

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

Injury No.: 03-036575

Employee: Jerald L. Wells  
Employer: Essex Contracting Incorporated  
Insurer: Missouri Employer's Mutual Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: April 29, 2003  
Place of Accident: Jefferson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence, read the briefs of the parties and considered the entire record. Pursuant to section 286.090 RSMo, the Commission affirms in part and reverses in part the award and decision of the administrative law judge dated January 4, 2007. The award and decision of Administrative Law Judge Gary L. Robbins, is attached and incorporated to the extent it is not inconsistent with the instant award.

#### I. Preliminary Matters

The stipulations of the parties, issues in dispute and summary of the evidence were accurately recounted in the January 4, 2007, award issued by Administrative Law Judge Gary L. Robbins and will not be repeated by the Commission unless special emphasis necessitates.

The administrative law judge awarded employee additional and future medical care to cure and relieve him from the effects of his April 29, 2003, work accident. The administrative law judge noted that all of the doctors agreed that employee will need additional or future medical care, but differed as to the level of care employee would require. The administrative law judge found Dr. Volarich's testimony to be the most credible and ordered employer/insurer to provide additional and future medical care in compliance with his recommendations, which included the need for future surgery.

Employer/insurer filed an Application for Review with the Commission. Employer/insurer alleges that the administrative law judge's decision to award future medical benefits in the form of additional surgical and/or non-surgical treatment was in error as employee failed to establish by competent and substantial evidence that it was reasonably probable that future surgery was needed by reason of his work related injury.

The Commission, as discussed below, reverses the administrative law judge's award of future medical treatment in accordance with the recommendation of Dr. Volarich because the Commission does not believe Dr. Volarich's testimony to be more credible than that of Drs. Coyle and Suthar. As such, employee did not establish by competent and substantial evidence that it was reasonably probable that he would need future surgical treatment. The Commission affirms the remainder of the administrative law judge's January 4, 2007, award.

#### II. Future Medical Benefits

The need for future medical care need not be established as a certainty, but it must be established as being reasonably probable through competent, medical testimony. *Bowers v. Highland Dairy Company*, 132 S.W.3d 260 (Mo.App. 2004).

In summary fashion, employee testified that he continues to suffer from pain in his back, neck and left leg. Employee testified that he is taking medications for his pain, including Oxycontin and sleeping pills. The principal medical opinions concerning the issue of future medical care and treatment were rendered by Dr. Coyle, Dr. Suthar and Dr. Volarich. The Commission finds the testimony of Drs. Coyle and Suthar to be more credible.

On August 7, 2003, Dr. Coyle performed a cervical discectomy and fusion at C6-7 on employee. As of November 3, 2003, he felt that employee had reached maximum medical improvement. Dr. Coyle opined that employee had no need for future surgical medical treatment for the C6-7 fusion. However, Dr. Coyle did believe that employee would benefit from the use of anti-inflammatory medication in the future.

Dr. Suthar addressed employee's lumbar spine. He recommended that employee continue on his medications, including Ambien, Vicodin and Flexeril. Dr. Suthar further testified that employee would need future medical testing of his liver and kidneys as a result of taking such medications.

Dr. Volarich testified that it is appropriate for employee to take Oxycontin for his pain. Dr. Volarich also discussed employee's need for future surgical treatment in his medical report and during his testimony. His medical report clearly states that based on his examination, "additional surgery is not indicated at this time." It goes on to state that employee has an "additional C4-5 protrusion that will *potentially* cause him problems in the near future and require additional surgery." His testimony merely states that he thought employee would need a complete fusion of the neck from C4-7 if employee continued to have problems with his C4-5. Neither satisfies the reasonably probable standard required for an award of future surgical medical care in this matter.

### III. Conclusion

The Commission concludes that the competent and substantial evidence supports a finding that employee is entitled to receive non-surgical future medical care and treatment reasonable and necessary to cure and relieve him from the effects of his April 29, 2003, work injury, and this benefit is awarded. As stated above, all remaining findings of fact and conclusions of law are affirmed.

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 24<sup>th</sup> day of August 2007.

### LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

DISSENTING OPINION FILED

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

## DISSENTING OPINION

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

Dr. Coyle testified that after a fusion, "there is some tendency to get wear and tear above it due to the increased stress from the fusion . . . ." Dr. Suthar similarly testified that when someone has a fusion the spinal anatomy is altered and it is not uncommon for that person to have secondary pains from other structures of the spine.

These opinions are in synch with Dr. Volarich's opinion that employee will need future surgical medical care. Dr. Volarich also alluded to the "domino effect" that occurs once a level of the spine is fused which causes the levels above and below the fused level to take all the stresses because there is no movement at the fused level. This of course places more wear and tear on those other discs and results in bulges and herniations.

Furthermore, in his deposition, Dr. Volarich testified that it was likely that employee would need a complete fusion of the neck from C4-5. This, coupled with all of the above, clearly satisfies employee's burden to show by competent and substantial evidence that there was a reasonable probability he would need future surgical treatment for his injuries suffered in the April 29, 2003, work accident.

As such, I would affirm award of the administrative law judge. Therefore, I respectfully dissent from the decision of the majority of the Commission to modify the award to reduce benefits in this case.

---

John J. Hickey, Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Jerald L. Wells

