

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

Injury No.: 02-120953

Employee: Keith Woodfin  
Employer: Safety Construction Company  
Insurer: Fairfield Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: Alleged February 18, 2002  
Place and County of Accident: Alleged St. Louis, 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 May 18, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued May 18, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21<sup>st</sup> day of September 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING  
\_\_\_\_\_  
William F. Ringer, Chairman

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

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

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Keith Woodfin

Injury No.: 02-120953

Dependents: N/A  
Employer: Safety Construction Company  
Additional Party: Second Injury Fund  
Insurer: Fairfield Insurance Co.  
Hearing Date: February 22 and 23, 2007

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: SC:tr

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: February 18, 2002 (alleged)
5. State location where accident occurred or occupational disease was contracted: St. Louis, Mo.(alleged)
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? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Claimant testified he injured his low back while attempting to lift a concrete barrier.
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: None
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Keith Woodfin Injury No.: 02-120953

17. Value necessary medical aid not furnished by employer/insurer? \$128,562.90
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: N/A
20. Method wages computation: N/A

### COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: 0

No weeks of permanent partial or total disability from Employer 0

22. Second Injury Fund liability: No

TOTAL:

None

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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Kevin Wayman

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

Employee:	Keith Woodfin	Injury No.:	02-120953
Dependents:	N/A	Before the	
Employer:	Safety Construction Company	<b>Division of Workers'</b>	
		<b>Compensation</b>	
Additional Party:	Second Injury Fund	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Fairfield Insurance Co.	Checked by:	SC:tr

### **PRELIMINARIES**

Keith Woodfin ("Claimant") requested a hearing pursuant to §287.450 RSMo (2000). A hearing was held at the Missouri Division of Workers' Compensation, St. Louis office, on February 22, 2007. The case was continued to February 23, 2007. Attorney Kevin Wayman represented Claimant. Attorney Carl Kessinger represented Safety Construction Company ("Employer") and Fairfield Insurance Co ("Insurer"). Assistant Attorney General Eileen Krispin represented the Second Injury Fund ("SIF"). The record closed after presentation of evidence. Hearing venue is correct and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

### **STIPULATIONS**

The parties have stipulated to the following on or about February 18, 2002:

1. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation Law.
2. Employer's liability was fully insured by Insurer.
3. A Claim for Compensation was filed within the time prescribed by law.

### **ISSUES**

The issues for disposition are: accident; arising out of and in the course of employment; notice; medical causation; liability for past medical expenses totaling \$128,562.90; rate; liability for permanent partial disability (PPD) or permanent total disability (PTD) by either Employer or the SIF; average weekly wage; and reasonableness/necessity for treatment.

### **EXHIBITS**

Claimant's Exhibits A through U were admitted. Claimant withdrew Exhibit H. Exhibit V is excluded based on hearsay. Employer offered Exhibits 1 through 15 which were admitted, except for a portion of Exhibit 7, which contained a 1989 deposition based on lack of foundation. Employer withdrew Exhibits 16 through 22 as duplications. The SIF offered no exhibits. Any notations found on the exhibits were present when admitted into evidence.

### **SUMMARY OF THE EVIDENCE**

All evidence was reviewed but only evidence necessary to decide the award is summarized below.

#### ***Live Testimony***

##### ***Claimant***

##### ***Educational Background***

1. Claimant was born June 18, 1965 and was 36 years old at the time of the alleged accident. Claimant was an honor student in high school before completing twelfth grade. However, he did not graduate because he lacked one English credit.
2. Claimant testified he became an apprentice carpenter. After four years he achieved journeyman carpenter status. Claimant has a current commercial drivers' license. He testified he can read, write, and perform basic math. Claimant testified that carpentry and bridge building require math skills. <sup>[1]</sup>

##### ***Pre-existing Conditions***

3. While wrestling in high school, Claimant injured his back and treated with a chiropractor several times for a "slipped" disc. Claimant denied a fractured back in the mid eighties until it was pointed out during cross examination. <sup>[2]</sup>
4. In 1985 Claimant fell eight feet off a roof, injured his low back, and felt a burning sensation. He did not recall seeing a doctor, but did not disagree if his deposition stated that he did.
5. In 1986 he injured his back in a motorcycle accident. However, he returned to work without seeing a doctor.
6. In 1988, Claimant jammed his low back while carrying an I-beam. Claimant did not return to carpentry after this injury as he could not lift heavy items. Claimant was also involved in an automobile accident where he broke his left arm but does not remember any back pain associated with the accident.
7. Claimant testified that in 1999 he treated one time for back and leg pain, received steroid injections, and symptoms resolved.
8. Claimant does not recall treating at Jackson Medical Center in December 2001, January 2002 or February 2002.

