Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 88-034276

Employee: Eugene White

Employer: General Motors

Insurer: Self-Insured

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

Date of Accident: February 26, 1988

Place and County of Accident: St. Charles County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 27, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Koren M. Mueller, issued April 27, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 13th day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Eugene White Injury No. 88-034276

Dependents: N/A

Employer: General Motors

Additional Party: State Treasurer, as Custodian of the Second Injury Fund

Insurer: Self-Insured

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Hearing Date: December 20, 2005; formally submitted January 13, 2006 Checked by: KMM/lsn for bb

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? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 26, 1988
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: assembly work
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Chest
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: $2,100.00
16. Value necessary medical aid paid to date by employer/insurer? $2,000.00
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: $269.81/$161.88
20. Method wages computation: by agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: No

TOTAL: ……..NONE

23. Future requirements awarded: NONE

Said payments to begin as of the date of this Award 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 -- of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Eugene White

Injury No: 88-034276

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: General Motors

Additional Party State Treasurer, as Custodian of the Second Injury Fund

Insurer: Self-Insured

Checked by: KMM/lsn for bb

PRELIMINARIES

A consolidated final hearing was held on the above-referenced claim as well as companion file number 89-065590 in the St. Charles Division of Workers' Compensation office on December 20, 2005. Post-hearing briefs were received and the case was formally submitted on January 13, 2006. Gary J. Sanguinet represented Eugene White (hereinafter "Claimant"). Daniel J. Harlan represented General Motors (hereinafter "Employer") and Barbara Toepke represented the Second Injury

Fund. Claimant appeared and was the only live witness to testify. Mr. Sanguinet requested an attorney fee of 25% of all benefits awarded.

The parties have stipulated and agreed that on or about February 26, 1988 Claimant while in the employment of Employer sustained an injury by accident arising out of and in the course of employment occurring in St. Charles County, Missouri. The parties agreed the rates for temporary total disability and permanent partial disability were $269.81 and $161.88 respectively. Claimant was paid compensation to date in the amount of $2100.00 and medical aid was provided by Employer in the amount of $2000.00.

The parties agreed and stipulated that the following issues are to be resolved:

1. Medical causation
2. Nature and extent of permanent partial disability
3. Nature and extent of Second Injury Fund liability

EXHIBITS

Claimant offered the following exhibits, which were admitted into evidence without objection:

Exh. A: Dr. Robert Poetz deposition taken November 12, 1990
Exh. B: Dr. Robert Poetz deposition taken August 12, 1993

Employer offered the following exhibits, which were admitted into evidence without objection:

Exh. 1: Dr. Ralph Graff deposition taken August 9, 1994

Exh. 6: Dr. Graff letter dated January 24, 1989

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the substantial and credible evidence, as well as the applicable law I find the following:

Only the evidence necessary to support this award has been summarized. Any objections not expressly ruled on in this award are overruled. Claimant testified he was working for Employer when a tail panel with a staple on the end struck him on the left chest nipple. He had surgery on his own two weeks later to remove a lump from his left chest area. He then was treated for a post-operative infection. At hearing he complained of no feeling and numbness in the left nipple area. He also complained of problems using his left arm since this injury. Claimant testified he has not worked since 1989.

Dr. Robert Poetz testified on Claimant's behalf by depositions taken on November 12, 1990 and August 12, 1993. Dr. Poetz testified he examined Claimant and at the time of his evaluation Claimant complained of left chest area pain radiating into the left armpit and left arm and left nipple numbness. Dr. Poetz testified Claimant was released to return to work after his surgery and infection on June 15, 1988. Dr. Poetz admitted he did not review any medical records regarding this injury prior to his testimony. Dr. Poetz testified on cross-examination that Claimant did not sustain any permanent partial disability as a result of his left chest injury.

Dr. Ralph Graff testified on Employer's behalf by deposition taken on August 9, 1994. Dr. Graff testified he examined Claimant for the first time on January 19, 1989. He testified that the pathology report after the breast tissue excision indicated a diagnosis of benign gynecomastia. Dr. Graff noted his exam of the left nipple area revealed a well-healed scar and no mass. He testified that his examination of the left axilla was negative. He concluded Claimant had no disability as a result of the March 1988 incident. Dr. Graff could find no connection between the left breast surgical procedure and Claimant's pain in the left axilla.