Injury No. 02-156518

03-036575

03-134632

Dependents: N/A

***Employer: Essex Contracting Incorporated***

Additional Party: Second Injury Fund

Insurer: Missouri Employer's Mutual Insurance Company

Hearing Date: September 27, 2006

Checked by: GLR/kh

## SUMMARY OF FINDINGS

1. Are any benefits awarded herein? None in 02-156518 and 03-134632. Yes in 03-036575.
2. Was the injury or occupational disease compensable under Chapter 287? No in 02-156518 and 03-134632. Yes in 03-036575.
3. Was there an accident or incident of occupational disease under the Law? No in 02-156518 and 03-134632. Yes in 03-036575.
4. Date of accident or onset of occupational disease? 02-156518-alleged December 27, 2002. 03-036575-April 29, 2003. 03-134632-alleged January 20, 2003.
5. State location where accident occurred or occupational disease contracted: Jefferson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No in 02-156518 and 03-134632. Yes in 03-036575.
8. Did accident or occupational disease arise out of and in the course of the employment? No in 02-156518 and 03-134632. Yes in 03-036575.
9. Was claim for compensation filed within time required by law? Yes in all three cases.
10. Was employer insured by above insurer? Yes in all three cases.
11. Describe work employee was doing and how accident happened or occupational disease contracted: 02-156518-the employee alleged that he fell on the ice. 03-036575-the employee was in a piece of equipment that fell and threw him into the dash area. 03-134632 the employee alleged that he fell off of a piece of equipment.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Back, neck and body as a whole.
14. Nature and extent of any permanent disability: 30% permanent partial disability in 03-036575. Permanent total disability due to a combination of disabilities.
15. Compensation paid to date for temporary total disability: 02-156518-\$0. 03-036575-\$16,587.72. 03-134632-\$0.
16. Value necessary medical aid paid to date by employer-insurer: 02-156518-\$0. 03-134632-\$0. 03-036575-\$50,436.70
17. Value necessary medical aid not furnished by employer-insurer: No claim made in any case.
18. Employee's average weekly wage: 02-156518-\$870.85. 03-036575-\$870.85. 03-134632-\$870.85

19. Weekly compensation rate: 02-156518 and 03-134632-\$580.52 per week for TTD and PTD, and \$340.12 for PPD. 03-036575-\$580.57 per week for TTD and PTD, and \$340.12 for PPD.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award
22. Second Injury Fund liability: See Award
23. Future requirements awarded: See Award

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 J. McMichael

## FINDINGS OF FACT AND RULINGS OF LAW

On September 27, 2006, the employee, Jerald L. Wells, appeared in person and by his attorney, Daniel J. McMichael, for a hearing for a final award. Patrick M. McHugh represented the employer-insurer at the hearing. Assistant Attorney General Laura C. Wagener represented the Second Injury Fund. The trial was initially set to try Case No. 03-036575 by itself, however; on the trial date the Court granted the request of the parties and also heard Case No. 02-156518 and Case No. 03-134632. The employee dismissed Case No. 03-134634. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

### UNDISPUTED FACTS

#### 02-156518

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act and liability was fully insured by Missouri Employer's Mutual Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Essex Contracting Incorporated and was working under the Workers' Compensation Act.
3. The employee's claim was filed within the time allowed by law.
4. The employee's average weekly wage is \$870.85. His rate for temporary total and permanent total disability is \$580.52 per week, and his rate for permanent partial disability is \$340.12 per week.
5. The employer-insurer paid no medical benefits in this case.

#### 03-036575

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act and liability was fully insured by Missouri Employer's Mutual Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Essex Contracting Incorporated and was working under the Workers' Compensation Act.

3. On or about April 29, 2003 the employee sustained an accident or occupational disease arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$870.85. His rate for temporary total and permanent total disability is \$580.57 per week, and his rate for permanent partial disability is \$340.12 per week.
7. The employee's injury was medically causally related to his accident on occupational disease.
8. The employer-insurer paid \$50,436.70 in medical aid.
9. The employer-insurer paid \$16,587.72 in temporary disability benefits. The benefits paid covered a 28-4/7<sup>th</sup> week period beginning on May 2, 2003 through November 17, 2003.

03-134632

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act and liability was fully insured by Missouri Employer's Mutual Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Essex Contracting Incorporated and was working under the Workers' Compensation Act.
3. The employee's claim was filed within the time allowed by law.
4. The employee's average weekly wage is \$870.85. His rate for temporary total and permanent total disability is \$580.52 per week, and his rate for permanent partial disability is \$340.12 per week.
5. The employer-insurer paid \$0 in medical aid.
6. The employer-insurer paid \$0 in temporary disability benefits.

## ISSUES

02-156518

1. Whether on or about December 27, 2002 the employee sustained an accident or occupational disease arising out of and in the course of his employment?
2. Whether the employer had notice of the employee's accident?
3. Whether the employee's injury was medically causally related to his accident or occupational disease?
4. Whether the employer-insurer is responsible to pay for additional or future medical aid?
5. Nature and extent of permanent partial disability?
6. Liability of the Second Injury Fund for permanent partial disability?

03-036575

1. Whether the employer-insurer is responsible to pay for additional or future medical aid?
2. Nature and extent of disability, permanent partial v. permanent total disability?
3. Liability of the Second Injury Fund for either permanent partial or permanent total disability?

03-134632

1. Whether on or about January 20, 2003 the employee sustained an accident or occupational disease arising out of and in the course of his employment?
2. Whether the employer had notice of the employee's accident?
3. Whether the employee's injury was medically causally related to his accident or occupational disease?
4. Whether the employer-insurer is responsible to pay for additional or future medical aid?
5. Nature and extent of disability, permanent partial v. permanent total disability?
6. Liability of the Second Injury Fund for either permanent partial or permanent total disability?

## EXHIBITS

The following exhibits were offered and admitted into evidence in all of the cases:

#### Employee's Exhibits

- A. Deposition of David Volarich, D.O.
- B. Deposition of Timothy G. Lalk
- C. Medical records

#### Employer-Insurer's Exhibits

1. Deposition of James Coyle, M.D.
2. Deposition of Manish Suthar, M.D.
3. Division of Workers' Compensation records in Cases 88-000147, 90-032854 and 97-497406.
4. Medical records of Ashutosh Patel, M.D.
5. Deposition of Jerald L. Wells
6. Division of Workers' Compensation records

#### Second Injury Fund Exhibits

None

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

#### STATEMENT OF THE FINDINGS OF FACT IN ALL CASES:

In order to more easily understand the evidence in this case, it needs to be broken into several areas:

1. Pre-existing injuries.
2. The testimony of the employee and evidence pertaining to Injury Number 02-156518, Injury Number 03-134632 and Injury Number 03-036575.
3. Medical evidence.

#### Pre-existing Injuries-

The employee has had numerous injuries that predated December 27, 2002. Some of them appear to be minor and have no consequence and others appear to be serious with long lasting disabling affects.

In 1965, when the employee was a child, he fell off a porch and broke his left elbow. This accident occurred in 1965 and has had minimal affect on the employee during his lifetime. The employee indicated that there was a slight loss of strength and he could feel changes in the weather even up to 2002.

In 1967, the employee was involved in an automobile accident and sustained multiple injuries. He fractured his jaw, fractured his right wrist, fractured some ribs and fractured his left hip.

The employee testified that over his lifetime, the affects of this injury slowed him down a little. He indicated that there was aching and grinding in his left hip, popping and stiffness in his jaw, and ongoing weakness in the right wrist and forearm.