##### ***Employment History***

9. From 1990 to 1993, Claimant worked for the SE Co-op as a fertilizer plant manager and performed office work. Claimant operated heavy equipment and measured stone quality from 1993 to 1999. Claimant also built homes for Shipley Construction and the Semco Company as a carpenter. Claimant drove a truck for two weeks. Claimant also operated heavy equipment, and worked as a clown in the rodeo. Claimant denied any bull riding activities in his capacity as a clown. <sup>[3]</sup> Claimant uses the phone, computer, and works with the public.
10. Claimant testified he began working as a laborer for Employer as needed in August 2000. He laid heavy highway baskets, worked on rock walls, lifted up to 80 pounds alone, and 150 pounds with help. His only limitation was soreness after heavy lifting.
11. Claimant denied a 15 pound weight limit prior to February 18, 2002 until questioned on cross examination. <sup>[4]</sup>
12. Claimant testified he earned \$24.00 an hour but had no regular work schedule between December 2001 and February 2002. Claimant was also paid for the use of his truck at the rate of \$125.00 a week or \$25.00 a day.
13. Claimant testified he began work at 7:30 p.m. on February 18, 2002 <sup>[5]</sup> Claimant worked the Kramer job located at I-270 and Hanley Road with David Waldruff, a co-worker and evening supervisor Steven Worley.
14. Claimant testified the shift ended at 3:00 a.m., and he attempted to load a concrete barrier, weighing more than 300 pounds, to return it to Employer, as requested by Donna Fink, CEO and President of the company. <sup>[6]</sup> Claimant testified Ms. Fink called him earlier that day and asked him to bring the barrier device back to the office. The barrier

was used to close portions of the highway while work was performed. However, no equipment was available to load the barrier into the truck, so Claimant attempted to load it by hand with the help of co-worker Dave Waldruff.

15. Claimant testified he experienced severe leg and back pain when he attempted to lift the barrier, causing him to drop the barrier. Unlike earlier injuries, this pain did not go away. Claimant testified he was told to report work accidents to the foreman; so at 6:00 a.m., Claimant radioed Steven (Todd) Worley, superintendent, and Raymond Burgette, the job foreman.
16. Claimant denied receiving written reporting instructions. Claimant declined Mr. Worley's offer to receive medical treatment. Employer did not instruct him to see a doctor.
17. Claimant called in sick the next night due to back and leg pain; and remained off work for a week to ten days. Claimant later testified he lost no time from work after the injury except for weather conditions.
18. Claimant testified he did not perform regular duties after February 18, 2002. Claimant testified he later talked to Mr. Worley and Mr. Burgette about seeing a doctor. However, both men testified they did not recall discussing treatment with Claimant.
19. After February 2002, Claimant testified he was placed on light duty by Ms. Fink and promoted to foreman. As a foreman he recorded hours and stations worked by employees.
20. Claimant sought treatment from Dr. Albanna; and informed him he was injured while working. Claimant testified Dr. Albanna recommended surgery; however Ms. Fink requested he postpone surgery until a work slow down in October. Dr. Albanna provided steroid injections and light duty. Claimant later testified no doctor placed him on light duty prior to surgery. Ms. Fink never instructed him to see a different doctor.
21. On May 30, 2002 Claimant testified he was fired for allowing employees to leave twenty minutes early. Employer did not contest Claimant's receipt of unemployment compensation benefits. Claimant believed he was terminated because Mr. Worley stopped working for Employer. Claimant received unemployment benefits from July 2002 through July 2003 at \$250.00 per week.

#### *Pace Employment*

22. Claimant testified he began working for Pace Company in early June 2002 after passing a physical examination. He believed he could perform the work. Claimant built bridges and highways and needed no help performing his duties. Claimant was not disciplined for failure to perform. Claimant was not demoted. He knelt, crawled, and smoothed concrete without accommodation.
23. Claimant testified that Employers' work was ten times harder than the work at Pace. <sup>[7]</sup> Claimant stopped working for Pace due to the sudden unexplained return of back and leg pain which felt "like a bulldozer sat on him."
24. Claimant denied being injured at Pace. He did not recall if he was at work when the pain returned, but he worked through it.
25. From February 18, 2002 to August 2002, back pain was intermittent but not unbearable. After surgery Claimant testified the pain increased and continues to worsen with time.
26. Dr. Albanna referred Claimant to Health Centers, P.C. in September 2002 where they unsuccessfully attempted to return him to work. Claimant does not recall if he reported a work related injury.
27. Claimant testified Dr. Albanna refused to treat him in November 2002 after his insurance lapsed. Claimant sought treatment at Barnes Jewish Hospital where diagnostic tests were performed but Claimant obtained no relief.
28. Claimant identified receipt of the following bills for medical treatment:
  - a) Dr. Albanna - \$42,497.50; (Exhibit M),
  - b) Kirkwood MRI - \$1,200.00 (Exhibit N.),
  - c) St. Anthony's Medical Center –March 4, 2002, July 10, 2002, and July 19, 2002- \$354.00, \$2,245.62, and \$746.00 respectively, and August 12, 2002 through August 17, 2002, totaling \$76,150.34 ((Exhibit O),
  - e) Anesthesia bill of St. Louis County Anesthesia –August 12, 2002 - \$2,340.00 (Exhibit P),
  - f) Health Center – September 13, 2002 to September 29, 2002 - \$975.00 (Exhibit Q),
  - g) Barnes Jewish Hospital-St. Peters – February 25, 2003 - \$249.45; (Exhibit R)
  - h) Dr. Robert Gardner – September 29, 2003 to February 16, 2005 - \$1,805.00 (Exhibit S)
29. Claimant described his back as a failed fusion. Prior to surgery, Claimant had little back pain. Before February of

2002, Claimant testified he did not lift heavy things to avoid more injuries. He had aches and pains but they generally went away. He sees Dr. Boardman every six months. <sup>[8]</sup>