A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. Phelps v. Jeff Wolk Construction Co., 803 S.W.2d 641, 646 (Mo.App. 1991). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. Banner Iron Works v. Mordis, 663 S.W. 2d 770,773 (Mo.App. 1983). After reviewing all the evidence submitted including Claimant's complaints regarding the nature and extent of disability in this case I find there is no expert medical evidence introduced of any permanent partial disability resulting from this injury. I find the medical experts persuasive and therefore find Employer is not liable for any permanent

partial disability in this case.

Based upon the above findings, I also find there is no Second Injury Fund liability. Therefore the other issues in this case are moot.

Date: April 27, 2006

Made by: /s/ KOREN M. MUELLER
KOREN M. MUELLER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST
PATRICIA "PAT" SECREST
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 89-065590

Employee: Eugene White

Employer: General Motors

Insurer: Self-Insured

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

Date of Accident: May 22, 1989

Place and County of Accident: St. Charles 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. 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 27, 2006. The award and decision of Administrative Law Judge Koren M. Mueller, issued April 27, 2006, 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 13th day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Eugene White

Injury No. 89-065590

Dependents: ----

Employer: General Motors

Additional Party: State Treasurer, as custodian of the Second Injury Fund

Insurer: Self-Insured

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Hearing Date: December 20, 2005; formally submitted January 13, 2006 Checked by: KMM/bfb

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: May 22, 1989
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: Assembly work
12. Did accident or occupational disease cause death? No Date of death? ----
13. Part(s) of body injured by accident or occupational disease: low back
14. Nature and extent of any permanent disability: 7 1/2% body as a whole referable to the low back
15. Compensation paid to-date for temporary disability: $1,957.55
16. Value necessary medical aid paid to date by employer/insurer? None

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: N/A

19. Weekly compensation rate: $279.64/$167.78

20. Method wages computation: by agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: $5,033.40

22. Second Injury Fund liability: No

TOTAL: $5,033.40

23. Future requirements awarded: None

Said payments to begin as of the date of this Award 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:

Gary J. Sanguinet

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Eugene White Injury No: 89-065590

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: ----

Employer: General Motors

Additional Party State Treasurer, as custodian of the Second Injury Fund

Insurer: Self-Insured

Checked by: KMM/bfb

PRELIMINARIES

A consolidated final hearing was held on the above-referenced claim as well as companion file number 88-34276 in the St. Charles Division of Workers' Compensation office on December 20, 2005. Post-hearing briefs were received and the case was formally submitted on January 13, 2006. Gary J. Sanguinet represented Eugene White (hereinafter "Claimant"). Daniel J. Harlan represented General Motors (hereinafter "Employer") and Barbara Toepke represented the Second Injury Fund. Claimant appeared and was the only live witness to testify. Mr. Sanguinet requested an attorney fee of 25% of all benefits awarded.

The parties have stipulated and agreed that on or about May 22, 1989 Claimant was in the employment of Employer in St. Charles County, Missouri. The parties agree that Employer had notice of the injury and a claim for compensation was filed within the time prescribed by law. The parties agreed that the rates for temporary total disability and permanent partial disability were $279.64 and $167.78 respectively. The parties agreed and stipulated that Claimant was paid temporary total disability compensation to date in the amount of $1957.55 covering a period from May 22, 1989 through July 5, 1989. Employer provided no medical aid.

