinions. Dr. Cohen and Dr. Bernstein opined that the claimant's psychiatric disabilities combined synergistically with the claimant's physical disabilities from the accident at

work to render the claimant totally and permanently disabled. They examined the claimant in 2001 and 2002, but did not specify whether the claimant's psychiatric disabilities preexisted the 1997 accident or were a product of the 1997 accident or a subsequent occurrence. Dr. Stillings opined that the claimant is permanently and totally disabled as a result of a synergistic combination of the claimant's preexisting permanent partial disabilities and his disability from the last injury alone. Thus, the forensic medical evidence demonstrates that the claimant's total disability was not a product of solely the last accident alone.

The defense aggressively cross-examined Dr. Stillings and argued in its well written brief that Dr. Stillings' findings were not in concert with the claimant's testimony and other evidence. The defense contends that Dr. Stillings' findings lack foundation in the evidentiary record. Dr. Stillings reviewed extensive records of the claimant's medical history, conducted psychological testing, and interviewed the claimant. He opined that the claimant's medical treatment for his psychiatric conditions was spotty. He testified that there is a difference between having a psychiatric condition and having treatment for the condition. He opined, "He clearly has – his depressive disorder, like most people', even if they're chronic, they F&S, ... they're worse at times and better. He got treatment for five years again in the '90's, so he had treatment in the '80's and '90's and 2000, so he has a chronic dysthymia. That's what dysthymia is, a chronic mood disorder." See Dr. Stillings deposition, page 17.

Some of Dr. Stillings's findings are contrainuitive to a lay review. For instance, he opines that the claimant's dysfunctional family of origin, parent-child relational problem, partner-relationship problem, and alcohol abuse are permanent partial disabilities. First, one can certainly question whether these conditions are permanent. From a lay perspective, it would seem that those conditions may be the etiology for the claimant's chronic dysthymia and personality disorder, but Dr. Stillings' expertise in psychiatry must be given deference over lay evaluation. This is based on the rulings of our Courts. "[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence." Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App.W.D.2002). Accordingly, where expert medical testimony is presented, "logic and common sense," or an ALJ's personal views of what is "unnatural," cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) ("The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert."). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

Second, the defense questions whether Dr. Stillings' reliance on the claimant's verbal medical history without treatment records provides sufficient foundation for his conclusions. Dr. Stillings contended that the history taken was reliable for two reasons. Some of the treatment was from over twenty years ago, and medical records were not available. In addition, the claimant's lack of psychiatric care may explain the continuing seriousness of his disorders. Dr. Stillings contended that the claimant's dysthymia was chronic and that it would get better and worse over the years.

I thought, though, that he was candid and forthright. He was a bit disorganized. His mental state was a bit disorganized. ... I had good rapport

with him. I think he was able to share some things with me that perhaps he didn't share with other people. I spent a lot of time with him. I think he's at a stage in his life now where he is prone to being more open because he hasn't been drinking for about twelve years or thirteen years. I think he's come to grips with some of the shortcomings in the past and is less likely to defend himself and less likely to hide them or just not mention them. I think, also, his report, I'll give an example of one of the reasons I think he's candid and forthright. Because he said he got treatment from like '91 to '95, which Dr. Bernstein apparently missed. But if you look at the St. Louis Medical Clinic, in 10/91, he was diagnosed with anxiety and prescribed Xanax. In 7/94, he was prescribed Zoloft. So I think his report to me that he was getting treatment from '91 to '95 is consistent with the medical records. I can't explain how Dr. Bernstein missed that, but he never ever indicated in any of the medical records or to me, that he was ever free of psychiatric problems in the 1990's prior to the work injuries. There's just no evidence to support that contention whatsoever, and there's so much counter-evidence, it's overwhelming. And I think that he to the best of his ability, because he is somewhat depressed, he reported as accurately as he was able. See Dr. Stillings deposition, pages 27-29.

Based on the evidence submitted, the claimant had a 15% preexisting psychiatric permanent partial disability based on his chronic dysthymia and personality disorder that combined with the claimant's pain disorder from his abdominal and groin injury at work in 1997 and the 1998 and 1999 occurrences.

