

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

Injury No.: 88-185088

Employee: Robert Winston  
Employer: General Motors  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: July 27, 1988 (Allegedly)

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 November 24, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Koren M. Mueller, issued November 24, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 16<sup>th</sup> day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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

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

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Robert Winston

Injury No. 88-185088

Employer: General Motors  
Add. Party: State Treasurer, as Custodian of the  
Second Injury Fund  
Insurer: Self  
Hearing Date: 8/24/04

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri  
Checked by: KMM/df

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: alleged 7/27/88
5. State location where accident occurred or occupational disease was contracted: St. Charles County, MO
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
8. Did accident or occupational disease arise out of and in the course of the employment? n/a
9. Was claim for compensation filed within time required by Law? No
10. Was employer insured by above insurer? n/a
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Alleged fall
12. Did accident or occupational disease cause death? No Date of death? n/a
13. Part(s) of body injured by accident or occupational disease: Back
0. Nature and extent of any permanent disability: n/a
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? n/a
18. Employee's average weekly wages: n/a
19. Weekly compensation rate: \$279.64/\$167.78
0. Method wages computation: By stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None  
Unpaid medical expenses: None  
None weeks of temporary total disability (or temporary partial disability)  
None weeks of permanent partial disability from Employer

n/a weeks of disfigurement from Employer

22. Second Injury Fund liability: No

TOTAL:

23. Future requirements awarded: None

Said payments to begin 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: Robert Winston

Injury No: 88-185088

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents:

Employer: General Motors

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

Insurer: Self

Checked by: KMM/df

### **PRELIMINARIES**

A consolidated hearing was held in injury numbers 88-185088 and 92-134465 on August 24, 2004 in St. Charles County and post-hearing briefs were to be submitted by the parties on September 17, 2004. Robert Winston (hereinafter "Claimant") by counsel requested an additional week to complete a post-hearing brief and there were no objections to an extension of time. Therefore post-hearing briefs were submitted by the parties by September 24, 2004. The claims were fully submitted on September 24, 2004. Claimant was represented by Harry J. Nichols. General Motors Corp. was represented by Daniel J. Harlan. The Second Injury Fund was represented by Barbara Toepke. Claimant testified at the

hearing. Mr. Nichols requested a fee of 25% of Claimant's award.

The parties stipulated that on or about July 27, 1988 the Claimant was in the employment of General Motors Corp. (hereinafter "Employer") in St. Charles County, Missouri. The parties further stipulated that the applicable compensation rates are \$279.64/\$167.78 and that Claimant has not been paid temporary total disability benefits to date. The parties also stipulated that Employer has not paid any medical benefits to date. The parties agreed and stipulated that the issues for disposition in this case are:

1. Accident
2. Notice
3. Nature and extent of permanent partial disability
4. Statute of limitations
5. Whether the Employer's Answer was filed within the time prescribed by law
6. Payment of medical bills
7. Second Injury Fund liability

## EXHIBITS

Claimant offered the following exhibits which were admitted into evidence:

Claimant's A: Social Security Administration Notice of Decision dated June 26, 1996  
(admitted over objection of SIF)

Claimant's B: General Motors Dispensary records (admitted by stipulation of parties)

Claimant's C: Terrence L. Piper, M.D. (St. Peters Bone & Joint Surgery) records  
(admitted by stipulation of parties)

Claimant's D: Joseph H. Morrow, Jr., D.O. deposition (admitted by stipulation of parties)

Claimant's F: Marc W. Weise, M.D. (Orthopedic & Sports Medicine) records (admitted by stipulation of parties)

Claimant's G: Joseph Hanaway, M.D. deposition (admitted by stipulation of parties)

Claimant's H: Charles M. Linsenmeyer, M.D. records (admitted over objection of ER)

Claimant's J: Terrence K. McKellar, D.C. records (admitted over objection of SIF)

Claimant's K: Paul Spezia, D.O. records (admitted over objection of SIF)

Claimant's L: St. Louis Regional Medical Center records (admitted by stipulation of parties)

Claimant's M: Barnes-Jewish Hospital of St. Peters records (admitted by stipulation of parties)

Claimant's N: Boonslick Medical Group, Inc. records (admitted by stipulation of parties)

Claimant's O: St. Joseph Health Center records (admitted by stipulation of parties)

Claimant's P: Daniel J. Bergmann, M.D. (Bennis Surgical) records (admitted over objection of SIF)