#### *Current Complaints*

30. Current complaints include left leg numbness and inability to move his toes. While using the bathroom, Claimant feels like his toes will explode, he has constant back pain, on a scale of 7 out of 10, pain with activities, and decreased right leg sensation. He cannot sit for more than an hour or walk more than 50 yards due to pain. He is losing feeling in his right leg. Lying down aggravates the condition.
31. Claimant testified that since 2003 he hunts within 100 yards of his house twice a year; and attempts to fish occasionally. Claimant stated that he has not ridden a horse since the August 2002 surgery. Claimant testified that his pain level prevents him from working and talking to customers on a full-time basis.
32. Claimant owns a farm in southeast Missouri which his step-mom and dad help him manage. Claimant testified he cannot perform farm activities. Claimant still throws feed for chickens twice a month. His dad cares for the horses. Claimant assists by wiping counters and the dishwasher. He does not pick up trash or shop. Claimant has trouble sleeping. He wears a back brace as needed.
33. Claimant could walk all day and into the night, now he is limited to 50 yards. Claimant has trouble driving. Claimant has not fished since 2002 and rarely hunts. Following the August 2002 surgery, the back pain has continued to worsen over time.
34. To relieve pain Claimant drinks beer on Saturday nights, lies down up to two hours, or takes muscle relaxers. Claimant testified he has not been pain free since February 2002 and does not believe he can perform any work duties. <sup>[9]</sup>
35. Video tapes of Claimant show Claimant working outside, bending, moving quickly down a slight incline, and watering plants. Claimant testified his activities on the tape do not reflect a normal day. He had a baby girl in July, had just returned home in August, and was glad to be back. He felt like Superman with a natural high about being home. He explained this was the reason he could perform those activities shown on the tape. He testified that the day after each video he was sore.
36. Claimant has not worked since leaving Pace and is currently receiving social security disability.

#### *Steven Worley a/k/a Todd Worley, Superintendent, Friend*

37. Claimant and Mr. Worley have been friends since high school. Employer hired Claimant based on Mr. Worley's recommendation. Mr. Worley assigned Claimant work and monitored his performance. Mr. Worley worked for Employer from 1995 to 2002.
38. Mr. Worley testified that in January or February 2002, Claimant informed him he was injured while lifting a barrier device. Mr. Worley was required to record accidents in a green log book. He does not recall making the entry, reporting the injury to Ms. Fink, or her response. However, he is certain he did these things as this was the procedure for reporting injuries.
39. Mr. Worley testified there was no written procedure on handling injuries. It was company policy for employees to notify the project manager, and the manager notified the front office. Mr. Worley did not handle treatment issues and did not recall Claimant asking for treatment. The front office was responsible for preparing accident reports and providing treatment.
40. Mr. Worley admitted he had a personal relationship with Ms. Fink, until March of 2001 when the relationship ended. Mr. Worley testified he lost \$25,000 in a business deal with Ms. Fink; however, it did not negatively impact him or affect his testimony. Ms. Fink asked him to train her ex-husband for his job, which he did not appreciate. After seeing the "writing on the wall", he decided to leave the company because of the money he lost and the ex-husband coming aboard.
41. After initial time off, Claimant returned to work with no restrictions. He continued to work on silt fences, baskets and barrier walls although he complained of back pain.
42. Mr. Worley voluntarily left Employer during the Kramer job. Most people he had recommended for employment were fired after he left.

#### *Raymond Burgette, Foreman, Friend*

43. Mr. Burgette testified he worked for Employer from 1996 to 2002. He met Claimant once in high school but he did not know him until they began working together for Employer. Mr. Burgette and Claimant became friends and visit on a regular basis. He and Claimant both worked for Employer as foremen, according to Mr. Burgette.
44. Mr. Burgette vaguely remembered Claimant reporting a back injury in February or March 2002 when he moved a barrier while on the Kramer project at I-270 and Hanley. Claimant called him on his Nextel company phone during a winter night job and reported he was injured at the end of the shift. Claimant stated he may not be at work the next day. Mr. Burgette reported the injury to Mr. Worley. Mr. Burgette was instructed to contact the main office when an accident occurred. There was no written manual or procedure to handle work injuries to his knowledge.
45. After the injury, other workers assisted Claimant as needed. Mr. Burgette did not discuss medical treatment with Claimant until after Claimant received surgery.
46. Mr. Burgette was fired in May 2002 along with three others for allowing employees to leave 20 minutes early.

