

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

Injury No.: 04-006332

Employee: Jason Zeigler
Employer: J. E. Dunn Construction Company (Settled)
Insurer: Builders Association Self-Insurers' Fund (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: January 8, 2004
Place and County of Accident: Kansas City, Platte 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 January 29, 2008, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Kenneth J. Cain, issued January 29, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 11th day of September 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

DISSENTING OPINION

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

In 1996, employee sustained a work-related back injury that required surgical treatment. Employee filed a workers' compensation claim regarding the 1996 back injury. On December 30, 1997, employee and employer settled that claim based upon approximate permanent partial disability of 17.5% of the body as a whole.

On January 8, 2004, employee sustained a back injury in the instant matter. Employee filed workers' compensation claims against employer and the Second Injury Fund. On January 13, 2005, employee and employer settled his claim against employer based upon approximate permanent partial disability of 13.75% of the body as a whole. The claim against the Second Injury Fund went to hearing and is the subject of the award under review.

The only issue in this matter is whether or not employee's preexisting back condition is a permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if employee becomes unemployed. The administrative law judge concluded it was not.

Dr. Stepp was credible in his opinions. The evidence clearly supported his opinions. There was no credible, competent or objective evidence which contradicted his opinions. While Claimant offered self-serving testimony that he imposed limitations upon himself following his return to work after the 1996 accident; there was no credible, competent or objective evidence which supported his testimony. Claimant did not make a credible witness on that issue.

Furthermore, although Claimant testified that as part of his self imposed limitations after the 1996 accident, his co-workers helped him do his heavy lifting; he offered no testimony from any co-worker who allegedly helped him with any heavy lifting. He offered no testimony from any supervisor who could have confirmed that the company allowed other workers to do part of another employee's job duties. He offered no job descriptions showing that his job duties changed after the 1996 injury. In fact, Claimant's own testimony seemed to indicate that his employer would not accommodate for his injuries. He testified that he quit his job after the 2004 accident to seek a less physically demanding job.

...Claimant failed to prove the Second Injury Fund's liability for compensation due to his failure to prove that the disability from his 1996 accident constituted a hindrance or obstacle to his employment or reemployment. His claim was not denied on any other basis.

The administrative law judge's conclusion that Dr. Stepp was "credible in his opinions" suggests that Dr. Stepp offered opinions in the instant case. He did not. The administrative law judge relies solely upon the medical records of Dr. Stepp generated when Dr. Stepp treated employee for his 1996 back injury. The administrative law judge's findings regarding Dr. Stepp's "opinions" are based upon medical reports prepared on or before September 12, 1997. While Dr. Stepp's records regarding employee's physical condition in 1997 may be useful as a tool to help us understand employee's back history, they are of no value in helping us determine whether employee's back condition was a hindrance or obstacle to employment or reemployment on January 8, 2004.

As a prerequisite to imposing liability on the Second Injury Fund, a claimant must first establish that a pre-existing permanent partial disability existed **at the time the work-related injury was sustained** and was of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo. App. 2001).

Muller v. Treasurer of Mo., 87 S.W.3d 36, 40 (Mo. App. 2002) (emphasis added).

There is no indication that Dr. Stepp was ever asked, or spontaneously offered, his opinions regarding whether employee's disability as of January 8, 2004, was serious enough to constitute a hindrance or obstacle. In any event, there is no evidence of any such opinion in the record. The administrative law judge erred by relying on 6 year-old records.

The administrative law judge also failed to apply the proper focus in determining whether a disability constitutes a hindrance or obstacle to employment. "[I]n deciding whether a pre-existing injury constitutes a hindrance or obstacle to employment or reemployment, the focus is 'on the potential that the pre-existing injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition.'" *E.W. v. Kansas City School District.*, 89 S.W.3d 527, 538 (Mo. App. 2002) (citation omitted).

I find that employee testified credibly regarding the manner in which he modified his job duties to accommodate his surgically repaired back. Employee testified regarding his ongoing symptoms and periodic need for pain relievers. Dr. Koprivica testified that employee's back condition was a hindrance or obstacle to employment when he sustained the instant work injury. Dr. Koprivica described how employee was limited mechanically in terms of bending, lifting, and carrying as a result of the 1996 back injury. Dr. Koprivica's testimony was uncontradicted. In the instant case, employee has shown not only the potential for his preexisting back injury to combine with a later injury, but also that it *actually* has hindered his employment.