In 1978, the employee had surgery on both of his feet due to walking on concrete. Over the years, the employee indicated this caused some pain problems with prolonged weight bearing and impact activities.

In 1984, the employee fell off of a tractor-trailer. As a result of this accident the employee had surgery on his right shoulder and cervical fusion surgery at C5-6 that was done by Dr. Marchosky in December 1984. The employee reported that this accident caused some decreased strength, aching and limited motion in the right shoulder.

In 1988, the employee hurt his right wrist. This accident was reported as a work related injury under Injury Number 88-000147. The case settled on December 14, 1989 for a permanent partial disability of 4% of the right wrist.

On February 27, 1990, the employee injured his neck and his left upper extremity when the truck he was driving hit a bump causing his head to strike the roof of the cab. This accident was reported as a work related injury under Injury Number 90-032854. This case settled against the employer-insurer for 12-½ % permanent partial disability on February 18, 2002. There was also a settlement with the Second Injury Fund on May 15, 1995.

On June 24, 1997, the employee had an accident when he injured his back while carrying a metal pipe. Dr. Marchosky performed back surgery on January 26, 1998. The employee had substantial problems with his left hip due to an injection. The employee continued treatment and Dr. Kennedy did a lumbar fusion surgery on February 22, 1999. This case settled against the employer-insurer on June 8, 2000 for 42-½ % permanent partial disability. There was also a settlement with the Second Injury Fund on July 17, 2001. Dr. Kennedy found the employee to be at maximum medical improvement as of November 17, 1999. At the time that Dr. Kennedy released the employee he indicated "he will continue to work unrestricted but understands that he should not exert himself excessively if he begins to have increasing pain or change in his symptoms". Dr. Kennedy provided a permanent partial disability rating of 30%.

#### Testimony of the Employee-

The employee testified at trial, and previously testified by deposition taken on February 15, 2005. The employee is fifty-six years old and lives in Valley Mines, Missouri with his wife. He graduated from Desoto High School and has no further formal education. He has worked as a laborer and truck driver his entire life.

At trial the employee summarized his medical/physical condition prior to December 2002. He testified that despite his prior injuries he was carrying on with his life. He indicated that he was working daily and had aches and pain from getting older. He testified that there was some loss of motion in his back, and some weakness in his neck, arm and back, but that he had little pain from his prior injuries. He further indicated that he did not have too much difficulty-working overhead.

The employee testified about and contrasted his medical/physical condition as of the trial date with his condition prior to December 2002. He indicated that he does not sleep well because when he rolls over it aggravates his back and neck-the movement wakes him up. He indicated that as he was testifying his back and left leg were in pain. He stated that the left leg aches and burns like someone was putting a Bic lighter on it. He testified that both his neck and back hurt and they both snap and pop. He said it feels like he has a headache from the top of his head to the bottom of his foot on the left side. He reported that he couldn't work overhead as it makes his neck, back and arms hurt.

The employee further indicated that he has to lie down five to ten times a day to deal with the pain-sometimes a few minutes will relieve the pain, sometimes longer. He testified that the pain affects his ability to concentrate and sometimes he does not fully comprehend what he is told. He says due to his concentration problems, he is having a difficult time trying to learn how to use a computer. He also indicated that due to the beating you take, the vibration and climbing that is required; he can no longer drive a truck or operate heavy equipment. He indicated that after he is in one position for a while, he has to move-extended sitting, standing or driving a car all increase his pain.

The employee testified that he can lift a gallon of milk, but even that activity will let him know that he is doing it. He indicated that he cannot bowl, cannot do sports with his children, and can't use a vacuum cleaner without discomfort. He testified that he does use a riding lawnmower to cut the grass, but it takes a long time. The employee testified that he is taking medications, including Oxycontin and sleeping pills. He indicated that he has taken more meds in the past but indicated he could not function on all the medication he was taking. He indicated that he took Oxycontin prior to coming to trial. He testified that the medications sometimes helps the pain and make it tolerable

The Court closely observed the employee while he was in the Courtroom and especially while he was testifying. His actions, facial expressions and conduct were totally consistent with someone who was in pain and discomfort. The employee was observed to be rubbing his left thigh almost continually, almost continually leaning to the right and stretching and shifting in his chair. On multiple occasions the employee stood up and on occasion even leaned against the city council bench as he was testifying.

The employee testified about the injuries he had prior to December 2002 and how they affected him. In summary while he testified about the problems he had from past accidents, he tried to minimize their affects and indicated that despite the problems, he always performed his job up until the accident of April 29, 2003. He indicated that his employer put an air ride in his truck and he was more careful as to how he bent stooped and lifted. He further indicated that he could do his work activities, but his off work activities were affected. He said that while he could do a little running, he did not engage in such activities as he "wanted to save myself for work". He testified, "I realized my back was vulnerable, so I didn't take no chances. I had to work for a living, so I saved my back for working".

When the employee returned to work in 1999 he said that he was more conscious about lifting and had to use his legs more. He indicated that repetitive lifting would make him more tired and fatigued. He agreed that he had to move heavy concrete forms as part of his job, but indicated that he got the help of a coworker, could not do it as quickly and took more frequent breaks. He said that if he did do lifting work, he paid for it and felt pain that was different from burning. He indicated that he had to work through pain and that made him hurt more. In general, the employee indicated that his problems did not keep him from working but how he worked. He testified that from 2000 to 2002 his back got tired, some fatigue, some aching if he overdid it, but other than that he worked every day. He further indicated that he tried to be more aware, more people helped him, he asked people to help him lift and in general he tried to be more careful. He indicated that he did not lift things as he did before because he did not want to hurt himself. He testified that he probably could lift pretty much the same stuff once but could not do it in repetition. The employee testified that before his most recent accidents, he did not take pain medication for his back. During cross-examination the employee testified about inconsistencies between his trial and prior testimony as to the affects of his prior injuries. The employee indicated that he does not specifically recall his testimony but is sure that he had problems. He indicated that he has been on so many medications that they have about ruined his life.

December 27, 2002 is the date of the first accident in this case. The employee stated that he fell on the ice in the Essex yard and experienced neck and back pain. He indicated that the accident shook him up but he thought he could work through it. He testified, "he believes" he told Sandy (the lady that you report accidents to) about the incident but was not for sure. He testified that he did not insist that a claim be filed. He stated that you could not

report every accident that you have, as the employer could not afford the insurance, but also testified that he usually told Sandy when he got hurt. The employee testified that he got no medical care for this accident and lost no time. He also testified that the symptoms gradually faded away.