The parties agreed and stipulated that the following issues are to be resolved:

4. Accident
5. Arising out of and in the course of employment
6. Medical causation
7. Nature and extent of permanent partial disability
8. Nature and extent of permanent total disability against the Second Injury Fund
9. Second Injury Fund liability

EXHIBITS

Claimant offered the following exhibits, which were admitted into evidence without objection:

Exh. A: Dr. Robert Poetz deposition taken November 12, 1990
Exh. B: Dr. Robert Poetz deposition taken August 12, 1993

Employer offered the following exhibits, which were admitted into evidence without objection:

Exh. 1: Dr. Ralph Graff deposition taken August 9, 1994
Exh. 2: Dr. Graff's reports
Exh. 3: Employer's dispensary records
Exh. 4: Dr. Harold Bizer medical records
Exh. 5: Clinical Neurology, Inc. medical records

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the substantial and credible evidence, as well as the applicable law I find the following:

Only the evidence necessary to support this award has been summarized. Any objections not expressly ruled on in this award are overruled. Claimant testified he was working for Employer on a platform on May 22, 1989 and while he was sanding the back of a car and bending over he felt his back pop. Claimant testified he experienced pain in his neck and down both legs. He reported the incident to labor relations and reported to St. Mary's Hospital. Claimant testified he had a lumbar fusion in 1992 or 1993 and treatment at Saint Louis University's Chronic Pain Clinic. At the time of hearing

Claimant complained of terrible pain in his back with pain and numbness in both legs. He complained of headaches and back and leg pain daily. He testified that after the work incident he could not do anything, it affected his ability to work. He testified that he currently takes two types of OxyContin for pain relief. Claimant testified he has not worked since 1989.

Claimant testified he had a motor vehicle accident in 1985 and underwent three back surgeries at that time. He testified he was 100% better after the 1985 accident. He testified he could perform his job at that time.

On cross-examination Claimant testified that all of the back surgeries that were performed were at the L4-5 level. He admitted to treatment through pain management, including narcotic pain medications after the 1985 accident. He also admitted to hospitalization in 1986 for detoxification from narcotic pain medication and alcohol. He admitted he was off work for approximately three years after his 1985 accident until his return to work in 1988. When he was released to return to work in 1988 he was still on pain medication from his prior back injury. He may have used sick leave after returning to work in 1988 for treatment of hernias and an ulcer. He had an additional low back surgery by Dr. Sprich on January 25, 1991 and a third low back surgery, a low back fusion, performed in March of 1992 by Dr. Murphy.

On cross-examination Claimant did not recall an April 27, 1989 visit to Gateway Community Hospital for persistent back pain and bilateral radicular pain. Claimant did not recall whether he received weekly benefits from Employer after his May 22, 1989 injury. Claimant admitted he returned to work in 1988 with restrictions, but Employer did not abide by his work restrictions. Claimant admitted that when he returned to work in 1988 he tried many different jobs. Claimant testified that he was a utility worker and that some foremen would advise him to take sick leave for back pain. Claimant testified that he completed an Associates Degree in Liberal Arts after graduating from high school.

Claimant admitted on cross-examination that he was hospitalized for one to two weeks after an assault with a spade subsequent to his May 22, 1989 injury. He admitted he injured his back in the assault, stating that the attacker tried to kill him. He testified that his back has worsened since 1989.

Dr. Robert Poetz testified on Claimant's behalf by depositions taken on November 12, 1990 and August 12, 1993. Dr. Poetz testified he examined Claimant on April 2, 1990 and November 2, 1992. Dr. Poetz testified that Claimant re-injured his back at work on May 22, 1989 while performing restricted duties as a sander. He testified that Claimant reported to St. Elizabeth Hospital's Emergency Department for x-rays of the lumbar spine, which were negative with the exception of a pseudoarthrosis formation at L5-S1. He testified that there was no visual change from the previous exam of June 4, 1985. At St. Elizabeth's Hospital, Claimant was given medication and placed on no work status and followed up with his private physician the next day. Dr. Poetz testified that Claimant underwent further diagnostic studies, which revealed diffuse disc bulging at L4-5, mild scoliosis and degenerative changes. Dr. Poetz testified that his evaluation included diagnoses of history of herniated nucleus pulposus at L4-5 with L4-5 diskectomy, degenerative joint disease at L4-5 and acute lumbar strain with bilateral lumbar radiculitis. Dr. Poetz recommended restrictions including avoiding prolonged standing, walking and lifting as well as additional treatment. Dr. Poetz testified that the mild scoliosis, degenerative changes and pseudoarthrosis pre-existed Claimant's May 22, 1989 injury.