***Dale Tucker, Investigator***

47. Mr. Dale Tucker, an investigator with Advanced Investigative Company, testified on behalf of Employer and Insurer. Mr. Tucker, an independent contractor, contracted with High Pierron Risk Management to provide investigative services regarding Claimant's workers' compensation case. Mr. Tucker's assignment was to locate Claimant at his residence and obtain evidence regarding his daily activities.
48. Mr. Tucker testified he has two years experience as an investigator, 15 years experience as a patrol officer and he also served in the detective's bureau and the fraud unit.
59. Mr. Tucker admitted he misrepresented himself when he introduced himself to Claimant as a representative with Global Positioning Satellite ("GPS"), a fictitious company. His truck listed the GPS name.
50. Mr. Tucker was familiar with the Sony mini DVD camera he used to conduct surveillance; and it was in good working condition. He identified Claimant as the person he videotaped. Mr. Tucker performed surveillance on August 2 and 7, 2006 at Claimant's residence.
51. Mr. Tucker testified the surveillance tapes were sealed and sent to High Pierron Risk Management. On February 22, 2007, Mr. Tucker received the tapes from Attorney Kessinger. He identified the scenes as being the same ones he witnessed and originally taped. Mr. Tucker found the tapes to be an accurate reflection of Claimant's activities on those dates.
52. Mr. Tucker testified he did not alter or edit the tapes and assumed no alteration was made by High Pierron. Mr. Tucker testified he turned the tape off when the Claimant was out of view and he has no idea what Claimant was doing when he was not visible on the tape. There were fifteen minutes of recorded activity and thirty three minutes of lapsed time due to Mr. Tucker turning off the tape when Claimant was not in view.
53. The second tape contained four minutes of activity and eighteen minutes of elapsed time for the same reason. Mr. Tucker estimated several hours were spent recording activity each day at Claimant's residence. He testified no tapes were removed or edited from the set.
54. The August 2, 2006 tape was 15 minutes long, began at 10:20 a.m. and ended at 10:50: Claimant was observed bending forward on eleven occasions, walking normally throughout the tape, bending and throwing an object. In one scene, Claimant bent, twisted around a tree, and threw an object. Claimant was observed slightly running down an incline carrying a watering hose.
55. The next scene Claimant leaned into a large bin of trash, picked up several items, and walked while carrying those items in one hand and a hose in the other hand. Claimant was seen watering a number of trees throughout the videotape.
56. Claimant rose from a kneeling position without apparent difficulty. In one scene, Claimant knelt for 23 seconds before rising without apparent difficulty. Claimant was observed to stand and smoke on occasion throughout the videotape.
57. Claimant was not visible at times on the August 7, 2006 tape, but he was seen at a distance in a wooded area near his home and walking outside his home; sometimes carrying a hose.
58. Claimant testified on rebuttal that his activities on the tape do not reflect a normal day. He had a baby girl in July, had just returned home in August, and was glad to be back. He felt like Superman with a natural high about being home. He explained this was the reason he could perform those activities shown on the tape. He testified that the day after each video he was sore.

### *Pre-existing Medical Evidence*

59. After a low back injury carrying an I-beam, Claimant treated with Stephen A. Furjes, D.C on April 1, 1988 and was diagnosed with a capsular ligament tear at L4-5, scoliosis, I.V.F. encroachment and lumbar facet asymmetry (Ex B 12-11). Claimant provided a history of low back injury in 1985 when he fell off a roof. He reported no back treatment since 1985. Dr. Furjes predicted Claimant would have periodic episodes of pain and stiffness when the L4-5 area was subjected to stress, i.e. heavy lifting (Ex. B-2).
60. On May 19, 1988, Claimant reported low back pain and right sided popping following a car accident. On March 2 and 29, 1989, Claimant reported low back pain, spasm, and left foot numbness for more than three months.
61. Due to continuing pain, C. Douglas Meadows, M.D., examined Claimant on September 21, 1989. X-rays revealed deformities at L2, L4 and L5. Dr. Meadows concluded Claimant had reached MMI and released him without finding PPD (Ex. A).
62. After bending over Claimant experienced left leg, thigh and calf pain. An MRI taken at Southeast Missouri Hospital on July 5, 1999 revealed L2-3 mild broad based disk bulge, L3-4: mild disk bulge impressing the thecal sac, L4-5: stenotic spinal canal disk bulge intruding the right foramen, L5-S1: disk bulge –left impressing the left lateral recess, short pedicles, and hypertrophic changes. X-rays revealed an old fracture at L2, L3 and L4 which Claimant did not recall. However, he admitted having multiple injuries over time. Radiologist noted Claimant has “unusually severe degenerative change in the lumbar spine for a 30 year old at L2-3, L3-4 and L4-5” (Ex. C).
63. K. Charles Cheung, M.D, diagnosed a L4-5 and L5-S1 disc herniations on June 9, 1999. Claimant improved with steroid injections (Ex. D).
64. On January 31, 2002, Claimant was treated at Jackson Medical Center for back pain lasting a week, and a history of back pain being treated by Dr. Cheung. Claimant noted continuing weakness and numbness of the left calf. Claimant reported impingement three years prior but no insurance for treatment. MRI scheduled and medicine prescribed (Ex. E).