Claimant's Q: Saint Louis United Health Sciences Center/Anheuser-Busch Eye Institute  
(admitted over objection of SIF)

Claimant offered the following exhibits which were NOT admitted into evidence:

Claimant's E: Jacques Paul Schaerer, M.D. records (ER and SIF objections sustained)

Claimant's I: Samuel Bernstein, Ph.D., C.R.C. records (ER and SIF objections sustained)

Employer offered the following exhibits which were admitted into evidence:

Employer's 1: Ralph J. Graff, M.D. May 16, 2002 deposition (admitted by stipulation of parties)

Employer's 2: Ralph J. Graff, M.D. May 5, 1992 deposition (admitted by stipulation of parties)

The Second Injury Fund offered the following exhibit, which was admitted into evidence:

SIF I: James England, Jr. deposition (admitted over objection of Claimant)

### SUMMARY OF LIVE TESTIMONY

Claimant's Testimony:

Claimant testified that he was 58 years old at the time of hearing (Injury date was 16 years ago). Claimant stated he graduated from high school and trade school for plumbing and pipefitting. Claimant testified he worked as a construction plumber from 1965 until 1976. He began working in 1976 as a skilled trades pipefitter at Employer. He did not work on the assembly line, instead he worked with high-pressure pumps, air lines, water lines, sewers and waste lines. He regularly serviced machines, hydraulic lines, water, sewer and high-pressure lines as well as gas and air lines. He testified that these lines could be located in ceilings, walls or floors. He further testified that he used 36-48 inch wrenches and pipes varying from ¼ inch to 3-4 inches in diameter. Claimant testified he was a journeyman and that when he was on lay-off for plant closure for one year he found work pipefitting with McDonnell Douglass. He testified he worked eight-hour days regularly from 1976 through 1987 with ER.

Claimant testified that he fractured his right hip in May 1976 at work and spent one week in the hospital. He complained that his hip hurt after he returned to work. Claimant testified that he presented to ER's dispensary for low back pain and saw Dr. Piper in 1987 for low back pain. Claimant testified that Dr. Piper performed a low back fusion in 1987 at Barnes Hospital-St. Peters and Claimant was off work for one year after surgery on ER-sponsored sick pay. Claimant testified he returned to work sometime in 1988, not sure of the date and saw Dr. Piper from time to time after returning to work. Claimant testified he also went to the ER's dispensary after returning to work. He stated the only physician ER sent him to was Dr. Graph. He further testified that he had temporary relief from the back surgery and that his back pain subsided.

Claimant further testified that after returning to work in 1988 he was transferred from the paint shop to the body shop. Claimant testified he went down while in the process of going over a track. After this injury in 1988 he testified that pain radiated more down his legs and continues to this date. Claimant testified that from 1988 through 1992 he worked full-time and he was expected to trouble-shoot. Claimant testified he worked with other plumbers and missed a "couple of days." Claimant could not specify the date of the 1988 injury at work.

On cross-examination Claimant testified he could not remember whether he was off work from 8/24/87 through 1/10/88. He also testified he could not remember whether he was back on sick leave from 1/18/88 until 6/13/88. He admitted he was not sure of the July 27, 1988 date of injury from the Workers' Compensation Claim form. Claimant stated he went to ER's dispensary and believed he also went back to see Dr. Piper. Claimant admitted on cross-examination to a slip on ice at home in January or February, but could not remember the year. Claimant agreed that he may have seen Dr. Piper and was sent to work hardening and physical therapy to try and get back to 100% after that injury. Claimant testified he did not sign the 1988 Workers' Compensation Claim for Compensation date-stamped October 29, 1990 alleging a July 27, 1988 date of injury. Claimant testified the last date he worked was October 15, 1992.

## FINDINGS OF FACT AND RULINGS OF LAW

Based upon the competent and substantial evidence, I find that:

Claimant alleges an injury by accident on July 27, 1988. 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 the 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. 195 (Mo.App. 1990). ER contends Claimant's claim for compensation is barred by the statute of limitations. Section 287.430 RSMo. provides:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefore is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death.

Judicial notice is taken of the Division of Workers' Compensation file. The claim for compensation was filed October 29, 1990 alleging a July 27, 1988 date of injury. The parties stipulated that ER did not pay temporary total disability benefits nor did ER provide medical aid for this injury. Therefore if the two-year statute of limitations is applicable the claim for compensation is time barred in accordance with Sec. 287.430 RSMo. above.