A final essential question requires a determination of the amount of permanent disability that the claimant suffered from the 1997 accident at work. Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. 1997). And the standard for determining whether a claimant is permanently and totally disabled is whether the person is able to compete on the open job market, with the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. Joulthouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. 1997).

Three forensic experts evaluated the claimant's permanent partial disability from his work related accident. First, Dr. Cohen rated the disability as 45% of the body referable to the accident of 3/14/97; 20% of the body referable to the accident of 3/23/98; and 35% of the body plus 45% of the left shoulder due to the accident in February of 1999. See Dr. Cohen deposition, pages 12-13. Second, Dr. Meadows opined that the claimant was employable in the open labor market if he could be retrained for a different occupation and that the claimant suffered an 18% permanent partial disability from his pain syndrome from the occurrences. See Exhibit Y. Third, Dr. Hogan opined that the claimant suffered a 3% permanent partial disability from the occurrences. See Dr. Hogan deposition, page 20. In addition, the claimant produced copies of the stipulations for settlement with the employer and insurer on all three of the injuries in question. See Exhibit X. The injuries were settled as follows: 3/14/97 accident, 20% of the body as a whole (groin); 3/23/98 accident, 40% of body as a whole (groin); and 2/1/99 accident,

40% of body as a whole (cervical spine) and 35% of the left shoulder. See Exhibit X. Dr. Stillings opined that the claimant suffered no additional permanent partial disability from the occurrences. See Dr. Stillings deposition, page 31.

Based on the evidence submitted, the claimant suffered a 60% permanent partial disability as an uncheduled disability as a result of the claimant's severe pain disorder from the 1997 accident and the 1998 and 1999 occurrences.

DEPENDENCY

Finally, inherent in all permanent total disability awards is the issue of the potential for such benefits to continue to dependents upon the employee's death. *Schoemehl v. Treasurer of State of Missouri*, 217 S.W.3d 900 (Mo. 2007). Claimant produced evidence which establishes that his spouse, Valerie Webb, was dependent upon him at the time of his accident of March 23, 1998. The same holds true for three of his children: Amy Webb, Tracy Webb, and Derek Webb. It is therefore found that Valerie Webb, Amy Webb, Tracy Webb, and Derek Webb were claimant's dependents at the time of his March 23, 1998 injury, for purposes of the possibility of future disability benefits per *Schoemehl*. The dependent's actual entitlement to benefits is held in abeyance during claimant's lifetime.

CONCLUSIONS

Based on the foregoing, the claimant suffered an injury from an accident that arose out and in the course of his employment on March 14, 1997, causing a pain disorder resulting in a 60% permanent partial disability as an uncheduled disability. The claimant's pain disorder synergistically combined with the claimant's preexisting psychiatric permanent partial disability from chronic dysthymia and a personality disorder resulting in the claimant's unemployability in the open labor market and permanent total disability. The claims against the employer and insurer were settled in 2005. However, the Second Injury Fund bears liability for permanent total disability benefits to be paid to the claimant for his lifetime.

Date: July 29, 2009

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ NAOMI L. PEARSON
Naomi L. Pearson
Division of Workers' Compensation

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

Injury No.: 98-022063

Employee: Michael Webb

Dependents: Valerie Webb, spouse; Amy Webb, Tracy Webb and Derek Webb, dependent children

Employer: United Parcel Service (Settled)

Insurer: Liberty Mutual Fire Insurance Company (Settled)

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 29, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued July 29, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4th day of February 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Michael Webb Injury No.: 98-022063
Dependents: Valerie Webb, Amy Webb, Tracy Webb, & Before the
Derek Webb **Division of Workers'**
Employer: United Parcel Service (Settled) **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Additional Party: Second Injury Fund
Insurer: Liberty Mutual Fire Insurance Company (Settled)
Hearing Date: May 27, 2009 Checked by: EJK/ch

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of alleged accident or onset of occupational disease: March 23, 1997
5. State location where accident occurred or occupational disease was contracted: St. Charles 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? No
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 occurred or occupational disease contracted:
The claimant was pulling a pallet of paper with a pallet jack when he slipped and fell.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: abdominal area
14. Nature and extent of any permanent disability: None from this occurrence
15. Compensation paid to-date for temporary disability: \$28,322.42
16. Value necessary medical aid paid to date by employer/insurer: \$35,785.22