Dr. Poetz testified on August 12, 1993 that he issued a supplemental report dated March 8, 1993 after his receipt of additional medical records. He testified he added the diagnoses of recurrent herniated nucleus pulposus at L4-5 with posterior lumbar interbody fusion. Dr. Poetz testified that work hardening would be appropriate for Claimant to succeed in returning to gainful employment. Dr. Poetz testified that he increased Claimant's permanent partial disability to 50% of the body as a whole referable to the lumbar spine as a result of the May 22, 1989 injury.

On cross-examination Dr. Poetz admitted that Claimant had radicular symptoms associated with his 1985 injury. He also admitted that the post-1989 diagnostic studies performed were not inconsistent with the previous surgery. Dr. Poetz testified that he did not express an opinion on whether Claimant was permanently and totally disabled. Dr. Poetz testified that the disability he found associated with the 1985 injury could combine with the disability he found associated with the 1989 injury to create a disability greater than the simple arithmetic sum of the two disabilities.

Dr. Ralph Graff testified on Employer's behalf by deposition taken on August 9, 1994. Dr. Graff testified he examined Claimant on January 19, 1989, August 7, 1990, March 26, 1992 and January 26, 1994. Dr. Graff testified that the operative note of Dr. Sprich from Claimant's January of 1991 surgery does not indicate a frank herniation. Dr. Graff testified that after his review of additional medical reports he found no evidence of an injury at Employer around May 1989 and therefore assigned no permanent partial disability. On cross-examination Dr. Graff admitted that he concluded in his September 25, 1990 report that Claimant had 7 ½% permanent partial disability of the body as a whole as a result of Claimant's May 22, 1989 work injury. He testified on cross-examination that by January 26, 1994 he concluded that Claimant did not have a work injury. Dr. Graff admitted on cross-examination that there was a history and physical taken March 24, 1992 that refers

back to the work injury in May 1989. Dr. Graff noted that the statement was from a practitioner that did not take care of Claimant at the time of the May 22, 1989 injury. Dr. Graff admitted on cross-examination that Dr. Sprich, in his June and July 1989 records, also referred to a work injury in May of 1989. Dr. Graff testified that Dr. Sprich was not a treating doctor until a month after the May 22, 1989 work injury.

Issues relating to accident

In a workers' compensation proceeding it is the claimant who has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury Fund liability. Meilves v. Morris, 422 S.W.2d 335, 339 (Mo. 1968); Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195 (Mo.App. 1990). Claimant testified credibly regarding the accident at Employer on May 22, 1989. Employer's dispensary records also contain an entry dated May 22, 1989 wherein Claimant was noted as standing on a platform sanding and bending quite a bit with increased pain and pain to the legs. Claimant is quoted as stating he did not think he could work with the pain. The note closed by stating that Claimant has to decide when to go on sick leave. Dr. Bizer's medical records, although difficult to read, note a visit on May 23, 1989 stating Employer placed Claimant on jobs against his restrictions and that Claimant was seen and examined at a hospital. Dr. Graff admitted on cross-examination that the history of a work injury was noted in treatment by Dr. Sprich in June and July of 1989. Therefore, based upon all the credible evidence submitted, I find Claimant has met his burden of proving he had an accident at Employer on May 22, 1989.

Issues relating to arising out of and in the course of employment and medical causation

Claimant has a complicated medical history regarding his low back treatment. Claimant alleges his need for a post-May 22, 1989 lumbar laminectomy and fusion is related to the work injury of May 22, 1989. Employer disputes this contention. Claimant must establish a causal connection between the accident and the claimed injuries. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. 1994). Whether employment is a substantial factor in causing the injury is a question of fact. Sanderson v. Porta-Fab Corp., 989 S.W.2d 599, 603 (Mo.App. 1999). Determinations of this kind require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo.banc 1994). When medical theories conflict, deciding which to accept is an issue reserved for determination of the fact finder. Hawkins v Emerson Electric Co., 676 S.W.2d 872, 877 (Mo.App. 1984). Dr. Poetz testified that the need for Claimant's lumbar laminectomy and fusion was related to the May 22, 1989 work injury. However, Dr. Poetz admitted that Claimant had significant pre-existing low back problems, including degenerative changes, scoliosis and radiculopathy. His diagnosis from the May 22, 1989 work injury was acute low back strain with radiculopathy. Dr. Graff initially described a work injury on May 22, 1989 with 7 ½% permanent partial disability, but later changed his opinion. I find based upon all the credible evidence submitted, that Claimant suffered an acute low back strain as a result of the May 22, 1989 work injury. I find that Claimant's need for further surgery, including a lumbar fusion, is not medically causally related to the work injury of May 22, 1989.