If the employer fails to file a report of injury as required by 287.380 RSMo., the time to file a claim for compensation is extended to three years after the date of injury. Weniger v. Pulitzer Publishing, 860 S.W.2d 359, 360 (Mo.App. 1993). Sec. 287.380 RSMo provides in part:

Every employer or his insurer in this state, whether he has accepted or rejected the provisions of this chapter, shall within ten days after knowledge of an accident resulting in personal injury to any employee notify the division thereof, and shall within one month from the date of filing of the original notification of injury, file with the division under such rules and regulations and in such form and detail as the division may require...

However, an employer is entitled to notice from Claimant of the time, place and nature of the injury as soon as practicable after the injury but not later than thirty days after the accident. Sec. 287.420 RSMo. Claimant testified that he was unsure of the date of the July 27, 1988 accident and did not identify any individual at ER that he gave notice to of this injury. ER's dispensary records fail to note an accident or injury occurring on July 27, 1988 (Claimant's Exh. B).

Claimant's Exh. B indicates that employee did not work from 8/21/87 until 1/4/88 and again from 1/18/88 until 6/13/88. Dr. Piper performed a low back spinal fusion and decompression in August of 1987 for Claimant's long history of low back pain (Claimant's Exh. C). Claimant followed up with Dr. Piper over the years and Dr. Piper noted on January 18, 1988 that Claimant had increased pain and advised Claimant to take "a couple more" weeks off from work. Dr. Piper notes on February 8, 1988 that Claimant slipped and fell on ice and his back was worse and advised Claimant not to work for two weeks. Claimant then saw Dr. Piper on February 29, 1988 with continued right lumbar tenderness with spasm associated with the fall on ice and advised no work for one week (Id.). Claimant saw Dr. Piper again on March 28, 1988 and the doctor noted Claimant was improving with work hardening therapy, and advised no work. The April 25, 1988 visit notes continued work hardening and Claimant was "not quite ready to return to full capacity yet." Dr. Piper recommends part-time hours and a start back to work the following Monday according to his June 7, 1988 progress note (Id.). Claimant's Exh. B indicates that Dr. Piper returned Claimant to work on 6/13/88 with the following restrictions: limit bending, stooping and repetitive lifting for a one month period and limit lifting to twenty-five pounds. The next office visit with Dr. Piper is dated October 3, 1988 and notes that Claimant fell at ER "a week ago." The next entry in ER's dispensary records is 8/20/89, after Claimant returned to work after an injury at home on 7/20/89 (Claimant's Exh. B).

There is no mention of an injury or accident on or about July 27, 1988 in ER's dispensary records or Dr. Piper's records. Claimant's testimony regarding the July 27, 1988 accident was vague and he did not recall the exact date of injury. I find that the two-year statute of limitations applies since ER was not given notice of the July 27, 1988 injury by Claimant until the claim for compensation was filed October 29, 1990. The statute of limitation issue can be raised at any time before the Commission. Snow v. Hicks Bros. Chevrolet, 480 S.W. 97, 100-101 (Mo.App. 1972). The Division of Workers' Compensation file reveals that the statute of limitations issue was raised by ER's amended answer on July 11,

2002. The issue of statute of limitations was also raised by stipulation of the parties at the beginning of the hearing in this matter.

CONCLUSION

Based upon the above findings the two-year statute of limitations under Sec. 287.430 RSMo. is applicable because ER did not have knowledge of the accident until Claimant filed a Claim for Compensation on October 29, 1990. Claimant's Claim for Compensation based upon an accident by injury on July 27, 1988 is time barred by Sec. 287.430 RSMo. and therefore Claimant's claims against ER and SIF are denied. The remaining issues are moot.