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Michael Webb

Injury No.: 98-022063

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$797.28
- 19. Weekly compensation rate: \$531.52/\$278.42
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: Prior Settlement

22. Second Injury Fund liability: No

None

TOTAL:

None

23. Future requirements awarded: None

Said payments to begin August 9, 2000, and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dean L. Christianson, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Michael Webb	Injury No.: 98-022063
Dependents:	Valerie Webb, Amy Webb, Tracy Webb, & Derek Webb	Before the Division of Workers'
Employer:	United Parcel Service (Settled)	Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Liberty Mutual Fire Insurance Company (Settled)	Jefferson City, Missouri Checked by: EJK/ch

This workers' compensation case raises several issues arising out of a work related injury on March 23, 1998, when the claimant slipped while pulling a pallet jack injured his abdominal area. The issues for determination are (1) accident arising out of and in the course of employment, (2) Causation, (3) permanent disability, (4) liability of the Second Injury Fund, and (5) dependency.

At the hearing the claimant testified in person and offered depositions of Raymond Cohen, D.O., Wayne Stillings, M.D., and Samuel Bernstein, PhD., as well as voluminous medical records. The Second Injury Fund offered depositions of Patrick Hogan, M.D., and Christine Kelly.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accidents were alleged to have occurred in Missouri.

SUMMARY OF FACTS

This forty-six year old claimant, a driver for United Parcel Service, has a tenth grade education with no GED and no other training, other than on-the-job training in truck driving. He has not served in the U.S. military. Most of his past employment has involved the operation of heavy trucks.

March 14, 1997 Occurrence

The claimant injured his abdominal area on March 14, 1997, when he slipped and fell on ice while he was hooking a trailer to his tractor. The device he was operating then ran into his back and head. While on the ground, he felt pain and a lump in his abdomen. After a few days he received medical care from Dr. Meadows on several occasions and received medication, before consulting a surgeon, Dr. Altepeter, who performed a surgical hernia repair procedure. The claimant was off work for seven weeks after the injury but did not do well after the surgery. He testified that he might even have been worse. However, he returned to work on a regular duty status. In returning to work, he had difficulty performing his job but his co-workers helped him with heavier work such as hooking trailers to his truck. However, he was able to drive.

Because of claimant's ongoing pain he returned to Dr. Meadows and Dr. Altepeter. An abdominal CT scan of his abdomen was performed but then no additional care was provided. He went to Dr. Mantese for a second opinion. All of these doctors told him that he simply needed to give it more time. His complaints, however, did not change.

March 23, 1998 Occurrence

On March 23, 1998, the claimant was pulling a pallet of paper with a pallet jack when he slipped and fell. He felt an increase in pain at that time. He returned to Dr. Meadows, who referred him to Dr. Bennett. Dr. Bennett examined the claimant, referred him to a pain physician, Dr. Tate. Dr. Tate performed several nerve blocks upon him and provided pain medication. The blocks helped him for short periods, such as an hour, but his symptoms returned. Dr. Mackinnon evaluated him and scheduled a surgical procedure, which was performed together with Dr. Thompson. During the surgery a nerve in his abdominal area was removed. He thereafter developed an infection and was hospitalized for two weeks. He did not feel he received any relief from this surgery. Dr. Mackinnon then referred him to Dr. Sicard who he saw on one occasion for a surgical consultation. He was then referred to Dr. Soper, who he described as a hernia specialist. Dr. Soper performed a CT scan of his abdomen and then recommended a surgical procedure. This was done to repair another hernia. After this surgery he described himself as being weak and still very much in pain.