The second accident is to have occurred on January 20, 2003. The employee testified that he fell off a backhoe and initially experienced pain in his legs and feet. Again the employee testified that he thinks he reported the accident but is not sure. He also did not insist that a claim be filed as he thought he could work through it. He testified that he did not request that the employer provide medical care for this accident. He further indicated that he did not seek immediate care for the accident and initially sought care from Dr. Loucks because it started hurting so bad. The employee stated that he paid his own co-payments knowing that work would pay for a workers' compensation injury. Dr. Loucks bills were paid through the union. He testified that he went to see Dr. Loucks as his sister-in-law referred him there.

The employee testified that the main problem he was having was pain in his back and his left leg. He testified that his leg has always hurt since he had problems with an injection he had in 1998 following previous back surgery.

On April 29, 2003, the employee had his third accident. On this occasion he was using a high-lift to crush and haul barrels. In the process of doing this work, the employee testified that the piece of equipment fell about three feet and he was thrown forward into the windshield. He testified that he was sitting in his seat when the machine slammed to the ground and threw him forward, striking his knees, hip and face. He said his whole body was thrown forward. He indicated he felt immediate pain-at his deposition he testified that his neck, arms, middle back, lower back and his legs all had problems. He testified that he reported this accident to Sandy and he was sent for medical care.

The employee was originally sent to physical therapy, but due to continued problems was sent to Dr. Kennedy. Dr. Kennedy provided care and ordered injections. The employee also indicated that Dr. Kennedy wanted to do both neck and back surgery, however he was sent to Dr. Coyle. Dr. Coyle did neck surgery on August 7, 2003 and referred the employee to Dr. Suthar for pain management. The employee testified that the surgery and injection provided some help for a short period.

When he was asked about the condition of his back after his release from his last accident, the employee testified that they were the same, they never addressed his mid back. He testified that his mid back hurts and pops-it hurts all the time. He says the mid back is like his neck and lower back in that it hurts all the time, sometimes worse than others. He indicated that at first his neck seemed a little better, but now he still has the numbness and burning in his neck and down his arms. He testified that his symptoms if anything have gotten worse-worse as time goes on.

#### Medical Evidence-

Dr. Patel apparently is the employee's family physician. Dr. Patel's records were introduced into evidence. Many of them were handwritten and are very difficult to read. Dr. Patel's records date back at least to 1996 and show that the employee was complaining of back and leg pain as early as November 1998. The records generally deal with back, neck and leg pain. Dr. Patel is the physician who is currently prescribing Oxycodone for the employee.

Dr. Coyle is an orthopedic surgeon who first saw the employee on July 22, 2003 re: complaints of neck, low back, left upper and left lower extremity pain. He testified by deposition on September 5, 2006. Dr. Coyle took a history, did a physical exam and examined cervical spine films. Based on his examinations, he provided several diagnoses concerning the April 29, 2003 injury:

1. thoracolumbar sprain due to his work accident. There was no evidence of a neurologic injury.

2. cervical and lumbar juxtafusal changes, specifically juxtafusal stenosis at C6-7 and juxtafusal changes at C4-5 in the cervical spine.
3. he agreed with Dr. Kennedy on conservative treatment for the lumbar spine and felt that he needed a decompression fusion at C6-7.

Dr. Coyle felt that C4-5 should be left out of the fusion because the employee was already fused at C5-6. He further felt that if after the fusion the employee still had problems, a left foraminotomy at C4-5 should be considered. He testified that there was no need for back surgery. Dr. Coyle performed a C6-7 anterior cervical discectomy and fusion surgery on August 7, 2003 and continued care after that.

As of September 22, 2003, Dr. Coyle did not think the employee could work and referred him to Dr. Suthar for care for his back. At that time he felt that the employee was doing well from the standpoint of his neck, but needed further care due to back pain. As of November 3, 2003, Dr. Coyle felt that the employee had reached maximum medical improvement as far as his neck. He gave restrictions of:

1. no work above shoulder height
2. no extended work requiring lifting over the head.

Dr. Coyle saw the employee again in September 2005. At that time the employee reported that he never went back to work, had never gotten better and that he had problems with his right shoulder and was scheduled for rotator cuff surgery. The doctor performed additional testing. Based on his additional evaluations he testified that the prior fusion was solid from C5-C7 but the employee had spurring that he referred to as an idiopathic condition that can cause cord compression. He opined that this condition was causing the employee to have stenosis but that it was not related to the work accident. He further opined that some of the symptoms may be relieved by surgery, but that surgery would not be under the work injury as it is at a different level.

Dr. Coyle saw the employee again on February 27, 2006, and did a report that summarized from April 2003 to present. Dr. Coyle performed an examination and reported his findings. Dr. Coyle gave a diagnosis that pertains to the April 29, 2003 work accident. Dr. Coyle stated that the employee said he had a history of two-work injuries-one in January 2003 and the second in April 2003. Dr. Coyle indicated that the employee reported that his symptoms began after the second incident and were not related to the first incident. Dr. Coyle said that based on what the employee said and what his examination showed; the employee underwent surgery for cervical spondylosis and stenosis that was aggravated by the work incident of April 2003. Dr. Coyle felt that the employee was still at maximum medical improvement as to the cervical fusion when he was reexamined on February 27, 2006.

Dr. Coyle provided his opinions concerning permanent partial disability ratings:

1. 20 % due to the work accident of April 29, 2003 and
2. 15 % for non-related preexisting problems, which were his prior fusion and the opacification of the posterior longitudinal ligament.
3. he left his restrictions that he recommended in November 2003 and did not change them.

Dr. Coyle said there was no future medical care for the cervical spine but he deferred to Dr. Suthar re the lumbar spine. Dr. Coyle went on to say:

1. the employee underwent surgery due to the aggravation for the accident of April 29, 2003.
2. the employee's prior conditions became symptomatic due to the trauma.
3. the employee's back is not a surgical problem. Dr. Coyle indicated that Dr. Kennedy said the back was non-surgical and he let it go at that. He deferred to Dr. Suthar for opinions about the employee's back.
4. the imaging studies dated December 5, 2005 concerning the neck showed calcification of the posterior longitudinal ligament. He indicated that more surgery may be needed for the employee's neck for this condition but it was not work-related.
5. since he released the employee in November 2003, the employee has developed increased symptomology in the cervical spine.
6. the employee would benefit from anti-inflammatory medications, exercise and that he should quit smoking.