Date: \_\_\_\_\_ Made by: \_\_\_\_\_

KOREN M. MUELLER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Gary Estenson  
*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.: 92-134465

Employee: Robert Winston  
Employer: General Motors  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: June 21, 1992

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 November 24, 2004. The award and decision of Administrative Law Judge Koren M. Mueller, issued November 24, 2004, 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 16<sup>th</sup> day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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

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

\_\_\_\_\_  
Secretary

**AWARD**

Employee:	Robert Winston	Injury No. 92-134465
Employer:	General Motors	Before the
Add. Party:	State Treasurer, as Custodian of the Second Injury Fund	<b>DIVISION OF WORKERS' COMPENSATION</b>
Insurer:	Self	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Hearing Date:	8/24/04	Checked by: KMM/df

**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: 6/21/92
5. State location where accident occurred or occupational disease was contracted: St. Charles County, MO
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? n/a
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Claimant alleged he felt pop in back when he grabbed pipe.
12. Did accident or occupational disease cause death? No Date of death? n/a
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 7-1/2% body as a whole referable to low back
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? Unknown per parties

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: n/a
- 19. Weekly compensation rate: \$431.26/\$213.57
- 20. Method wages computation: By stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses: None

weeks of temporary total disability (or temporary partial disability) None

30 weeks of permanent partial disability from Employer

n/a weeks of disfigurement from Employer

22. Second Injury Fund liability: No

TOTAL: \$6,407.10

23. Future requirements awarded: None

Said payments to begin as of date of 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:

Harry J. Nichols

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Robert Winston

Injury No: 92-134465

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents:

Employer: General Motors  
Add. Party: State Treasurer, as Custodian of the  
Second Injury Fund  
Insurer: Self

Checked by: KMM/df

### **PRELIMINARIES**

A consolidated hearing was held in injury numbers 88-185088 and 92-134465 on August 24, 2004 in St. Charles County and post-hearing briefs were to be submitted by the parties on September 17, 2004. Robert Winston (hereinafter "Claimant") by counsel requested an additional week to complete a post-hearing brief and there were no objections to an extension of time. Therefore post-hearing briefs were submitted by the parties by September 24, 2004. The claims were fully submitted on September 24, 2004. Claimant was represented by Harry J. Nichols. General Motors Corp. was represented by Daniel J. Harlan. The Second Injury Fund was represented by Barbara Toepke. Claimant testified at the hearing. Mr. Nichols requested a fee of 25% of Claimant's award.

The parties stipulated that on or about June 21, 1992 the Claimant while in the employment of General Motors Corp. (hereinafter "Employer") sustained an injury by accident arising out of and in the course of employment occurring in St. Charles County, Missouri. The parties further stipulated that the applicable compensation rates are \$431.26/\$213.57 and that Claimant has not been paid temporary total disability benefits to date. The parties also stipulated that Employer paid an unknown amount of medical benefits to date. The parties agreed and stipulated that the issues for disposition in this case are:

8. Nature and extent of temporary total disability
9. Nature and extent of permanent partial disability
10. Nature and extent of permanent total disability
11. Second Injury Fund liability
12. Payment of medical bills

### **EXHIBITS**

Claimant offered the following exhibits which were admitted into evidence:

Claimant's A: Social Security Administration Notice of Decision dated June 26, 1996  
(admitted over objection of SIF)

Claimant's B: General Motors Dispensary records (admitted by stipulation of parties)

Claimant's C: Terrence L. Piper, M.D. (St. Peters Bone & Joint Surgery) records  
(admitted by stipulation of parties)

Claimant's D: Joseph H. Morrow, Jr., D.O. deposition (admitted by stipulation of parties)

Claimant's F: Marc W. Weise, M.D. (Orthopedic & Sports Medicine) records (admitted by stipulation of parties)

Claimant's G: Joseph Hanaway, M.D. deposition (admitted by stipulation of parties)

Claimant's H: Charles M. Linsenmeyer, M.D. records (admitted over objection of ER)

Claimant's J: Terrence K. McKellar, D.C. records (admitted over objection of SIF)

Claimant's K: Paul Spezia, D.O. records (admitted over objection of SIF)

Claimant's L: St. Louis Regional Medical Center records (admitted by stipulation of parties)

Claimant's M: Barnes-Jewish Hospital of St. Peters records (admitted by stipulation of parties)

Claimant's N: Boonslick Medical Group, Inc. records (admitted by stipulation of parties)

Claimant's O: St. Joseph Health Center records (admitted by stipulation of parties)

Claimant's P: Daniel J. Bergmann, M.D. (Bennis Surgical) records (admitted over objection of SIF)

Claimant's Q: Saint Louis United Health Sciences Center/Anheuser-Busch Eye Institute (admitted over objection of SIF)

Claimant offered the following exhibits which were NOT admitted into evidence:

Claimant's E: Jacques Paul Schaerer, M.D. records (ER and SIF objections sustained)