February 1, 1999 Occurrence

After Dr. Soper's surgery to repair the hernia, the claimant began receiving physical therapy at HealthSouth. During this treatment he was working on a treadmill and became dizzy and light-headed. He attributed this to the medication he had been taking for his symptoms. He stepped off the treadmill and tried to sit down on a bench. However, he missed the bench and fell against a pole, striking his left side. He then fell to the ground, landing on his buttocks and his back. After this he went to Dr. Hogan and received medication, which he described as not being helpful. He testified that the medication caused him to see things, such as bugs. When Dr. Hogan had nothing further to offer him, he consulted Dr. Gornet for neck pain. He testified that his neck pain began following the 1997 injury and that continues to this date. Dr. Gornet performed a fusion on his neck and, thereafter, gave him medications and physical therapy. Dr. Gornet also referred him to Dr. Miller for left shoulder pain. Dr. Miller performed a surgical procedure on his left shoulder and installed a pain pump that was later removed. Since then his treatment has been through his family physician, Dr. Joftus. He has also received psychological care.

Dr. Cohen

Dr. Cohen diagnosed the claimant with several medical conditions which he attributed to the accidents with employer. First, he diagnosed: status-post inguinal hernia repair and subsequent severe ilioinguinal and iliohypogastric neuralgia requiring two subsequent surgeries. See Dr. Cohen deposition, page 11. He testified that this diagnosis was caused by the accident of 3/14/97, and then significantly aggravated by the accident of 3/23/98. Second, he diagnosed: status-post cervical surgery for cervical radiculopathy and status-post left shoulder surgery, along with severe depression. He opined that the physical therapy accident in February 1999

caused these conditions. Dr. Cohen rated the disability as 45% of the body referable to the accident of 3/14/97; 20% of the body referable to the accident of 3/23/98; and 35% of the body plus 45% of the left shoulder due to the accident in February of 1999. See Dr. Cohen deposition, pages 12-13. He also opined that the claimant is permanently and totally disabled due to the combination of these disabilities. He did not find that claimant had any pre-existing disability before the 1997 accident. Dr. Cohen opined that the claimant's left arm and neck condition resulted from a herniated disc in the cervical spine. See Dr. Cohen deposition, pages 44-45.

Dr. Stillings

Dr. Stillings diagnosed the claimant with a number of pre-existing psychiatric problems: dysfunctional family of origin (5% disability); parent-child relational problem, emotionally abusive mother, emotionally and physically abusive father, lack of love and nurturance (5% disability); dysthymia, early onset (10% disability); partner relational problem, abuse of first wife and chronic marital discord (5% disability); alcohol abuse and dependence (5% disability); pain disorder associated with both psychological factors and a general medical condition referencing the three work injuries in 1997, 1998, and 1999. See Dr. Stillings deposition, pages 8-12. He also found a personality disorder, which he termed: personality disorder not otherwise specified, with depressive, dependent, antisocial, and avoidant personality traits (5% disability). He concluded that claimant has a Global Assessment of Functioning of 45. He testified that these pre-existing conditions were a hindrance or obstacle to employment, and that overall the claimant is permanently and totally disabled. See Dr. Stillings deposition, pages 13-14.

Dr. Bernstein

Dr. Bernstein testified that the claimant is not employable in the open labor market and attributed this to the totality of claimant's problems related to his abdomen, neck, left shoulder and psychiatric condition. See Dr. Bernstein deposition, page 27. His testing revealed that the claimant functions in the "mentally deficient" range. See Dr. Bernstein deposition, page 38. He testified that while the claimant is of average intelligence, his scores are lowered by the effects of depression, anxiety, and pain. He also found claimant to have memory problems. See Dr. Bernstein deposition, page 43. He described claimant's background as unskilled with a limited education. See Dr. Bernstein deposition, page 61.

Dr. Hogan

Dr. Hogan, a neurologist, evaluated claimant and arrived at a diagnosis of post herniorrhaphy pain of undetermined etiology, possibly neuritic. See Dr. Hogan deposition, page 8. He provided claimant with medication, which provided intermittent and partial relief. He testified that claimant did not make complaints to him of problems with the neck or shoulders, however, he also testified that he was not treating neck or shoulder problems. See Dr. Hogan deposition, page 11. He last examined the claimant in 2003 and at that time reviewed the claimant's neck and shoulder condition. He testified that he would not have recommended the neck surgery, and that the claimant's findings on examination were non-organic. He opined that the claimant did not suffer a stroke. Dr. Hogan found permanent disability of 3% of the body as a whole referable to subjective pain in the abdominal area. See Dr. Hogan deposition, page 20. He opined that the claimant was either sub-consciously or consciously making up his complaints. Dr. Hogan was unaware that claimant had three separate workers' compensation claims pending.