### *Alleged Primary Medical Evidence*

65. On February 27, 2002, Claimant treated with Dr. Alexander Beyzer, and reported left gluteal pain, numbness, tingling, and weakness to his foot. Pain was increased over several weeks. Claimant reported being hit by a horse five years ago without pain until two years ago. Steroid treated helped. MRI revealed a L3-4 bulge, L4-5 central protrusion with no root compression, and central stenosis and disc protrusion, L5-S1 bulge and stenosis (Ex. F, G). There was no mention of a work incident.
66. Lumbar spine X-rays on March 4, 2002 reveal levoscoliosis with advanced osteoarthritis and degenerative disk at L4-5 with sclerotic changes, spurs, narrowed disc space at L5-S1 and L2-L3, limbus vertebrae at L5, L4, and L2 (Ex F).
67. On July 8, 2002, Claimant was seen by Dr. Alexander Beyzer and reported increased pain for several months. On July 10, 2002, a myelogram revealed indentation of the thecal sac at L5-S1, L4-5, L3-4 and L2-3 (Ex. F). MRI dated July 24, 2002 revealed, central herniated disc and spinal stenosis L3-L4, and central herniated disc L4-5, and bulging disc with osteophyte and stenosis at L5-S1. EMG and nerve conduction studies show L5-S1 radiculopathy on the left.
68. On July 24, 2002, Faisal Albanna, M.D., treated Claimant with increasing left gluteal pain into his leg with numbness and tingling into his foot over the past two weeks. Claimant reported being hit by a horse five years prior with no complaints until two years ago. Treatment included steroids. History included bull riding and working as a rodeo clown (Ex. F). Dr. Albanna mad no mention of the work incident.
69. On August 12, 2002, Dr. Albanna performed a micro laminectomy at L3-4, L4-5, L5-S1, microdiscectomy and posterior fusion at L4-5, L5-S1 and lateral fusion with graft (Ex. F).
70. Physical therapy was discontinued after Claimant missed two appointments (Ex. I). According to medical records, Claimant voluntarily stopped seeing Dr. Beyzer in November 2002. Claimant returned on December 20, 2005, and complained of severe back pain with activity (Ex. F).
71. On August 23, 2003, Claimant was treated at Barnes-Jewish St. Peters Hospital for left leg and foot pain since spinal fusion in 2002. Records show the complaint is not work related. Claimant reported inability to see a surgeon due to no insurance (Ex. J).
72. On September 29, 2003, Claimant was examined by Dr. Gardner and provided a history of injury in February 2002 when he lifted something at work and felt pain in his left leg (Ex. K). On October 28, 2003, a bone scan revealed

decreased activity in lumbar spine. On December 22, 2003, EMG of the left leg revealed S1 radiculopathy.

73. On February 27, 2006, Claimant complained of low back pain going down both legs but declined the recommended steroid injections offered by Dr. Beyzer (Ex. F).

### *Deposition Testimony*

74. **David T. Volarich**, a board certified independent medical examiner and radiologist, evaluated Claimant at his attorney's request on May 9, 2005, three years after the alleged accident.
75. Dr. Volarich agreed that in 1999 Claimant had radicular complaints into the left leg, a herniated disc at L5-S1, spinal and foraminal stenosis, and bulges from L2-3 to L4-5. He also agreed a person with this condition may need surgery. But he found the new condition to be a herniation at L4-5 after February 2002 (Ex. T-48).
76. Based on the new finding, Dr. Volarich concluded the February 18, 2002 work injury was the substantial factor causing the L4-5 herniation and aggravation of pre-existing conditions from L3 to S1. <sup>[10]</sup> Dr. Volarich had no history of Claimant being kicked by a horse or bull riding (Ex. T 44-45).
77. Dr. Volarich opined Claimant had attained maximum medical improvement (MMI) and rated 35% PPD of the body for the new low back condition (Ex. T-25). Dr. Volarich rated 30% of the low back as a pre-existing condition and found the combination of disabilities greater than the simple sum or total of each separately, requiring a loading factor (Ex. T-26, 39).
78. Dr. Volarich opined the 1999 MRI did not identify a herniation at L4-5. He opined the 2002 MRI also reflected an aggravation of the pre-existing nerve impingement at L5-S1 (Ex. T-38).
79. Dr. Volarich determined Claimant was unable work full time in the type of work he performed with Employer. After reviewing Mr. Timothy Lalk's opinion, Dr. Volarich opined Claimant to be permanently and totally disabled due to the February 2002 work injury combined with his pre-existing medical conditions (Ex. T-34).
80. Dr. Volarich recommended the following restrictions: avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing, and similar tasks, occasional lifting up to 20 pounds, avoid fixed positions over 30 minutes, no overhead lifting, lifting away from the body, long distances, or uneven terrain. Dr. Volarich recommended on-going medical care for failed back syndrome, advised, Claimant to stop smoking, stretch, exercise, and follow up with his personal physician.
81. Dr. Volarich noted he would have set restrictions based on the 2002 injury alone. Prior to 2002 Dr. Volarich opined he would have set less restrictive limits on lifting more than 50 pounds, fixed positions and proper lifting form (Ex. T-62).
82. **Timothy G. Lalk**, a vocational rehabilitation counselor, interviewed Claimant once on July 26, 2005, at the request of his attorney.
83. Claimant rushed through two of three tests; scoring high school level in reading and sixth grade in math. <sup>[11]</sup>
84. Mr. Lalk reviewed diagnostics and medical records of Drs. Beyzer, Cheung, Albanna, Berkin, Gardner, Chabot, and Volarich. He concluded Claimant was incapable of "securing and maintaining employment in the open labor market" because he did not believe an employer would accommodate his need to change positions frequently and lie down every hour for up to 30 minutes (Ex. U-46).
85. Mr. Lalk believed Claimant's presentation to an employer would also be an obstacle. Claimant's discomfort was obvious when standing, walking or sitting (Ex. U-46). Mr. Lalk noted Claimant favored his left leg when he walked and bent forward when walking or sitting. Claimant testified he relied on a walking cane and lumbar belt for outside activities.
86. No vocational rehabilitation was recommendation until Claimant could control his symptoms better and work a sedentary position (Ex. U-46).
87. **Michael C. Chabot, D.O.**, a board certified orthopedic surgeon, examined Claimant once at Employer's request on February 19, 2004 when Claimant reported injury to his back when lifting at work on February 18, 2002 (Ex 1-8-9).
88. Dr. Chabot reviewed St. Anthony's Hospital records with no history of a work injury. Dr. Berkin's record contained no history of a fractured back in 1986 or history of Claimant riding bulls for pleasure or working as a rodeo clown (Ex. 1-12).