Claimant's I: Samuel Bernstein, Ph.D., C.R.C. records (ER and SIF objections sustained)

Employer offered the following exhibits which were admitted into evidence:

Employer's 1: Ralph J. Graff, M.D. May 16, 2002 deposition (admitted by stipulation of parties)

Employer's 2: Ralph J. Graff, M.D. May 5, 1992 deposition (admitted by stipulation of parties)

The Second Injury Fund offered the following exhibit, which was admitted into evidence:

SIF I: James England, Jr. deposition (admitted over objection of Claimant)

#### SUMMARY OF LIVE TESTIMONY

Claimant's Testimony:

Claimant testified that he was 58 years old at the time of hearing (Injury date was 12 years ago). Claimant stated he graduated from high school and trade school for plumbing and pipefitting. Claimant testified he worked as a construction plumber from 1965 until 1976. He began working in 1976 as a skilled trades pipefitter at Employer. He did not work on the assembly line, instead he worked with high-pressure pumps, air lines, water lines, sewers and waste lines. He regularly serviced machines, hydraulic lines, water, sewer and high-pressure lines as well as gas and air lines. He testified that these lines could be located in ceilings, walls or floors. He further testified that he used 36-48 inch wrenches and pipes varying from ¼ inch to 3-4 inches in diameter. Claimant testified he was a journeyman and that when he was on lay-off for plant closure for one year he found work pipefitting with McDonnell Douglass. He testified he worked eight-hour days regularly from 1976 through 1987 with ER.

Claimant testified that he fractured his right hip in May 1976 at work and spent one week in the hospital. He complained that his hip hurt after he returned to work. Claimant testified that he presented to ER's dispensary for low back pain and saw Dr. Piper in 1987 for low back pain. Claimant testified that Dr. Piper performed a low back fusion in 1987 at Barnes Hospital-St. Peters and Claimant was off work for one year after surgery on Employer-sponsored sick pay. Claimant testified he returned to work sometime in 1988, not sure of the date and saw Dr. Piper from time to time after returning to work. Claimant testified he also went to the ER's dispensary after returning to work. He stated the only physician ER sent him to was Dr. Graph. He further testified that he had temporary relief from the back surgery and that his back pain subsided. Claimant testified that he sees Dr. McKellar monthly.

Claimant further testified that after returning to work in 1988 he was transferred from the paint shop to the body shop. Claimant testified he went down while in the process of going over a track. After this injury in 1988 he testified that pain radiated more down his legs and continues to this date. Claimant testified that from 1988 through 1992 he worked full-time and he was expected to trouble-shoot. Claimant testified he worked with other plumbers and missed a "couple of days." Claimant could not testify to the date of the 1988 injury at work.

Claimant testified that he was rebuilding pumps and was working overhead in a cherry picker with a co-worker in 1992 when he tried to hold onto pipes to keep them from falling on workers below. He testified that he felt a pop in his back and instant back pain when he grabbed the pipe. Claimant testified he reported this incident to the nurse and committee man Tom. Claimant further testified he was not sent out for treatment, but was treated in ER's dispensary with heat and cold compresses that night. He testified that no further surgery was recommended by any doctor. After this injury Claimant testified he went back to the same work and last worked at ER October 15, 1992. Claimant testified that ER at that time gave him written notice that they had no work within his restrictions, that Claimant could not perform his assigned duties and he went on sick leave.

Claimant testified he received ER-sponsored sick and extended disability payments as well as a pension for 17 years of service at ER. Claimant testified he is receiving Social Security disability payments. Claimant testified his condition has gotten worse since the 1992 injury. He further stated he has not worked anywhere else since the injury and has had no other serious accidents since that time. Claimant stated he has had multiple retina surgeries, diverticulitis, acid reflux and left knee surgery. Claimant could not recall if his knee bothered him before 1992.

On cross-examination Claimant testified he could not remember whether he was off work from 8/24/87 through 1/10/88. He also testified he could not remember whether he was back on sick leave from 1/18/88 until 6/13/88. He admitted he was not sure of the July 27, 1988 date of injury from the Workers' Compensation Claim form. Claimant admitted on cross-examination to a slip on ice at home in January or February, but could not remember the year. Claimant agreed that he may have seen Dr. Piper and was sent to work hardening and physical therapy to try and get back to 100% after that injury.