See Dr. Hogan deposition, page 25. He testified that he never evaluated the claimant's neck or shoulders.

Christine Kelly

Ms. Christine Kelly, a physical therapist, testified that she treated the claimant at HealthSouth Physical Therapy in 1998 and 1999. Her records show that claimant complained of dizziness on March 4, 1999. See Kelly deposition, page 17. Subsequent visits revealed the same. She did not remember claimant having fallen during his visits. See Kelly deposition, page 22. A copy of her records were attached to the deposition, but she testified that the records were not complete and that only half of them were attached. See Kelly deposition, page 26. She also testified that other therapists worked with the claimant. See Kelly deposition, page 28. Some of the records indicate that the claimant could not complete his therapy due to dizziness.

DISCUSSION

The essential question in this case is whether the three occurrences are three compensable events or whether the three occurrences are continuances of the claimant's 1997 accident. Dr. Cohen opined that the events were separate accidents and created separate permanent partial disabilities. The settlements with the employer and insurer suggest the same. On the other hand, the treating physician, Dr. Meadows prepared a summary of the claimant's treatment on April 12, 1999, and opined that the claimant suffered a pain syndrome from the 1997 accident and that the subsequent occurrences "just accelerated the workup to try and resolve the original pain following the herniorrhaphy of 1997." See Exhibit Y. A detailed finding of fact is set forth in the discussion in an award issued in Injury Number 97-406714 and is incorporated by reference as is set forth herein.

The legal standard to determine this issue was established by our Supreme Court in Hall v. Spot Martin, 304 S.W.2d 844, 852 (Mo. 1957), when the Court considered a case involving this type of situation:

A general rule often applied in cases of this nature is that "a subsequent incident, or injury, may be of such a character that its consequences are the natural result of the original injury and may thus warrant the granting of compensation therefor as a part of that injury, but that, on the other hand, the facts and circumstances may be such as to establish the second injury as an independent, intervening cause, the effects of which cannot be included in computing the compensation allowable for the original injury, the determination of the question in each case being one of fact to be decided on the evidence." ... If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. This group also includes the kind of case in which a man has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culmination in a second period of disability precipitated by some lift or exertion. Id.

Under this test, the 1998 and 1999 occurrences would be independent intervening causes of disabilities if Dr. Cohen's findings are utilized. On the other hand, if Dr. Meadows' findings are utilized, the 1998 and 1999 occurrences appear to be merely recurrences of the 1997 occurrences and not independent, intervening causes of the claimant's condition and disabilities. Both Dr. Cohen and Dr. Meadows are physicians licensed to practice medicine in this state with knowledge of our state Workers' Compensation system. Dr. Meadows' findings are more credible, because he had a first row seat in the claimant's medical care and treatment and had the opportunity to examine the claimant many times from March 1997 to April 1999. See Exhibit Y. Dr. Cohen examined the claimant on two occasions in May 2001 and November 2002. In some cases, one can complain that the treating physician has tunnel vision and cannot see other aspects of the case or has bias due to employment by the insurance company. In this case, Dr. Meadows obtained extensive consulting medical and surgical opinions from other qualified experts in their field. The physician's employment by the employer and insurance company does not appear to be a factor, because the findings are adverse to the interests of the employer and insurer.

For these reasons, the 1998 and 1999 occurrences were recurrences of the 1997 occurrence, and did not contribute even slightly to the causation of the claimant's disabling pain syndrome. No compensation is awarded in this case.