The employee met his burden of going forward with evidence that his preexisting back disability was a hindrance to employment. The Second Injury Fund did not offer evidence to rebut employee's proof. Employee has proven his preexisting back condition was a hindrance or obstacle to employment or reemployment. The administrative law judge's conclusion that employee has not so proven is against the great weight of the evidence and contrary to the law. To the extent the administrative law judge believes that an employee can only prove a disability constitutes a hindrance or obstacle to employment through the testimony of a vocational expert, the belief is not supported by the Workers' Compensation Law or Missouri case law.

The administrative law judge suggests that Dr. Koprivica's opinion was sufficient to establish that the preexisting back disability combined synergistically with the primary back injury to result in greater disability than the simple sum of the disability resulting from each injury.

Thus, due to the denial of the claim on other grounds, it was not necessary to reach the Second Injury Fund's argument that Claimant's two back injuries did not combine with each other to result in a greater overall disability to Claimant's body as a whole than the disability represented by the simple sum of the disability from the injuries considered individually. It must be noted, however, that there was no evidence to support the Second Injury Fund's position.

While I agree with the administrative law judge on this point, his comments on this topic are dicta. I would reverse the decision of the administrative law judge and grant employee's request to remand this matter for further findings and conclusions as are necessary based upon a conclusion that employee's preexisting back injury is a hindrance or obstacle to employment or reemployment.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

FINAL AWARD

Employee: Jason Ziegler Injury No. 04-006332
Dependents: N/A
Employer: J. E. Dunn Construction Company (previously settled)
Insurer: Builders Association Self-Insurers' Fund
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: December 4, 2007 (briefs filed January 4, 2008) Checked by: KJC/pd

FINDINGS OF FACT AND RULINGS OF LAW

- Are any benefits awarded herein? No.
- 2. Was the injury or occupational disease compensable under Chapter 287? Yes.
- 3. Was there an accident or incident of occupational disease under the Law? Yes.
- 4. Date of accident or onset of occupational disease: January 8, 2004.
- 5. State location where accident occurred or occupational disease was contracted: Kansas City, Platte County, Missouri, an adjoining county to Jackson County.
- 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
- 7. Did employer receive proper notice? Yes.
- 8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
- 9. Was claim for compensation filed within time required by Law? Yes.
- 10. Was employer insured by above insurer? Yes.
- 11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee, while in the course and scope of his employment as a laborer for J.E. Dunn Construction Company, sustained an injury to his back while using a jackhammer to break up concrete.
- 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: Herniated disk L5-S1 on the left side.
 15. Compensation paid to-date for temporary disability: \$16,563.75.
 16. Value necessary medical aid paid to date by employer/insurer? \$25,522.22.
 17. Value necessary medical aid not furnished by employer/insurer? N/A.
- Employee's average weekly wages: Employee is entitled to the maximum compensation rate.
 - Weekly compensation rate: \$662.55/\$347.05.
 - Method wages computation: By agreement and statute.

COMPENSATION PAYABLE

21. Amount of compensation payable: N/A.

TOTAL: None

22. Second Injury Fund liability: None.

23. Future requirements awarded: None.

Said payments to begin N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the Claimant N/A shall be subject to a lien in the amount of 25 percent 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: Jason Ziegler

Injury No. 04-006332

Dependents: N/A

Employer: J. E. Dunn Construction Company (previously settled)

Insurer: Builders Association Self-Insurer's Fund

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

Prior to the hearing, the parties entered into various admissions and stipulations. The only remaining issue involved the liability of the State Treasurer as Custodian of the Second Injury Fund for compensation.

Mr. Jason Zeigler (hereinafter referred as Claimant) settled his claim against his Employer, J. E. Dunn Construction Company, based on a permanent partial disability of 13.75 percent to the body as a whole due to an injury to his low back. The parties stipulated that Claimant's prior injury was also to his low back. The file shows that he settled his claim arising out of the prior injury based on a permanent partial disability of 17.5 percent to the body as a whole.

At the hearing, Claimant testified that he was born on May 13, 1968 and that he was 38 years old. He stated that he began working for J. E. Dunn in late 1993 or early 1994 as a laborer. He stated that he now worked for Hoy Excavating as a heavy equipment operator.