Claimant further testified that ER's dispensary provided medication for the June 21, 1992 injury and that he asked for a referral to an outside doctor for back treatment. Claimant admitted he did not miss much time from work after the 1992 injury. Claimant stated he did not recall being in the dispensary three to four times after the June 21, 1992 injury. Claimant also testified on cross-examination that he did not attempt to find work elsewhere and did not seek services from a vocation rehabilitation service. Claimant agreed that no new restrictions were placed upon him relative to the June 1992 injury. Claimant further testified his low back continued to worsen and is substantially worse since he left ER in October 1992.

#### FINDINGS OF FACT AND RULINGS OF LAW

Based upon the competent and substantial evidence, I find that:

Claimant's Exh. B, ER's dispensary records, contain a case record on June 22, 1992 which states Claimant reported a strain to his back while dismantling pipe. Claimant received treatment from the dispensary and continued on restricted duty. Claimant worked for ER until October 15, 1992 when there was reportedly no work available within his restrictions.

The parties stipulated that the nature and extent of temporary total disability was an issue to be resolved. Claimant testified that he did not miss much time from the 1992 injury. Claimant did not offer any additional evidence to support an award of temporary total disability benefits. Therefore, there is insufficient evidence to support an award of temporary total disability benefits in accordance with Sec. 287.160 RSMo.

The parties also stipulated that the nature and extent of permanent partial disability was an issue to be resolved. Claimant submitted the deposition testimony of Joseph H. Morrow, Jr., M.D. who testified that he examined Claimant on October 28, 1991 and November 20, 1992 (Claimant's Exh. D). Dr. Morrow testified that Claimant had permanent partial disability of 70 percent of the body as a whole, with 45 percent attributable to pre-existing back problems, 15 percent attributable to the July 27, 1988 injury and ten percent attributable to the June 20, 1992 date of injury. Dr. Morrow testified that the injury of June 20, 1992 is categorized as a sprain and recommended Claimant avoid prolonged walking, standing, sitting beyond "his normal limits of tolerance," over and above the other restrictions he had given in his October 28, 1991 report. Dr. Morrow testified that he agreed Claimant had been performing sedentary work within his restrictions

at ER until the job was eliminated. He further testified that if a job could be found within his restrictions, Claimant would be employable in the open labor market.

ER submitted the deposition testimony of Ralph J. Graff, M.D. who examined Claimant on August 6, 1991 and April 15, 2002 (ER's Exhs. 1 and 2). Dr. Graff testified that Claimant had permanent partial disability of 45 percent of the body as a whole, with 35 percent attributable to his postlaminectomy status prior to the 1988 injury, 5 percent attributable to the 1988 and 1989 injuries. Dr. Graff testified that at the time of his April 15, 2002 examination of Claimant the injury of June 21, 1992 resulted in an increase in permanent partial disability of five percent of the body as a whole.

Based upon all the competent evidence I find that as a result of his work injury of June 21, 1992, Claimant is found to have suffered a back sprain and permanent partial disability equivalent to 7.5 percent of the body as a whole attributable to the back. At the stipulated rate of \$213.57 per week, the amount due is for 30 weeks, or a total of \$6407.10.

The parties also stipulated that payment of medical bills was at issue. Claimant submitted Exh. J, the records and bill of Terrence McKellar, D.C. Claimant did not testify regarding this bill and there was no evidence that the chiropractic expense incurred from 1988 to 2004 or any future expense were reasonable and necessary treatment for the 1992 primary injury. Therefore there is not sufficient evidence to award payment of medical bills. Claimant's request for payment of medical bills is denied.

Finally, the parties also stipulated that permanent total disability and Second Injury Fund liability were issues to be resolved. 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). The threshold issue is to determine whether Claimant is permanently and totally disabled. Sec. 287.020.7 RSMo., provides the definition of "total disability" as follows:

The term "total disability" as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident. Sec. 287.020.7 RSMo.

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 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employees' situation and condition, he or she is competent to compete in the open labor market. Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo.App. 1992). Total disability means the "inability to return to any reasonable or normal employment." Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. Id.

The critical question in determining whether a workers' compensation claimant is totally disabled to trigger Second Injury Fund liability is whether any employer, in the usual course of employment, would reasonably be expected to employ claimant in his present physical condition. Lorentz v. Missouri State Treasurer, 72 S.W.3d 315, 319 (Mo.App. 2002).