Date: July 29, 2009

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ NAOMI L. PEARSON
Naomi L. Pearson
Division of Workers' Compensation

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

Injury No.: 99-183505

Employee: Michael Webb

Dependents: Valerie Webb, spouse; Amy Webb, Tracy Webb and Derek Webb, dependent children

Employer: United Parcel Service (Settled)

Insurer: Liberty Mutual Fire Insurance Company (Settled)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 29, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued July 29, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4th day of February 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Michael Webb Injury No.: 99-183505
Dependents: Valerie Webb, Amy Webb, Tracy Webb, & Before the
Derek Webb **Division of Workers'**
Employer: United Parcel Service (Settled) **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Additional Party: Second Injury Fund
Insurer: Liberty Mutual Fire Insurance Company (Settled)
Hearing Date: May 27, 2009 Checked by: EJK/ch

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of alleged accident or onset of occupational disease: February 1, 1999
5. State location where accident occurred or occupational disease was contracted: St. Charles 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? No
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 occurred or occupational disease contracted:
The claimant fell at physical therapy while recovering from his prior work related injuries.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: abdominal area
14. Nature and extent of any permanent disability: None from this occurrence
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$797.28
- 19. Weekly compensation rate: \$531.52/\$278.42
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable: Prior Settlement

- 22. Second Injury Fund liability: No None

- TOTAL: None

- 23. Future requirements awarded: None

Said payments to begin August 9, 2000, and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dean L. Christianson, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Michael Webb	Injury No.: 99-183505
Dependents:	Valerie Webb, Amy Webb, Tracy Webb, & Derek Webb	Before the Division of Workers'
Employer:	United Parcel Service (Settled)	Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Liberty Mutual Fire Insurance Company (Settled)	Jefferson City, Missouri Checked by: EJK/ch

This workers' compensation case raises several issues arising out of a work related injuries on February 1, 1999, when the claimant fell at physical therapy while recovering from his prior work related injuries. The issues for determination are (1) accident arising out of and in the course of employment, (2) Causation, (3) permanent disability, (4) liability of the Second Injury Fund, and (5) dependency.

At the hearing the claimant testified in person and offered depositions of Raymond Cohen, D.O., Wayne Stillings, M.D., and Samuel Bernstein, PhD., as well as voluminous medical records. The Second Injury Fund offered depositions of Patrick Hogan, M.D., and Christine Kelly.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

SUMMARY OF FACTS

This forty-six year old claimant, a driver for United Parcel Service, has a tenth grade education with no GED and no other training, other than on-the-job training in truck driving. He has not served in the U.S. military. Most of his past employment has involved the operation of heavy trucks.

March 14, 1997 Occurrence

The claimant injured his abdominal area on March 14, 1997, when he slipped and fell on ice while he was hooking a trailer to his tractor. The device he was operating then ran into his back and head. While on the ground, he felt pain and a lump in his abdomen. After a few days he received medical care from Dr. Meadows on several occasions and received medication, before consulting a surgeon, Dr. Altepeter, who performed a surgical hernia repair procedure. The claimant was off work for seven weeks after the injury but did not do well after the surgery. He testified that he might even have been worse. However, he returned to work on a regular duty status. In returning to work, he had difficulty performing his job but his co-workers helped him with heavier work such as hooking trailers to his truck. However, he was able to drive.

Because of claimant's ongoing pain he returned to Dr. Meadows and Dr. Altepeter. An abdominal CT scan of his abdomen was performed but then no additional care was provided. He went to Dr. Mantese for a second opinion. All of these doctors told him that he simply needed to give it more time. His complaints, however, did not change.

March 23, 1998 Occurrence

On March 23, 1998, the claimant was pulling a pallet of paper with a pallet jack when he slipped and fell. He felt an increase in pain at that time. He returned to Dr. Meadows, who referred him to Dr. Bennett. Dr. Bennett examined the claimant, referred him to a pain physician, Dr. Tate. Dr. Tate performed several nerve blocks upon him and provided pain medication. The blocks helped him for short periods, such as an hour, but his symptoms returned. Dr. Mackinnon evaluated him and scheduled a surgical procedure, which was performed together with Dr. Thompson. During the surgery a nerve in his abdominal area was removed. He thereafter developed an infection and was hospitalized for two weeks. He did not feel he received any relief from this surgery. Dr. Mackinnon then referred him to Dr. Sicard who he saw on one occasion for a surgical consultation. He was then referred to Dr. Soper, who he described as a hernia specialist. Dr. Soper performed a CT scan of his abdomen and then recommended a surgical procedure. This was done to repair another hernia. After this surgery he described himself as being weak and still very much in pain.