Dr. Coyle testified that he gave the employee the benefit of the doubt on causation on the April 2003 injury as the

employee related an injury, but there was no radiographic evidence or damage due to the accident. However he stated that the employee said he had no pain before the accident and had pain afterwards therefore that is why he said the accident aggravated the preexisting condition. Dr. Coyle further testified that if the employee was symptomatic within three months prior to the April 2003 injury-that would mitigate against giving the employee the benefit of the doubt as to the accident aggravating the prior condition.

Dr. Suthar testified by deposition taken September 15, 2006. He indicated that he first saw the employee on September 29, 2003. He testified that he specializes in physical medicine rehabilitation and that his practice does do some pain management. He testified that Dr. Coyle referred the employee to him for low back treatment. Likewise, Dr. Suthar took a history, reviewed other records and did a physical examination. He reported that the examination was limited due to pain.

Dr. Suthar provided as assessment that:

1. the employee had prior surgeries and that his acute or immediate pain was mechanical pain, soft tissue and joint pain. He testified that it is not uncommon when someone has a fusion to have secondary pain from other structures of the spine.
2. it is hard to separate when someone has multiple injuries or trauma. Sometimes they just all pile on top of each other. I felt that the injury of April 2003, may have just added to everything else that was preexisting (emphasis added).

Dr. Suthar testified that he gave the employee injections to try to eliminate some of the mechanical pain.

Dr. Suthar saw the employee again on November 11, 2003. He testified that there was some improvement but the employee was still limited. He recommended that the employee continue his medications and recommended that a functional capacity evaluation be done. Dr. Suthar reported that the employee's condition had not substantially changed since he first saw him in September 2003.

Dr. Suthar provided a permanent partial disability rating for both the January and April 2003 injuries. He said it is hard to separate injuries, but it is clear that the employee had significant preexisting even a few months and a year before April 2003. He stated that the prior surgeries all have a cumulative affect and that the April 2003 injury may have been the tip of the iceberg that set off the persistent pain. (emphasis added). The doctor placed permanent restrictions on the employee due to an accumulation of his injuries. He limited the employee to sedentary work with frequent breaks every two hours and felt that he could still work. Dr. Suthar did not recommend any more injections, but did recommend additional pain medications such as Ambien, Flexeril and Vicodin. He further opined that the employee's condition would degenerate over time, as what has happened to him will accelerate the aging process. He testified that if the employee did not have any preexisting surgeries and conditions, this would have resolved in three to four months without the need for injections. (emphasis added).

Dr. Suthar noted that the employee's family doctor had prescribed Oxycontin for the employee and that he did not feel that this was an appropriate medication for the employee to be on. He testified that doctors do not necessarily treat patients due to radiographic findings, but treat a patient due to pain-it is the level of pain that necessitates treatment. He indicated that whatever is causing the employee's back pain is referred to as a failed back syndrome, meaning that the surgery did not alleviate the pain.

Dr. Suthar also testified that his opinion that the employee could return to work was all due to problems related to the back as he did not focus on the neck. He agreed that the combination of the injuries of January and April 2003 were substantial factors in bringing about the pain the employee had when he was treating the employee.

Dr. Volarich evaluated the employee and prepared a report in June 2004. He prepared a supplemental report dated July 21, 2004 after reviewing some records of Dr. Kennedy. Dr. Volarich testified by deposition dated on

November 29, 2005. He performed a physical examination of the employee and reviewed films and medical records that were provided to him. He testified that the x-rays showed longstanding degenerative problems but did not reveal any acute problems.

The employee gave a history of his preexisting injuries and the three accidents that are the subject of this case. Dr. Volarich testified that the employee told him that in each of the three cases he was having problems prior to 2002, but that he continued to perform heavy labor despite these problems. He indicated that the employee claimed that he had ongoing problems with his back and neck prior to 2002, but that he could do his job despite these problems. In addition, Dr. Volarich testified that the employee reported that he recovered from the December 27, 2002 accident, and indicated that his back problems increased after his accident on January 20, 2003. In addition, he reported that the employee denied neck problems after that accident. In essence the employee claimed that his neck problems returned after the April 29, 2003 accident even though his back was affected; and that his back problems were mostly due to the prior accident.

Dr. Volarich testified about the diagnoses he arrived at:

1. As to the December 27, 2002 injury-Dr. Volarich basically diagnosed strains that resolved and gave no ratings.
2. As to January 20, 2003 injury-his diagnosis was aggravation of lumbar syndrome with new disc protrusion at L3-4 as well as aggravation of pre-existing degenerative disc disease and degenerative joint disease and postoperative change at L4-5 causing intermittent recurrent bilateral lower extremity paresthesias.
3. As to April 29, 2003 injury-his diagnosis was aggravation of lumbar syndrome, disc protrusion at C4-5 to the right and aggravation of spinal stenosis C6-7 causing C-7 radiculopathy as well as aggravation of degenerative disc disease, degenerative joint disease and post operative changes at C5-6, status post bilateral C6-7 anterior cervical discectomy with fusion, grafting and plating, and failed back and neck syndrome.

Dr. Volarich testified that failed back and neck syndrome meant that the outcome of the surgeries were not what was anticipated, leaving the employee with many symptoms of pain.

Dr. Volarich also provided diagnoses that preexisted the December 27, 2002 accident:

1. herniated nucleus pulposus C5-6, status post anterior cervical discectomy with fusion in 1984
2. herniated nucleus pulposus L4-5, status post discectomy in 1988
3. persistent lumbar syndrome, status post L4-5 fusion in 1999
4. left shoulder internal derangement, status post arthroscopic repair, left hip fracture with posttraumatic degenerative arthritis, left elbow fractures with posttraumatic degenerative arthritis, left jaw temporomandibular joint dysfunction, right wrist fracture, and bilateral fourth toe osteomyelitis.