Claimant submitted the report of Marc W. Weise, M.D. who examined Claimant at the request of ER on June 28, 1996 (Claimant's Exh. F). Dr. Weise concluded that Claimant was at high risk for frequent episodes of lower back strains if he performs in the heavy lifting, stooping and overhead activities required of a pipe fitter. He concluded Claimant would be capable of performing work of a light or medium demand level. Mr. James England testified on August 20, 2004 on behalf of the Second Injury Fund that Claimant was capable of returning to work following the June 20, 1992 injury (SIF's Exh. I). Mr. England relied on restrictions from Drs. Weise, Morrow and Piper. Mr. England testified that Dr. Piper recommended in 1988 that Claimant limit lifting, bending, stooping and repetitive lifting for one month and a total lifting limit of 25 pounds. He also testified Dr. Morrow recommended in October, 1991 that Claimant avoid work that involved repetitive bending at the waist, repetitive squatting, pushing and pulling of objects of moderate weight without adequate rest intervals or repeated lifting of weights of more than 20 pounds without adequate rest. Mr. England continued that Dr. Morrow added in 2002 that Claimant should avoid prolonged walking, standing or sitting beyond normal limits of tolerance.

Mr. England testified credibly that after reviewing all the information provided and relying on the restrictions from Drs. Weise, Morrow and Piper Claimant could have continued in the X-21 position with ER. Mr. England further testified that

alternatively Claimant had obtained through education and experience transferable skills in plumbing and pipefitting which would be very marketable in the customer service area of retailers and sales work for plumbing suppliers or plumbing contractors as well as other types of work. Claimant returned to work following the June 20, 1992 injury and testified he was terminated by ER; he did not resign. Claimant also testified that he did not investigate retraining or career counseling services through vocation rehabilitation providers. Claimant also testified he did not attempt to work anywhere after leaving ER.

Claimant submitted Exh. G, the testimony of Joseph Hanaway, M.D., which is the only opinion that Claimant is totally disabled. Dr. Hanaway testified that Claimant "remains permanently and totally disabled because of his chronic low back problem." Dr. Hanaway did not evaluate Claimant until January 15, 2002, almost ten years after the primary injury. He also testified that his opinions were based upon Claimant's condition in January 2002. Claimant testified that his back condition is substantially worse at the time of hearing than it was at the time of his 1992 injury. The nature and extent of Claimant's pre-existing disability is determined as of the date of the primary injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo.App. 1995). The Second Injury Fund is not responsible for subsequent deterioration of a pre-existing condition. Dr. Hanaway's restrictions and opinions ten years after the primary injury are less reliable as to Claimant's condition in 1992 than those of the physicians noted above who saw Claimant closer in time to the injury in question. Based upon the competent and substantial evidence, I find that Claimant did not meet his burden of proof with regard to proving that he is permanently and totally disabled due to a combination of his work injury and pre-existing condition. Therefore the claim for permanent and total disability benefits from the Second Injury Fund is denied.

"A claimant for workers' compensation has the burden to offer affirmative evidence to prove all issues relating to the claim." Carbaugh v. Treasurer of Mo., 962 S.W.2d 400 (Mo. App. 1998), citing Staab v. Laclede Gas Co., 691 S.W.2d 343, 345 (Mo.App. 1985). In order to make a recovery from the Second Injury Fund the claimant must prove the following:

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the claimant becomes unemployed;
2. The extent of the permanent partial disability existing before the compensable injury;
3. The extent of permanent partial disability resulting from the compensable injury;
4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities;
5. The disability caused by the combination of the two permanent partial disabilities is substantially greater than that which would have resulted from the preexisting disabilities and from the last injury, considered alone and of itself. Section 287.220.1 RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo App. 1995); Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. 1995).

The medical opinions in evidence do not prove that Claimant's injuries combine to create greater overall disability; therefore step five above has not been met. Drs. Morrow and Graff testified that overall disability was a simple sum of the component disabilities. Therefore no compensation is awarded from the Second Injury Fund.

#### CONCLUSION

Based upon the above findings Claimant is found to have suffered a back strain as a result of the June 21, 1992 injury and suffered a permanent partial disability of 7.5% for a total due from the ER of \$6407.10. No compensation is awarded from the Second Injury Fund.

This award is subject to a lien in favor of Harry J. Nichols, 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: \_\_\_\_\_ Made by: \_\_\_\_\_

KOREN M. MUELLER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Gary Estenson

*Director*

*Division of Workers' Compensation*