February 1, 1999 Occurrence

After Dr. Soper's surgery to repair the hernia, the claimant began receiving physical therapy at HealthSouth. During this treatment he was working on a treadmill and became dizzy and light-headed. He attributed this to the medication he had been taking for his symptoms. He stepped off the treadmill and tried to sit down on a bench. However, he missed the bench and fell against a pole, striking his left side. He then fell to the ground, landing on his buttocks and his back. After this he went to Dr. Hogan and received medication, which he described as not being helpful. He testified that the medication caused him to see things, such as bugs. When Dr. Hogan had nothing further to offer him, he consulted Dr. Gornet for neck pain. He testified that his neck pain began following the 1997 injury and that continues to this date. Dr. Gornet performed a fusion on his neck and, thereafter, gave him medications and physical therapy. Dr. Gornet also referred him to Dr. Miller for left shoulder pain. Dr. Miller performed a surgical procedure on his left shoulder and installed a pain pump that was later removed. Since then his treatment has been through his family physician, Dr. Joftus. He has also received psychological care.

Dr. Cohen

Dr. Cohen diagnosed the claimant with several medical conditions which he attributed to the accidents with employer. First, he diagnosed: status-post inguinal hernia repair and subsequent severe ilioinguinal and iliohypogastric neuralgia requiring two subsequent surgeries. See Dr. Cohen deposition, page 11. He testified that this diagnosis was caused by the accident of 3/14/97, and then significantly aggravated by the accident of 3/23/98. Second, he diagnosed: status-post cervical surgery for cervical radiculopathy and status-post left shoulder surgery, along with severe depression. He opined that the physical therapy accident in February 1999

caused these conditions. Dr. Cohen rated the disability as 45% of the body referable to the accident of 3/14/97; 20% of the body referable to the accident of 3/23/98; and 35% of the body plus 45% of the left shoulder due to the accident in February of 1999. See Dr. Cohen deposition, pages 12-13. He also opined that the claimant is permanently and totally disabled due to the combination of these disabilities. He did not find that claimant had any pre-existing disability before the 1997 accident. Dr. Cohen opined that the claimant's left arm and neck condition resulted from a herniated disc in the cervical spine. See Dr. Cohen deposition, pages 44-45.

Dr. Stillings

Dr. Stillings diagnosed the claimant with a number of pre-existing psychiatric problems: dysfunctional family of origin (5% disability); parent-child relational problem, emotionally abusive mother, emotionally and physically abusive father, lack of love and nurturance (5% disability); dysthymia, early onset (10% disability); partner relational problem, abuse of first wife and chronic marital discord (5% disability); alcohol abuse and dependence (5% disability); pain disorder associated with both psychological factors and a general medical condition referencing the three work injuries in 1997, 1998, and 1999. See Dr. Stillings deposition, pages 8-12. He also found a personality disorder, which he termed: personality disorder not otherwise specified, with depressive, dependent, antisocial, and avoidant personality traits (5% disability). He concluded that claimant has a Global Assessment of Functioning of 45. He testified that these pre-existing conditions were a hindrance or obstacle to employment, and that overall the claimant is permanently and totally disabled. See Dr. Stillings deposition, pages 13-14.

Dr. Bernstein

Dr. Bernstein testified that the claimant is not employable in the open labor market and attributed this to the totality of claimant's problems related to his abdomen, neck, left shoulder and psychiatric condition. See Dr. Bernstein deposition, page 27. His testing revealed that the claimant functions in the "mentally deficient" range. See Dr. Bernstein deposition, page 38. He testified that while the claimant is of average intelligence, his scores are lowered by the effects of depression, anxiety, and pain. He also found claimant to have memory problems. See Dr. Bernstein deposition, page 43. He described claimant's background as unskilled with a limited education. See Dr. Bernstein deposition, page 61.