Claimant testified that he sustained two injuries to his low back while working for J. E. Dunn. He stated that his initial injury occurred in 1996 when he and a co-worker were lifting a 100-pound beam and the co-worker let go, causing the entire weight of the beam to be shifted to him.

Claimant testified that his doctor performed an L5-S1 laminectomy on his low back in February 1997. He stated that the surgery moderately improved his pain. He stated that afterwards he still experienced back pain, which radiated to his buttocks and intermittently to his knee. He stated that he was released from treatment for the 1996 injury with no restrictions. He alleged, however, that after he returned to work he imposed some limitations on himself such as no heavy lifting.

Claimant testified that his second low back injury at work occurred in January 2004. He stated that he had surgery on the same disks following both the 1996 and 2004 injuries. He stated that he was released to return to work following the 2004 injury in August of that year with a restriction of limited bending.

Claimant also alleged, however, that after his second surgery he developed new symptoms. He complained of numbness in both feet, but primarily on the right side following the second surgery. He stated that the numbness was worse when he was lying in bed.

Claimant testified that he quit his job with J. E. Dunn in November 2004 due to an inability to stay on his feet for the extended periods needed to do his job.

On cross-examination by the Second Injury Fund, Claimant reiterated that he was not given any work restrictions by his treating doctor following his 1996 low back injury and surgery. He also explained that despite the lack of any restrictions, he avoided a lot of lifting and bending at work.

P. Brent Koprivica, M.D., testified by deposition in February 2006, on Claimant's behalf. He stated that he was board certified in emergency medicine and by the American Board of Preventative Medicine. He stated that his specialty was occupational medicine.

Dr. Koprivica testified that he examined Claimant on November 15, 1997 and on November 10, 2004. He rated Claimant's permanent partial disability from the first injury at 20 percent to the body as a whole and the disability from the second injury at 17.5 percent to the body as a whole.

Dr. Koprivica testified that following the 2004 low back injury, Claimant developed new left radicular symptoms and new back pain. He stated that Claimant required new and more extensive surgery after the second accident. He acknowledged that both the 1996 and the 2004 accidents had resulted in injuries to the

L5-S1 disks on the left side.

Dr. Koprivica testified that Claimant's 1996 injury was a hindrance to Claimant's employment due to the self-limitation that Claimant imposed upon himself of no lifting over 100 pounds. He also indicated that Claimant's endurance was affected by the 1996 injury and that according to Claimant he took more frequent breaks after the accident. He stated that Claimant was given work restrictions following the 2004 accident.

Dr. Koprivica testified that Claimant's 1996 and the 2004 injuries combined to result in an enhanced disability to Claimant's body as a whole over and above the simple sum of the disability from the impairments considered individually. He stated that the enhanced disability was 10 percent. He reiterated that in his opinion the 2004 injury had resulted in new subjective complaints, new physical findings, and a new structural abnormality.

On cross-examination by the Second Injury Fund, Dr. Koprivica admitted that in the referral letter by Claimant's attorney, it was outlined what was required to establish Second Injury Fund liability. He admitted that Claimant's medical records showed that Claimant had left radicular complaints following both the 1996 and the 2004 injuries.

Dr. Koprivica acknowledged that Claimant's medical records showed that Claimant had continued to hunt, fish, and water and snow ski after the 1996 injury. He admitted that the only difference between Claimant's two low back surgeries was that in 2004 the doctor had to "deal with some scar tissue" or fibrosis resulting from the first surgical procedure.

Dr. Koprivica acknowledged that in his report he had mentioned a case, Uhrilir v. Farmer, referred to him by Claimant's attorney wherein the employee's injury on the job was to the low back as well as the preexisting injury and the Court had found the Second Injury Fund liable for compensation. Dr. Koprivica stated that, according to the facts in the case, the first surgery in Uhrilir involved a micro-diskectomy and the second surgery a much more substantial procedure with a fusion with screw fixation and a bone graft. He acknowledged that unlike in Claimant's case where the two surgeries were the same, in Uhrilir the surgeries differed.

Claimant also offered into evidence, various medical reports and records. Timothy Stepp, M.D., a neurosurgeon, performed Claimant's 1996 and 2004 low back surgeries. He noted that subsequent to the 1996 surgery, Claimant had a resolution of his left leg pain. He noted that Claimant was able to return to work in July 1997. He placed no job restrictions on Claimant. He noted on September 12, 1997 that Claimant was continuing to do "very well". He indicated that Claimant reported that he could perform his duties in a satisfactory manner. He stated that Claimant complained of occasional low back stiffness but denied any pain, weakness or sensory loss in his lower extremities.