89. Dr. Chabot opined that surgery was needed due to chronic degenerative conditions that resulted in neural compression and persistent back pain (Ex. 1-28). Medical records did not support Claimant's alleged work injuries. Dr. Chabot found no evidence in the records of a work injury that would require back fusion (Ex. 1-31). Also, medical records showed a long history of back pain, injuries, and degeneration as far back as 1988 (31).
90. In July 2005 Dr. Chabot found no PPD for the alleged work injury and estimated PPD for the three level fusion to be 12-30% depending on Claimant's result (Ex. 1-33).
91. **June M. Blaine**, a rehabilitation counselor, reviewed medical reports at Employers' request. However, Ms. Blaine did not interview Claimant (Ex. 2-14). Ms. Blaine noted uncertainty in test score validity due to time constraints listed in Mr. Lalk's report (Ex. 2-14). <sup>[12]</sup>
92. Ms. Blaine suggested several employment conclusions. Based on Dr. Chabot's report she found Claimant capable of some type of work. However, she stated her opinion would change if Dr. Chabot's opinion changed (Ex 2-26-27).
93. Based on Dr. Volarich's report, Ms. Blaine concluded Claimant unable to work in the open labor market. Ms. Blaine testified that if Claimant were unemployable it was due to a combination of injuries from February 2002 and pre-existing conditions (Ex. 2-18).
94. On cross examination, she admitted her report does not state whether an employer would reasonably expect to hire Claimant in his present physical condition (Ex 2-25).
95. Based on Dr. Chabot's opinion that Claimant could not return to his prior work, and considering the restrictions set by Dr. Volarich, Ms. Blaine concluded an employer in the usual course of employment could be expected to hire Claimant in his condition (Ex. 2-45-47)).
96. Based upon Dr. Berkin's report, she found Claimant able to perform supervisory work where he could sit and stand as needed. Other work Claimant could perform included: cashier, unarmed security, light manufacturing, and customer assistance in a home center for developing kitchen/bath redesign <sup>[13]</sup>
97. Ms. Blaine found Claimant had transferable skills as a manager, making deliveries and taking care of loads (Ex. 2-38).
98. **Donna Fink**, president and owner of the company, testified by deposition via telephone on August 11, 2006, as she resides in Florida.
99. Ms. Fink owned and operated the company from April 1992 to 2006. Ms. Fink's job was to oversee all operations of the company. Payroll stopped in 2003 and taxes were wrapped up in 2006. (Ex. 3-4).
100. Claimant worked as a seasonal laborer for the company. Claimant worked on crews for erosion control, setting barrier walls, baskets, and retaining walls.
101. Claimant earned \$23.11 per hour and qualified for health insurance based on 250 hours worked per quarter.
102. Claimant was fired in May 2002 for poor performance. She was also suspicious he was drinking on the job.
103. Employees were informed of the procedure for reporting work injuries through a handbook. Employees signed a sheet and returned it to Employer stating they read the handbook. Employees were to report work injuries to their superintendent or Ms. Fink. Superintendents were instructed to notify Ms. Fink if an employee requested medical treatment, and she would send them to Med First (Ex. 3-6). Ms. Fink testified she no longer has a copy of the handbook or signed statements (Ex 3-26).
104. Ms. Fink testified she had a personal relationship with Steven Worley from September 2000 to March 2001. Mr. Worley was Claimant's supervisor.
105. Ms. Fink first learned of Claimant's injury in November 2002 when she received a letter from Employment Security stating Claimant was injured on the job.
106. Ms. Fink denied being able to investigate or provide medical care because she did not know about the injury. Claimant did not request medical treatment (Ex.3-8).
107. Ms. Fink denied telling Claimant to lift or retrieve a lifting device in February 2002 (Ex.-11). Nor did she recall a Nextel call stating Claimant could not get the hoe to the lifting device (Ex. 3-36).
108. Both Mr. Worley and Mr. Burgette were required to notify Ms. Fink of work injuries. Neither of them notified Ms.

Fink that Claimant was injured (Ex.3-12).

109. Ms. Fink does not recall Claimant being on light duty or him saying he was treating with Dr. Albanna (13). She denied asking Claimant to hold off on surgery until the fall.

#### ***Other Evidence***

110. Missouri Division of Employment Security records show Claimant received unemployment benefits for the weeks of February 2, 2002 to November 23, 2002 and January 2003 to March 2003.
111. The Report of Injury stated Employer was notified of Claimant's injury on December 11, 2002. Location where injury took place was unknown. No medical treatment was provided and no time was lost from work (Ex. 6).

#### **FINDINGS OF FACT AND RULINGS OF LAW**

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

#### **Claimant has the burden of proof.**

In a workers' compensation proceeding, the employee 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). Claimant must prove the nature and extent of disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995). (*Overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W. 3d 220, 223 (Mo. banc 2003)). I find Claimant has not met his burden.