Issues relating to permanent partial disability

A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. Phelps v. Jeff Wolk Construction Co., 803 S.W.2d 641, 646 (Mo.App. 1991). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. Banner Iron Works v. Mordis, 663 S.W. 2d 770,773 (Mo.App. 1983). After reviewing all the evidence submitted, including Claimant's complaints regarding the nature and extent of disability in this case, I find that Claimant sustained 7 ½% permanent partial disability of the body as a whole referable to the low back as a result of the May 22, 1989 work injury. The parties agreed and stipulated to a permanent partial disability rate of $167.78 per week. The total number of weeks of permanent partial disability is 30 weeks at a rate of $167.78 for a total due from Employer of $5033.40.

Issues relating to Second Injury Fund liability

Section 287.020 RSMo. Provides that the term "total disability" as used in this chapter shall mean the inability to return to any employment, and not merely inability to return to the employment in which the employee was engaged in 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. Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d (Mo.App. 1982). The test for permanent total disability is whether any employer would reasonably be expected to hire the employee, considering the employee's current physical condition. Sutton v. Vee Jay Cement Contracting Co., 37 S.W.3d 522, 526 (Mo.App. 1999). An injured employee is not required, however, to be completely inactive or inert in order to be totally

disabled. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1999).

Claimant alleges he is permanently and totally disabled due to a combination of his pre-existing condition and May 22, 1989 work injury. No expert opinion was offered into evidence contending that Claimant is permanently and totally disabled. Claimant's expert, Dr. Poetz, opined that Claimant could perform sedentary work and suggested Claimant enroll in a vocational rehabilitation program. Employer's expert, Dr. Graff, noted in his September 25, 1990 report that Claimant was capable of returning to work. Dr. Hogan in his April 5, 1990 report noted that Claimant was capable of full duty work. Claimant admitted that his low back condition has gotten worse since his 1989 injury, indicating deterioration over time of his low back condition since the May 22, 1989 work injury. Claimant also testified about a serious assault with low back injury subsequent to the 1989 injury. Considering the substantial evidence and the entire record, I find Claimant has failed to carry his burden in proving that he is permanently and totally disabled by a combination of his pre-existing condition and his May 22, 1989 work injury. Therefore, Claimant's claim for permanent total disability benefits is denied.

Once a determination is made that a claimant is not permanently and totally disabled, the inquiry then turns to what degree, if any, is an individual permanently partially disabled for purposes of Second Injury Fund liability. Leutzinger v. Treasurer of the State of Missouri, 895 S.W.2d 591 (Mo.App. 1995). Dr. Poetz testified to disability in the back from the primary injury and pre-existing injury, but did not testify that the disabilities combined. When asked, Dr. Poetz responded that the pre-existing and primary disabilities "could" combine for overall disability greater than their simple sum, but did not state that they did combine. Therefore, I find that based upon the entire record that there is not sufficient evidence of enhanced disability to lead to Second Injury Fund liability. Claimant's Second Injury Fund claim is consequently denied.

CONCLUSION

In summary, Employer is liable for 7 ½% permanent partial disability of the body as a whole referable to the low back as a result of the May 22, 1989 work injury. The total number of weeks of permanent partial disability is 30 weeks at a rate of $167.78 for a total due from Employer of $5033.40.

This award is subject to a lien in favor of Gary J. Sanguinet, Attorney at Law, in the amount of 25% thereof for necessary legal services rendered.

This award is subject to interest as provided by law.

Date: April 27, 2006

Made by: /s/ KOREN M. MUELLER
KOREN M. MUELLER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST
PATRICIA "PAT" SECREST
Director
Division of Workers' Compensation