Dr. Stepp further noted that on examination Claimant had a full range of motion of his lumbar spine. He stated that straight-leg raising and Patrick's sign were negative bilaterally. He stated that Claimant's gait was non-spastic. He stated that Claimant could walk independently on his heels and toes. He concluded that Claimant had reached maximum medical improvement. He also concluded that Claimant had sustained a permanent partial disability of 12 percent to the body as a whole due to the low back injury. As noted above, he did not place any work restrictions on Claimant when he released him from treatment.

Earlier, while Claimant was receiving treatment, Dr. Stepp had placed work restrictions on Claimant. In August 1996, he had advised Claimant to refrain from working and to avoid strenuous activities such as bending or lifting. In December 1996, he had restricted Claimant from lifting over 20 pounds and advised him that he could frequently lift and carry up to 10 pounds. He also advised Claimant to only occasionally bend, squat or kneel.

The records further showed that subsequent to Claimant's January 2004 injury, Dr. Stepp placed work restrictions on Claimant. In September 2004, Dr. Stepp released Claimant to return to work with restrictions in the "medium/heavy" category. He stated that Claimant should lift 75 pounds maximum and that he could frequently lift or carry objects weighing up to 35 pounds. He stated Claimant should limit his bending and squatting to an occasional basis. He stated that the restrictions were permanent.

Finally, Dr. Stepp's records showed he defined heavy work as lifting 100 pounds maximum with frequent lifting and/or carrying of objects weighing up to 50 pounds.

The remaining medical reports and records were cumulative of the other evidence.

LAW

After considering all the evidence, including the testimony at the hearing, Dr. Koprivica's deposition and his reports, Dr. Stepp's medical reports and records, the other medical reports and the other exhibits and observing Claimant's appearance and demeanor, I find and believe that Claimant did not meet his burden of proving that the injuries he had sustained prior to his accident at work constituted a hindrance or obstacle to his employment or reemployment. Therefore, he did not prove the Second Injury Fund's liability for compensation. His claim is denied.

Claimant argued in his brief that he was entitled to permanent partial benefits from the Second Injury Fund. The applicable statute pertaining to such benefits provides as follows:

§287.220 RSMo. (1994). "All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability, whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or by the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. . ."

§ 287.220 RSMo. (1994).

Thus, to establish Second Injury Fund liability, the employee must prove each of the following:

- that he sustained permanent partial disability as a result of an injury on the job;
- that he had preexisting permanent partial disability;
- that the disability from body as a whole injuries such as Claimant's equaled 12.5 percent to the body as a whole;
- that the disability from his preexisting impairment or impairments constituted a hindrance or obstacle to his employment or reemployment; See ABB Power T & D Co. v. Kempker, 236 S.W.2d 43 (Mo. App. W.D. 2007); APAC Kansas, Inc. v. Smith, 227 S.W. 3d 1 (Mo. App. W.D. 2007); Liberty v. Treasurer for State of Missouri-Custodian of Second Injury Fund, 218 S.W. 3d 7 (Mo. App. W.D. 2007); Garret v. Treasurer of State of Missouri as Custodian of Second Injury Fund, 215 S.W. 3d 244 (Mo. App. S.D. 2007);
- that the disability from his injury on the job combined with his preexisting permanent partial disability; and
- that due to the combination of the disability from the injury on the job and the preexisting disability that he sustained a greater overall disability to his body as a whole than the disability represented by the simple sum of the disability from the impairments considered individually;

See also Gassen v. Lienbengood, 134 S.W.3d 75 (Mo. App. W.D. 2004); Wuebbeling v. West County Drywall, 898 S.W. 2d 515 (Mo. App. E.D. 1995); Karoutzos v. Treasurer of State, 55 S.W.3d 493 (Mo. App. W.D. 2001); and Kizior v. Trans World Airlines, 5 S.W. 3d 195, 200 (Mo. App. W.D. 1999) overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 225 (Mo. 2003); where the Court essentially set out the six tests as set out above.

The failure to prove, any of the above, defeats the employee's claim against the Second Injury Fund. Gassen; Wuebbeling. Claimant clearly proved numbers one to three above. He did not prove number four above. Thus, his claim against the Second Injury Fund must fail.