Dr. Volarich also provided disability ratings:

1. As to the December 27, 2002 accident-no disability
2. As to the January 20, 2003 accident-20% permanent partial disability of the body as a whole rated at the lumbosacral spine due to the disc protrusion at L3-4 to the right, aggravation of his lumbar syndrome including degenerative disc disease, degenerative joint disease and postoperative changes at L4-5. He stated that this rating accounted for this injury's contribution to the low back pain, lost motion, and lower extremity radicular symptoms with paresthesias with additional disabilities in the lower back.
3. As to the April 29, 2003 accident-7 ½ % permanent partial disability of the body as a whole rated at the lumbosacral spine due to the aggravation of his lumbar syndrome causing worsening back pain, lost motion, and lower extremity symptoms and additional disability in the low back. There also was a 40% permanent partial disability of the body as a whole rated at the cervical spine due to the aggravation of spinal stenosis at C6-7 that required discectomy and fusion with instrumentation. This rating also accounts for the disc protrusion at C4-5 to the right and aggravation of degenerative disc disease, degenerative joint disease, and postoperative changes at C5-6, all of which contributed to the employee's neck pain, lost motion, and upper extremity paresthesias with radicular symptoms. Additional disability exists on the neck

as well.

In addition to his other opinions, Dr. Volarich testified about the combination of disabilities as applied to all three cases. Dr. Volarich offered his opinions first focusing on the back and then the neck:

1. the injury of December 27, 2002 combines with the prior low back problems to create a greater disability.
2. the injury of April 29, 2003 is more of an aggravation of the employee's back syndrome that contributed to his pain. Dr. Volarich testified that this injury made "all of what he had before worse" (emphasis added). He added that had the employee not had the prior back trouble and then had this kind of a strain injury to the back, or this kind of an aggravation, this probably would have went away.

As to the neck, Dr. Volarich testified that the same logic applies. He testified that the first neck fusion was in 1984 at the C5-6 level. The reinjury was at C6-7. In his opinion the last injury created greater disability. He concluded by saying that the combination of the employee's disabilities created a substantially greater disability than the simple sum or total of each separate injury or illness and that a loading factor should be applied.

Under objection, Dr. Volarich deferred to a vocational expert but did testify that the employee is permanently and totally disabled due to a combination of the three work related injuries and his preexisting problems. He indicated that the employee is not able to engage in any substantial gainful activity nor can he be expected to perform in an ongoing working capacity in the future. He added that pain affects the employee's ability to work as well as his ability to function mentally.

Dr. Volarich indicated that future surgery might be necessary, including a potential neck fusion from C4-C7. He also indicated that it is not unreasonable for the employee to be taking Oxycontin.

Timothy Lalk testified by deposition taken January 13, 2006. He met with the employee on September 14, 2004 and prepared a report dated October 13, 2004. In addition to conducting a personal interview with the employee, Mr. Lalk reviewed the medical records and opinions that were provided to him. In his report, Mr. Lalk provided a more detailed summary of the medical treatment that has been provided to the employee.

Mr. Lalk was asked to provide his opinion as to whether or not the employee can compete in the open labor market for any employment. Mr. Lalk provided a two-pronged opinion:

1. "if he can work up to the level—recommended by Dr. Suthar in his medical opinion, then I believe that he might be able to do some unskilled sedentary positions such as information clerk or unarmed security guard or cashier in a convenience store or self-service store".
2. "If however, I take into account the restrictions given to him by Dr. Volarich and if I take into account the limitations that Mr. Wells reported to me, the symptoms that he reported to me and simply based upon my observation of how he behaves with those symptoms, then it's my opinion that he's not able to pursue and secure any type of occupation in the open labor market and that he would not be able to compete for any position".

Mr. Lalk says he concluded that the employee was permanently and totally disabled based on what he saw of the employee in his interview and based on Dr. Volarich's restrictions. He indicated that he looks at the level of activity that the employee has been able to demonstrate.

In part, Mr. Lalk indicated that the employee is unemployable partly due to his presentation. He does not think that any employer would hire someone who appears to be in such discomfort and who had difficulty performing even simple tasks of standing walking and sitting. He testified that the employee could not do even a sedentary job, as no employer would allow him to lay down and rest several times a day. He testified that no employer is going to accommodate the employee in an unskilled entry-level position.

Mr. Lalk further testified that the employee would not be able to persist throughout a full workday and he would not be able to go to work on a daily basis due to the complaints he is reporting in his neck and low back, and due to the fact that the only way he can resolve them is by lying down. Mr. Lalk did indicate that part of his opinion is based on pain, and that he has no way to quantify pain.

Under cross-examination, Mr. Lalk agreed that under the restrictions of Dr. Suthar, there are a number of jobs that could be found within those restrictions. Mr. Lalk also agreed that if the employee could function at a sedentary level, he is employable, if not, he is not employable.

After all the questioning, Mr. Lalk reaffirmed his position that when he considers the limitations the employee reported to him and considered his observations of the employee, in his opinion the employee is not employable and could not compete for any job.

RULINGS OF LAW IN 02-156518 (December 27, 2002):

Section 287.420 RSMo states:

No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, have been given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission feels that there was good cause for failure to give the notice, or that the employer was not prejudiced by failure to receive the notice. No defect or inaccuracy in the notice shall invalidate it unless the commission finds that the employer was in fact misled and prejudiced thereby.

Based on the testimony of the employee, which the Court found to be credible, and the entirety of the evidence, the Court specifically finds that the employee has failed to meet his burden of proof on either notice or accident.

The Court finds that the employee failed to prove that he gave any notice, let alone written notice. In addition there is no evidence regarding good cause for failure to give notice or lack of prejudice. This case is denied in its entirety. The other issues are moot and therefore are not addressed. However, the Court notes that even if the employee had an accident and even if he provided proper notice to his employer, he testified that the accident did not require him to get any medical care, he got no medical care, and that the problems faded away. Under these circumstances neither the employer-insurer nor the Second Injury Fund would have any responsibility for any further benefits as to this case standing by itself.

RULINGS OF LAW IN 03-134632 (January 20, 2003):

Once again, the testimony of the employee was found to be credible. This case is in part distinguished from the prior case, as there are records showing that the employee received medical care for this injury. The history in the medical records indicates that the employee told the medical providers about a work related event and got treatment for his injuries. The employee again equivocated about reporting the incident to Sandy. What is different and distinguishes this case from the prior case is that the employee testified that he went to see Dr. Loucks on his own as he was referred there by his sister-in-law, and he processed the medical bills through his union general health policy knowing that work would pay for medical bills related to a work accident.