Dr. Hogan

Dr. Hogan, a neurologist, evaluated claimant and arrived at a diagnosis of post herniorrhaphy pain of undetermined etiology, possibly neuritic. See Dr. Hogan deposition, page 8. He provided claimant with medication, which provided intermittent and partial relief. He testified that claimant did not make complaints to him of problems with the neck or shoulders, however, he also testified that he was not treating neck or shoulder problems. See Dr. Hogan deposition, page 11. He last examined the claimant in 2003 and at that time reviewed the claimant's neck and shoulder condition. He testified that he would not have recommended the neck surgery, and that the claimant's findings on examination were non-organic. He opined that the claimant did not suffer a stroke. Dr. Hogan found permanent disability of 3% of the body as a whole referable to subjective pain in the abdominal area. See Dr. Hogan deposition, page 20. He opined that the claimant was either sub-consciously or consciously making up his complaints. Dr. Hogan was unaware that claimant had three separate workers' compensation claims pending.

See Dr. Hogan deposition, page 25. He testified that he never evaluated the claimant's neck or shoulders.

Christine Kelly

Ms. Christine Kelly, a physical therapist, testified that she treated the claimant at HealthSouth Physical Therapy in 1998 and 1999. Her records show that claimant complained of dizziness on March 4, 1999. See Kelly deposition, page 17. Subsequent visits revealed the same. She did not remember claimant having fallen during his visits. See Kelly deposition, page 22. A copy of her records were attached to the deposition, but she testified that the records were not complete and that only half of them were attached. See Kelly deposition, page 26. She also testified that other therapists worked with the claimant. See Kelly deposition, page 28. Some of the records indicate that the claimant could not complete his therapy due to dizziness.

DISCUSSION

The essential question in this case is whether the three occurrences are three compensable events or whether the three occurrences are continuances of the claimant's 1997 accident. Dr. Cohen opined that the events were separate accidents and created separate permanent partial disabilities. The settlements with the employer and insurer suggest the same. On the other hand, the treating physician, Dr. Meadows prepared a summary of the claimant's treatment on April 12, 1999, and opined that the claimant suffered a pain syndrome from the 1997 accident and that the subsequent occurrences "just accelerated the workup to try and resolve the original pain following the herniorrhaphy of 1997." See Exhibit Y. A detailed finding of fact is set forth in the discussion in an award issued in Injury Number 97-406714 and is incorporated by reference as is set forth herein.

The legal standard to determine this issue was established by our Supreme Court in Hall v. Spot Martin, 304 S.W.2d 844, 852 (Mo. 1957), when the Court considered a case involving this type of situation:

A general rule often applied in cases of this nature is that "a subsequent incident, or injury, may be of such a character that its consequences are the natural result of the original injury and may thus warrant the granting of compensation therefor as a part of that injury, but that, on the other hand, the facts and circumstances may be such as to establish the second injury as an independent, intervening cause, the effects of which cannot be included in computing the compensation allowable for the original injury, the determination of the question in each case being one of fact to be decided on the evidence." ... If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. This group also includes the kind of case in which a man has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culmination in a second period of disability precipitated by some lift or exertion. Id.

Under this test, the 1998 and 1999 occurrences would be independent intervening causes of disabilities if Dr. Cohen's findings are utilized. On the other hand, if Dr. Meadows' findings are utilized, the 1998 and 1999 occurrences appear to be merely recurrences of the 1997 occurrences and not independent, intervening causes of the claimant's condition and disabilities. Both Dr. Cohen and Dr. Meadows are physicians licensed to practice medicine in this state with knowledge of our state Workers' Compensation system. Dr. Meadows' findings are more credible, because he had a first row seat in the claimant's medical care and treatment and had the opportunity to examine the claimant many times from March 1997 to April 1999. See Exhibit Y. Dr. Cohen examined the claimant on two occasions in May 2001 and November 2002. In some cases, one can complain that the treating physician has tunnel vision and cannot see other aspects of the case or has bias due to employment by the insurance company. In this case, Dr. Meadows obtained extensive consulting medical and surgical opinions from other qualified experts in their field. The physician's employment by the employer and insurance company does not appear to be a factor, because the findings are adverse to the interests of the employer and insurer.

For these reasons, the 1998 and 1999 occurrences were recurrences of the 1997 occurrence, and did not contribute even slightly to the causation of the claimant's disabling pain syndrome. No compensation is awarded in this case.

Date: July 29, 2009

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ NAOMI L. PEARSON
Naomi L. Pearson
Division of Workers' Compensation