The Second Injury Fund did not dispute that Claimant had sustained low back injuries in accidents at work in 1996 and in 2004. He settled his workers' compensation case involving his 1996 low back injury based on a permanent partial disability of 17.5 percent to the body as a whole. The evidence showed that he had low back surgery following his 1996 injury. He was off work for a substantial period of time. Dr. Stepp, who performed the surgery following the 1996 injury, rated Claimant's disability at a 12 percent permanent partial disability to the body as a whole. Dr. Koprivica rated Claimant's disability following the 1996 injury at 20 percent to the body as a whole. The most credible, competent evidence clearly showed that the settlement of 17.5 percent to the body as a whole properly reflected the amount of disability Claimant sustained as a result of his 1996 accident.

The evidence also showed that Claimant settled his 2004 workers' compensation case based on a permanent partial disability of 13.75 percent to the body as a whole. Again, Claimant had surgery following the 2004 accident. Dr. Koprivica rated Claimant's disability at 17.5 percent to the body as a whole. Claimant testified that he quit his job at J. E. Dunn following the 2004 accident to seek a less physically demanding position. The most credible, competent evidence clearly showed that the settlement properly reflected the amount of disability Claimant sustained in the 2004 accident.

Thus, Claimant proved that he sustained an injury on the job and that he had preexisting disability. He proved that the disability from both his injury on the job and his preexisting impairment was in excess of the 12.5 percent disability as required in the statute to establish Second Injury Fund liability. He did not, however, prove that his disability from the 1996 accident at work constituted a hindrance or obstacle to his employment or reemployment. Therefore, he did not prove the Second Injury Fund's liability for compensation.

Dr. Stepp, as noted above, was Claimant's treating neurosurgeon following the 1996 injury at work. Dr. Stepp performed Claimant's low back surgery. Dr. Stepp's opinion as the treating doctor was entitled to more weight than any other medical opinion offered in the case. Dr. Koprivica, who testified on Claimant's behalf, only saw Claimant on one occasion subsequent to the 1996 accident and prior to the 2004 injury. His opinion which will

be addressed later did not combine with the other evidence to prove Claimant's apparent allegation that his injuries from the 1996 accident were a hindrance or obstacle to his employment or reemployment.

Dr. Stepp, as Claimant admitted released Claimant to return to work following the 1996 injury without placing any restrictions on him. Claimant returned to his job doing heavy manual labor in the construction field. Dr. Stepp's records showed that he was aware that Claimant's job entailed heavy manual labor. The doctor's records further showed that during the treatment phase of Claimant's injury, he had placed restrictions on Claimant. He removed the restrictions after Claimant had recovered from his injury and reached maximum medical improvement.

Dr. Stepp also placed permanent work restrictions on Claimant subsequent to the 2004 low back injury. Again, that constituted evidence that the doctor ordered work restrictions for Claimant when he believed that the evidence so merited such restrictions.

Dr. Stepp was credible in his opinions. The evidence clearly supported his opinions. There was no credible, competent or objective evidence which contradicted his opinions. While Claimant offered self-serving testimony that he imposed limitations upon himself following his return to work after the 1996 accident; there was no credible, competent or objective evidence which supported his testimony. Claimant did not make a credible witness on that issue.

Furthermore, although Claimant testified that as part of his self imposed limitations after the 1996 accident, his co-workers helped him do his heavy lifting; he offered no testimony from any co-worker who allegedly helped him with any heavy lifting. He offered no testimony from any supervisor who could have confirmed that the company allowed other workers to do part of another employee's job duties. He offered no job descriptions showing that his job duties changed after the 1996 injury. In fact, Claimant's own testimony seemed to indicate that his employer would not accommodate for his injuries. He testified that he quit his job after the 2004 accident to seek a less physically demanding job.

Dr. Koprivica's testimony also did not show that Claimant's 1996 low back injury constituted a hindrance or obstacle to Claimant's employment or reemployment. First, Dr. Koprivica acknowledged that Claimant's medical records showed that Claimant had continued to hunt, fish and snow and water ski subsequent to the 1996 injury. Certainly those activities required bending, stooping, squatting, kneeling, twisting and turning. Those were activities where a person could fall.