Based on the testimony of the employee, which the Court found to be credible, and all the evidence the Court again specifically finds that the employee has failed to meet his burden of proof on either notice or accident. This case is denied in its entirety. The other issues are moot and therefore are not addressed. The Court notes however, that even though the employee has failed to meet the technical statutory requirements necessary to receive workers' compensation benefits for this case, this does not negate the possibility that the employee did sustain an injury that may have resulted in disability. While this case may not be compensable standing alone, it certainly cannot be ignored as a preexisting injury. As the case is denied neither the employer-insurer nor the Second Injury Fund have any further liability in this case.

RULINGS OF LAW IN 03-036575 (April 29, 2003):

The employee is claiming that he is permanently totally disabled. The term "total disability" is defined under Section 287.020.7 as follows:

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

The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment.

See 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. See 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." An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of State of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990).

The key question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform to work for which he or she entered. See

Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo. App. 1993), and Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995).

The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., in pertinent part 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. Any employee who has a preexisting permanent partial disability whether from a compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle

to employment or to obtaining reemployment, if the employee becomes unemployed . . . (minimum standard for permanent partial disability case is deleted). If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in permanent total disability, the minimum standard 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 employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of the payment of 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 the special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided . . .

Given these statutory provisions and cases, the first question that must be addressed is whether the employee is permanently and totally disabled. If the employee is permanently and totally disabled, then the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the preexisting injuries and conditions and the employee's last injury of April 29, 2003. Under Section 287.220.1, the preexisting injuries must also have constituted a hindrance or obstacle to the employee's employment or reemployment.

With regard to whether the employee is permanently and totally disabled, there is both medical and vocational evidence that addresses that issue. Dr. Coyle, Dr. Suthar, Dr. Voalrich and Mr. Lalk addressed the issue. Dr. Coyle concentrated his treatment on the employee's neck and essentially restricted his medical opinions to matters that excluded the back. Dr. Suthar concentrated his treatment on the employee's back and generally restricted his medical opinions to matters that excluded the neck. Dr. Coyle determined that the employee reached maximum medical improvement as to his neck as of November 3, 2003. Dr. Suthar determined that the employee reached maximum medical improvement as to his back as of November 11, 2003. The employee was paid temporary total disability benefits through November 17, 2003.

As of November 3, 2003, Dr. Coyle felt that as to the neck that the employee could work, but under permanent restrictions. As of November 11, 2003, Dr. Suthar felt that the employee could return to work with limitations to sedentary work with frequent breaks every two hours.

Dr. Volarich deferred to a vocational expert, but he testified that the employee was permanently and totally disabled. He indicated that the employee is not able to engage in any substantial gainful activity. The parties objected to the medical opinion of Dr. Volarich as to what caused the employee's permanent and total disability. Dr. Volarich opined that the employee was not able to work due to a combination of the employee's prior injuries and the last accident.

Mr. Lalk provided a two part opinion, assessing the restrictions placed on the employee by the doctors and then determining whether the employee was able to work or not. When all the dust settled, Mr. Lalk opined that the employee was permanently and totally disabled and could not compete in the open labor market.

In addition to both the medical and the vocational evidence, the Court found that the employee was a very credible and persuasive witness on the issue of permanent total disability. The employee offered detailed testimony concerning the impact his injuries have had on his daily ability to function either at home or in the workplace. The employee's testimony in this regard was credible and supports a conclusion that the employee will not be able to compete in the open labor market. With his physical limitation, restrictions and pain, it is extremely unlikely that any employer would reasonably be expected to hire the employee in his present physical condition.

In addition to the employee's testimony, the Court observed the employee for an extended period of time both prior to and during the course of his testimony and after. The employee exhibited numerous behavior and physical patterns that support a finding of permanent total disability including trouble sitting, rubbing his thigh, changing from sitting to standing position, leaning on a bench while testifying. In addition to the Court's own observations of these behavior patterns, other observers from the past have documented similar behavior. The Court's opinion was these behavior patterns were consistent with pain and were neither contrived nor exaggerated. Based on these observations of the employee, it is clear that he is suffering from a constant and significant level of pain and discomfort.

Based on a consideration of all the evidence, including the testimony of the employee, and all relevant medical and vocational rehabilitation evidence, the Court finds that no employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition and reasonably expect the

employee to perform the work for which he was hired. The Court finds that the employee is no longer able to compete in the open labor market and therefore is permanently and totally disabled. The Court finds and believes the evidence supporting the fact that the employee is permanently and totally disabled is more credible than the evidence opining that the employee could return to work. The Court would reach this same conclusion, even if the objected to portions of the testimony of Dr. Volarich was not considered.

On the question of whether the employee's preexisting conditions were a hindrance or obstacle to his employment or reemployment, there are multiple pieces of evidence and opinions that have been provided.

The employee has settled three workers' compensations cases in the past. Those disabilities are considered to be partial but permanent. The employee has settled a case for 4% of the right wrist, 12 ½ percent of the body as a whole, and 42 ½ percent of the body as a whole pertaining to the back. Dr. Kennedy released the employee saying "he will continue to work unrestricted but understands that he should not exert himself excessively if he begins to have increasing pain or change in his symptoms". In addition to these work related cases that were settled, there are other injuries/disabilities that the employee has. The most significant was a 1984 incident where the employee had right shoulder and cervical fusion surgery.

Several doctors have provided opinions about preexisting injuries and the accidents in the current three cases. Dr. Coyle provided ratings of 20% due to the work related injury of April 29, 2003 and 15 percent for his non-related preexisting problems and specified what they were. Dr. Suthar provided permanent partial disability ratings for both the January and April 2003 injuries. He testified that it is hard to separate injuries, but it is clear that the employee had significant preexisting even a few months and a year before April 2003. He stated that the prior surgeries all have a cumulative affect and that the April 2003 injury may have been the tip of the iceberg that set off the persistent pain. He also testified that if the employee did not have any preexisting surgeries and conditions, this would have resolved in three to four months. Dr. Volarich provided ratings/opinions about disability there are set out earlier in this opinion and are not going to be repeated here.

In addition to everything else the employee provided testimony as to how all of his disabilities have affected his ability to work. This is the only area where the parties questioned the credibility of the employee in that his prior testimony construing the effects of his prior disabilities was viewed to be inconsistent with his trial testimony. Contrasts were made as to suggested differences between the employee's trial and deposition testimony. The Court finds the employee's testimony as to the effects of his prior injuries to be credible-that they were work disabling despite the fact that he was able to work through them. The Court is helped by the fact that the medical records over the years document that he was having continued problems.