#### **Claimant did not sustain a work related accident on February 18, 2002.**

Section 287.120.1 RSMo (2000) provides workers' compensation where an injured worker shows that his injury was caused by an accident "arising out of and in the course of the employee's employment." Section 287.020.2 defines accident as "an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.

An accident arises out of the employment relationship "when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Abel By and Through Abel v. Mike Russell's Standard Service*, 924 S.W.2d 502,503 (Mo. 1996) (citations omitted). An injury occurs "in the course of" employment "if the injury occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment." *Shinn v. General Binding Corp.*, 789 S.W.2d 230, 232 (Mo. App.1990). "Arising out of" and "in the course of" are two separate tests. "[B]oth must be met before [an employee] is entitled to compensation." *Automobile Club Inter-Insurance Exchange v. Bevel*, 663 S.W.2d 242, 245 (Mo. banc 1984).

Claimant's testimony is not credible that he injured his back while working on February 18, 2002. Claimant testified he injured his back while lifting a barrier weighing more than 300 pounds with co-worker David Waldruff. However, there was no credible eyewitness testimony.

I do not find Claimant's witnesses credible. Mr. Worley Claimant's long time friend had a personal relationship with Ms. Fink until 2001. Mr. Worley testified Claimant reported the injury to him. However, Mr. Worley does not recall the specific conversation, reporting the accident to Ms. Fink, or logging it into the incident book. However, he is certain he did these things because this was the procedure.

Claimant's witnesses not only have reason to give favorable testimony for their friend, they also have reason to give unfavorable testimony against Employer. Mr. Worley left the company because he lost money on a business deal with Ms. Fink and she asked him to train her ex-husband to do his job. Mr. Burgette testified Claimant reported the injury to him; however, Ms. Fink also fired him.

In addition, Claimant has a long history of low back and left leg pain with weakness, which began in high school when he wrestled. In 1985 he fell off a roof. In 1988 he jammed his back and was involved in an automobile accident. In 1989 he sought treatment due to continuing back pain. In 1999 he was diagnosed, among other things, with a herniated disc at L4-5 and treated with steroid injections. The radiologist referred to Claimant's back as "unusually severe degenerative changes for a 30 year old at L2, L3-4, and L4-5." Between 1988 and 1999, a physician predicted Claimant would experience periodic episodes of pain in the L4-5 area with heavy lifting. Another physician suggested surgery may be needed if leg weakness increased. In January 2002 Claimant sought treatment for back pain and continuing left leg weakness and numbness. Complaints persisted at the next appointment on February 9, 2002, which necessitated an MRI, nine days before the alleged work accident.

Claimant provided contradictory statements about medical symptoms and treatment. Initially he said he did not ask Employer for medical treatment. Later he testified Employer did not provide treatment. Although he testified the pain was severe and different, he did not seek treatment for nine days. Claimant also testified Employer consented when told he was getting treatment.

Whether or not Employer denied treatment, there is no medical history of a February 18, 2002 work accident. When asked on the New Patient Information Sheet "was this in any way work related," he answered no twice.

Although Dr. Beyzer's February 27, 2002 report stated Claimant was employed by a construction company, there is no history of a lifting injury at work on February 18<sup>th</sup> or any other date. There is no indication his complaints were related to his activities with the company in any way. The History of Present Illness taken on February 27, 2002 stated:

The patient is a 36 year old Caucasian male who works for a construction company. He comes to the clinic with a complaint of pain in his left gluteal area radiating down to his leg with numbness and tingling in his foot and weakness in his left foot. It has become progressively worse over the last several weeks. He graded the pain 10 on a scale of 0 to 10. He was hit by a horse five years ago and it never bothered him until two years ago. He was treated with steroids and was good for about two years until recently. The pain increased after prolonged standing or walking.

Claimant's history of his illness suggests the gluteal and left leg pain and weakness resulted from being hit by a horse five years ago, not from a work injury.

The radiologist did not have a history of a February 18<sup>th</sup> lifting injury at work. An MRI taken February 27, 2002 included only a history of hip and leg pain for two weeks. Medical records contain no reference to a February 18, 2002 lifting injury at work when Claimant followed up with Dr. Albanna on July 8<sup>th</sup> and 16<sup>th</sup> despite Claimant's contrary testimony.

Prior to surgery, on August 12<sup>th</sup> the Indication for Procedure below does not reference a February 18, 2002 lifting injury at work:

The patient is a 37year old gentleman that has led a very exertional lifestyle. He rode motorcycles, played rodeo. He presents with mechanical discogenic back pain, bilateral lower extremity pain, predominantly left lower extremity sciatic type of pain, weakness of dorsiflexion affecting his left lower extremity. He has failed to respond to conservative treatment including physical therapy, and epidural steroid injection.

Clearly, Dr. Albanna and Dr. Beyzer did not provide conservative treatment. They ordered tests to determine how to treat Claimant. Dr. Beyzer only gave Claimant Celebrex samples, not steroids as Claimant testified. I find conservative treatment was provided before February 18, 2002, based on Claimant's testimony and medical records.

Medical records contained no history of a work injury six months after it allegedly occurred and after extensive back surgery had been performed. In fact a work history was denied. No record of a lifting injury at work was found between September and November 2002 when Claimant voluntarily stopped seeing Dr. Beyzer.