Dr. Koprivica further admitted in his report following Claimant's 1996 accident that Claimant should avoid lifting in excess of 100 pounds. An ability to lift 100 pounds according to Dr. Stepp constituted an ability to do heavy manual labor. Evidence that Claimant could do heavy manual labor detracted from his allegation that his injuries from the 1996 accident were a hindrance or obstacle to his employment or reemployment. No vocational testimony or evidence was offered as to whether his injuries from the 1996 accident were a hindrance or obstacle to his employment or reemployment. Claimant simply failed in his burden of proof. His claim against the SIF must fail. ABB Power T & C; APAC Kansas, Inc.; Liberty; Garret.

Thus, due to the denial of the claim on other grounds, it was not necessary to reach the Second Injury Fund's argument that Claimant's two back injuries did not combine with each other to result in a greater overall disability to Claimant's body as a whole than the disability represented by the simple sum of the disability from the injuries considered individually. It must be noted, however, that there was no evidence to support the Second Injury Fund's position.

Dr. Koprivica was the only physician to offer an opinion on that issue. Dr. Koprivica testified that Claimant's injury on the job did combine with Claimant's preexisting injury to result in a greater overall disability to Claimant's body as a whole than the simple sum of the disability from the impairments considered individually. He explained his opinion. No contrary medical opinions were offered in the case.

The Second Injury Fund also seemed to argue that "back on back" injuries in most cases were not

compensable for purposes of determining Second Injury Fund liability and that the disability from the subsequent injury was usually just merely a supplement to or a continuation of the preexisting injury.

Certainly, there is a credible argument that the combination as required in the statute to establish Second Injury Fund liability would mean that injuries to different parts of the body would be needed. Claimant's injury on the job and his preexisting low back injury were not only to the same part of the body, but also to the exact same disks L5-S1 on the left side. Claimant, in support of his argument, however, cited a case from the Eastern District of Missouri where the Court found liability of the Second Injury Fund in a "back-on-back" case, Uhrilir v. Farmer, 94 S.W.3d 441 (Mo. App. E.D. 2003) overruled on other grounds.

The Second Injury Fund in its cross-examination of Dr. Koprivica attempted to distinguish Uhrilir by focusing on the great discrepancy in the severity of the two injuries in Uhrilir as opposed to Claimant's case where the two back injuries were essentially identical and Claimant's complaints following the two injuries were essentially the same. That argument by the Second Injury Fund was not persuasive.

The Uhrilir Court did not rely in anyway on the differences in the severity of the two injuries in finding the Second Injury Fund liable for "back-on-back" or injuries to the same part of the body. The Court in Uhrilir did not buy the argument that the second injury was merely supplemental to the first injury and that the Second Injury Fund was not liable for "back on back" injuries. The Court in Uhrilir further noted that in an earlier case, Searcy v. McDonnell Douglas Aircraft, Co., 894 S.W. 2d 173 (Mo. App. E.D. 1995), it had found that "as a general rule where the first and second injuries were to the same body part, the second supplements the first rather than combining to create a greater disability than the sum of the two" Id at 178. The Court in Uhrilir, when addressing that issue, noted that "no such limitation is present within the text of Section 287.220 itself". The Court clearly found that the Second Injury Fund could be liable in a "back-on-back" case or any case where the injuries were to the same part of the body. The Court clearly called into question its earlier ruling in Searcy.

Thus, in conclusion, while Claimant's case was decided on other grounds, the Second Injury Fund's attempt to distinguish Uhrilir as set out above was not persuasive. The Second Injury Fund offered no medical evidence or opinions on the issue of whether Claimant's 2004 low back injury had or had not combined with his 1996 low back injury to result in a greater overall disability to Claimant's body as a whole than the simple sum of the disability from the injuries considered individually. Furthermore, Dr. Koprivica did not make any concessions during his cross-examination by the Second Injury Fund on that issue. The Second Injury Fund offered nothing which detracted from Dr. Koprivica's opinion. The Second Injury Fund only offered an unsupported conclusion or statement in its brief.

A litigant's unsupported conclusion or statement in a brief, however, does not constitute evidence. It did not constitute any proof of a disputed fact or issue. Claimant failed to prove the Second Injury Fund's liability for compensation due to his failure to prove that the disability from his 1996 accident constituted a hindrance or obstacle to his employment or reemployment. His claim was not denied on any other basis.

Date: _____

Made by: _____

Kenneth J. Cain

Chief Law Judge

Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker

Director

Division of Workers' Compensation