Based on a review of all of the medical evidence and the credible testimony of the employee, the Court finds that the employee's preexisting disabilities and conditions regarding his back and neck etc, including fusion surgeries all constituted a hindrance or obstacle to his employment or to obtaining reemployment.

Both Dr. Volarich and Mr. Lalk found that the employee's combination of disabilities created a substantially greater disability than the simple sum or total of each separate injury. It was Dr. Volarich's opinion that the work injury of April 29, 2003 and his preexisting disabilities caused the employee to be permanently and totally disabled. He opined that it was his opinion that the employee's permanent total disability was not from the last injury alone. As several doctor's stated, but for the employee's prior injuries the last injury alone would not have caused much of a problem-it was like the straw that broke the camel's back.

Based on all of this evidence, the Court finds that the employee is permanently and totally disabled as a result of a combination of his preexisting accidents, injuries and disabilities and the disabilities that resulted from the accident April 29, 2003.

Under Section 287.220.1 RSMo, in order to make the computations necessary to determine the liability of the Second Injury fund for permanent total disability, it is also necessary to make a specific finding regarding the disability resulting from the last injury, "considered alone and of itself". See Vaught v. Vaught, 838 S.W.2d 931 (Mo. App. 1997). As previously indicated, under Section 287.220.1 RSMo, in situations where the previous disability and the last injury combine to result in permanent and total disability, the employer is only liable for the disability resulting from the last injury considered alone and of itself and the Second Injury Fund is liable for the difference, if any, between the compensation for which the employer is liable and compensation provided under Chapter 287 for permanent total disability. Therefore the Second Injury Fund is responsible for making up the difference between the permanent partial disability payments and permanent total disability payments.

The employer-insurer paid the employee \$16,587.72 in temporary total disability benefits. The time period the benefits were paid for covered May 2, 2003 through November 17, 2003. By all accounts the employee had reached maximum medical improvement by November 11, 2003. The Court finds that as of November 17, 2003 the employee had completed his healing period. The Court finds that as of that date no employer in the usual course business would reasonably be expected to employ the employee in his physical condition and reasonably expect the employee to perform the work for which he is hired, and therefore was no longer able to compete in the open labor market and was permanently and totally disabled.

The Court has considered the opinions of the doctors and the testimony of the employee as to the disability that was created as a result of the April 29, 2003 accident. Based on this evidence the Court finds that as a direct result of the last injury the employee incurred a permanent partial disability of 30% to his body as a whole. It is the Court's ruling that the 30% disability includes all disabilities, either to the back the neck or otherwise.

The employer-insurer is therefore ordered to pay to the employee 120 weeks of permanent partial disability payable at the rate of \$340.12 per week commencing the day after the date that the employee reached maximum medical improvement (November 18, 2003), and ending on March 7, 2006. ( $400 \times 30\% = 120$ .  $120 \times \$340.12 = \$40,814.40$ ).

Since the compensation paid by the employer-insurer was less than the amount payable for permanent total disability under Section 287.200, RSMo, the Second Injury Fund is liable for the difference between what the employee is receiving for permanent partial disability from the employer-insurer and what he is entitled to receive for permanent total disability under Section 287.220.1 RSMo. The difference between the permanent total disability rate of \$580.57 per week and the permanent partial disability rate of \$340.12 per week is \$240.45 per week. The Second Injury Fund is therefore obligated to pay to the employee the sum of \$240.45 per week for 120 weeks commencing on November 18, 2003 and ending on March 7, 2006. ( $120 \times \$240.45 = \$28,854.00$ ) Commencing on March 8, 2006 the Second Injury Fund is responsible for paying the full permanent total disability benefit to the employee at the rate of \$580.57 per week. These payments for permanent total disability shall continue for the remainder of the employee's lifetime or until suspended if the employee is restored to her regular work or its equivalent as provided in Section 287.200 RSMo.

The only issue that is left to be resolved is that of future medical care. Every doctor who testified indicated that the employee needed additional or future medical care. They differed as to what kind of care the employee needed and what caused his need for additional care. There is ample evidence that the employee had received a considerable amount of medical care for either the work-related or non-work related injuries/accidents that preceded the last accident. While the Court did not find the accident of December 27, 2002 or the accident of January 27, 2003 compensable, the employee did receive medical care for the January 27, 2003 accident.

Dr. Coyle said that the employee may need an additional neck surgery, but opined that the surgery was not related to the accident of April 29, 2003. He testified that the employee would benefit from anti-inflammatory medications and exercise.

Dr. Suthar discussed the employee's pain and said that it was not unusual when someone has a fusion, the spinal column is altered and there are secondary pains. Based on his position that the employee's April 29, 2003 injury added to everything that was preexisting, he continued to give the employee medications and injections. The doctor testified that due to the April 29, 2003 it is necessary for the employee to take additional pain medications. Dr. Suthar was aware that Dr. Patel had prescribed Oxycontin for the employee as of April 29, 2004, and that he did not feel that was appropriate. He also testified that the employee will need continued testing of his liver and kidneys due to his use of medications. Dr. Patel's records are hard to read, but the employee testified that he was not taking Oxycontin until after his April 2003 accident.

Dr. Volarich testified that the employee may need additional cervical fusion surgery, the employee needs pain medication and that it is not unreasonable for the employee to be taking Oxycontin.

Based on a reading of all the evidence, the Court finds that the employer-insurer has the statutory responsibility to cure and relieve the employee from the effects of his injury that the employee is in needed of additional or future medical care to cure and relieve him from the effects of the April 29, 2003 accident. The Court orders that the employer-insurer provide future medical care to the employee. All of the doctors agreed that the employee needs maintenance as to the taking of pain medication and testing. The doctors disagree as to whether any further surgery is necessary and whether the surgery is caused by the accident. The Court finds the testimony of Dr. Volarich to be the most credible and orders that the employer-insurer should provide medical care in compliance with the recommendations of Dr. Volarich.

#### ATTORNEY'S FEE

Daniel J. McMichael, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

#### INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: \_\_\_\_\_

Made by:

---

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

A true copy: Attest:

---

Ms. Patricia "Pat" Secret

*Director*

*Division of Workers' Compensation*