Claimant's testimony that Ms. Fink asked him to postpone surgery is not credible. He testified Dr. Albanna discussed surgery in February 2002 but medical records contain no recommendation for surgery until July 2002. Diagnostics were not taken until March and Claimant did not follow up with Dr. Albanna until July. Ms. Fink denied asking Claimant to wait. I find Claimant did not discuss surgery with Ms. Fink following his February 27, 2002 appointment with Dr. Beyzer.

Nineteen months after the alleged injury, Claimant provided Dr. Gardner with the first medical history of a lifting injury at work in February 2002. It is reasonable to expect this important information, if true, would have surfaced in treatment and diagnostic records much sooner. Claimant also failed to mention it when he returned to Dr. Albanna in 2005 with severe back pain.

### **Claimant's back injury did not arise out of or in the course of employment.**

I do not find Claimant's injury or need for surgery arose out of or in the course of employment on February 18, 2002. I find Dr. Chabot's opinion more persuasive than Dr. Volarich's. Dr. Volarich, a radiologist, did not find a herniation at L4-5 on the 1999 MRI. He opined the L4-5 herniation was new based on the February 27, 2002 MRI. However, even Dr. Volarich acknowledged treatment records did not reflect a work injury until nineteen months after the alleged accident.

Dr. Chabot, a spine surgeon, noted there was no record of a work injury that would require back fusion. Also, medical records documented a long history of back pain, injuries and degeneration. Dr. Chabot did not review the February 27, 2002 MRI, but he did review the 2002 radiologist's report, the 1999 MRI study and 2002 CT myelogram. He found a herniation on the 1999 MRI based on stenosis at L4-5 and a finding that "the disc intrudes into the inferior portion of the

right foramen, narrowing it more than the left.” Dr. Chabot concluded Claimant had stenosis prior to 2002 which closes the spinal canal and compresses the dural sac. Therefore surgery was needed due to chronic degenerative conditions that resulted in neural compression and persistent back pain. Old chip fractures from L2 to L5 with spurs and protrusions may have contributed to compression as well.

Moreover, Dr. Cheung informed Claimant in 1999 of herniations at L4-5 and L5-S1, which may require surgery if left leg numbness increased. Less than three weeks before the alleged work injury, Claimant informed Jackson Medical Center he stopped treating with Dr. Cheung because he did not have insurance.

Even if Claimant did not have a herniation at L4-5 in 1999, he had many degenerative conditions throughout his spine, including L4-5. Claimant received medical treatment and was scheduled for an MRI nine days before the alleged work injury took place. Consequently, the herniation found in February 2002 may have been related to Claimant’s pain complaints in January 2002, or deterioration of his pre-existing conditions. Dr. Volarich does not address the January 2002 symptoms or their possible impact on the herniation.

Dr. Albanna recommended surgery to prevent progression of left leg weakness, which he believed could occur if surgery was delayed. As Dr. Cheung predicted in 1999, surgery was needed due to increased weakness and to prevent further progression of pre-existing left leg weakness.

It is undisputed Claimant had multiple back problems and a physically demanding job prior to February 18, 2002. However, Claimant alleged a traumatic injury on a particular day. I find Claimant failed to show he sustained any objective findings related to a lifting injury at work on February 18, 2002. I find Claimant has not met his burden to show the L4-5 herniation was the result of a work injury on February 18, 2002. I find Claimant failed to show a causal connection between the work he performed on February 18, 2002, and his need for back surgery.

Based upon medical records, witness testimony, and Dr Chabot’s opinion, I find Claimant did not prove he sustained a work related accident on February 18, 2002. I find the need for surgery did not arise out of and in the course of Claimant’s employment on February 18, 2002; therefore, Claimant is not entitled to compensation. All other points are moot.

### CONCLUSION

Claimant did not sustain an accident which arose out of and in the course of his employment. Therefore the claim is denied. The claim against the Second Injury Fund is also denied.

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

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

Suzette Carlisle  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia “Pat” Secret  
*Director*  
*Division of Workers' Compensation*

[1] However, this testimony contradicts Claimant’s deposition testimony that building bridges and carpentry do not require math skills.

[2] Claimant testified by deposition that he fractured his back in the mid eighties.

[3] Medical records indicate a history of bull riding.

[4] Claimant's deposition testimony was that he had pain lifting more than 15 pounds prior to February 18, 2002. Claimant's deposition is not in evidence.

[5] However, deposition testimony indicated he started work in the morning. The claim form indicated Claimant began work at 7:00 a.m.

[6] However Ms. Fink testified by deposition that she did not instruct Claimant to lift the barrier device or bring it back to the office.

[7] However, Claimant's deposition testimony is that the Pace work was heavier than Employer's work.

[8] Dr. Boardman's records are not in evidence.

[9] Claimant testified he did not limit his activities before February of 2002 and he performed all the housework.

[10] During cross examination, Dr. Volarich admitted none of the treatment records reflected a history of injury lifting a barrier at work.

[11] Based on the Wide-Range Achievement Test results, Revision 3. Claimant took 7 minutes to complete a 15 minute math test, and 16 minutes to complete a 30 minute reading test. Claimant reported he was out of time on the parking meter and did not want to walk back to put more money in the meter.

[12] Ms. Blaine relied on Mr. Lalk's test results and did not retest Claimant.

[13] It should be noted that Dr. Berkin's report is not in evidence.