

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

Injury No.: 10-026305

Employee: Lester Barker  
Employer: Laclede County  
Insurer: Missouri Association of Counties

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 3, 2013. The award and decision of Administrative Law Judge L. Timothy Wilson, issued June 3, 2013, 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 6<sup>th</sup> day of December 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T  
Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Lester Barker

Injury No. 10-026305

Dependents: N/A

Employer: Laclede County (a governmental entity)

Insurer: Missouri Association of Counties

Additional Party: N/A

Hearing Date: March 19, 2013

Checked by: LTW

### 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: April 5, 2010
5. State location where accident occurred or occupational disease was contracted: Laclede County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While engaged in employment with the Employer, and while the Employee was attempting to attach two large drain pipes that were approximately two feet in diameter and weighed approximately 150 pounds, Employee bent over and lifted the pipe, twisting it to the right in order to fit it to the connecting pipe. Upon doing so, Employee experienced an immediate, severe knife like pain in his low back that radiated into his right hip. As a consequence of this work incident Employee sustained injuries to his lumbar spine, which caused him to be governed by permanent work restrictions. These permanent work restrictions, in combination with the limitations caused by his illiteracy, render the Employee permanently and totally disabled.
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: BAW (Lumbar Spine)
14. Nature and extent of any permanent disability: Permanent Total Disability
15. Compensation paid to-date for temporary disability: None

- 16. Value necessary medical aid paid to date by employer/insurer? \$4,305.48
- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$510.80
- 19. Weekly compensation rate: \$340.55 (TTD / PTD / PPD)
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses: Denied

Future medical care: (See Award)

(Employee is entitled to future medical care from Employer and Insurer.)

Weeks of temporary total disability (or temporary partial disability): N/A

Weeks of permanent partial disability from Employer / Insurer: N/A

Weeks of disfigurement from Employer / Insurer: N/A

Permanent total disability benefits from Employer / Insurer: ..... (See Award)

(Employee is entitled to permanent total disability benefits from Employer and Insurer beginning May 5, 2011, at the rate of \$340.55 per week, for Employee's lifetime.)

- 22. Second Injury Fund liability: N/A

**TOTAL: \$340.55 PER WEEK, EFFECTIVE MAY 5, 2011, AND CONTINUING FOR EMPLOYEE'S LIFETIME, PLUS FUTURE MEDICAL CARE**

- 23. Future requirements awarded: Future medical and permanent total disability benefits

Said payments to begin immediately 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ryan Murphy, Esq.

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

Employee: Lester Barker

Injury No. 10-026305

Dependents: N/A

Employer: Laclede County (a governmental entity)

Insurer: Missouri Association of Counties

Additional Party: N/A

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on March 19, 2013. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about April 16, 2013.

The employee appeared personally and through his attorney Ryan Murphy, Esq. The employer and insurer appeared through their attorney, Matt Barnhart, Esq.

### **Dismissal of Injury No. 10-050269**

Prior to commencement of the hearing the employee, by counsel, orally moved to dismiss without prejudice the claim filed in Injury No. 10-050269, which references a date of injury of June 29, 2010. Without objection, the claim filed in Injury No. 10-050269 is dismissed without prejudice.

### **Stipulations**

The parties entered into a stipulation of facts in Injury No. 10-026305. The stipulation is as follows:

- (1) On or about April 5, 2010, Laclede County, Missouri (a governmental entity), was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Missouri Association of Counties.
- (2) On the alleged injury date of April 5, 2010, Lester Barker was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about April 5, 2010, the employee, Lester Barker, sustained an accident, which arose out of and in the course of his employment with the employer.

- (4) The above-referenced employment and accident occurred in Laclede County, Missouri. The parties agree to venue lying in Laclede County, Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section, 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the accident of April 5, 2010, the employee's average weekly wage was \$510.80, which is sufficient to allow a compensation rate of \$340.55 for temporary total disability compensation / permanent total disability compensation, and permanent partial disability compensation.
- (8) Temporary total disability compensation has not been provided to the employee.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$4,305.48 in medical expenses.

The issues to be resolved by hearing include:

- (1) Whether the employer and insurer are obligated to pay for certain past medical care and expenses in the amount of \$250.00?
- (2) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of the injuries?
- (3) Whether the employee sustained any permanent disability as a consequence of the accident of April 5, 2010; and, if so, what is the nature and extent of the disability?

### **EVIDENCE PRESENTED**

The employee testified at the hearing in support of his claim. Also, the employee presented at the hearing of this case the testimony of his wife, Becky Barker. In addition, the employee offered for admission the following exhibits:

Exhibit A..... Medical Report of David Volarich, M.D.  
Exhibit B.....Deposition of Phillip Eldred, C.R.C.  
(Inclusive of Deposition Exhibits)  
Exhibit C..... Vocational Report of Phillip Eldred, C.R.C.  
Exhibit D..Medical Records from St. John's Hospital, Lebanon Physical Therapy  
Exhibit E..... Medical Records from St. John's Clinic, Agape

Exhibit F..... Medical Records from St. John's Clinic, Lebanon Family  
Exhibit G..... Medical Records from Bays Chiropractic Clinic  
Exhibit H..... Medical Records from Springfield Neurological & Spine Institute  
Exhibit I ..... Medical Records from St. John's Clinic  
Exhibit J ..... Medical Records from St. John's Health Center  
Exhibit K..... Medical Bills from St. John's Health Center

The exhibits were received and admitted into evidence.

The employer and insurer presented three witnesses at the hearing of this case – Linda Cansler, Danny Rhoades, and Danny Dismang. In addition, the employer and insurer offered for admission the following exhibits:

Exhibit 1..... Medical Record from Fred Mcqueary, M.D. (In Re: Return to Work)  
Exhibit 2..... Letter Dated March 31, 2011  
Exhibit 3..... Statement of Benefit Charges  
Exhibit 4..... Deposition of James England, Jr., L.R.C.  
(Inclusive of Deposition Exhibits)

Exhibits 1, 3 and 4 were received and admitted into evidence. The employer and insurer offered for admission Exhibit 2, but the employee objected to its admission on grounds that it constituted a statement of employee not provided pursuant to a certified request submitted to the employer under Section 287.215, RSMo. In light of this objection, the undersigned determined that Exhibit 2 constituted a statement of the employee, and the employer had failed to comply with the requirements of Section 287.215, RSMo. Consequently, the objection was sustained and Exhibit 2 was denied admission.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Notice of Hearing
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

## **DISCUSSION**

### *Background & Employment*

The employee, Lester Barker, is 62 years of age, having been born on September 8, 1950. Mr. Barker resides in Lebanon, Missouri with his wife, Becky Barker. He and his wife have been married for 38 years.

Mr. Barker enjoys limited education. He quit elementary school at an early age, during in or around the 6<sup>th</sup> grade at the direction of his father, who required assistance supporting the 16 children in the family. Apparently, Mr. Barker's parents did not place an emphasis on the children's education, and Mr. Barker never learned to read or write. And he never obtained a GED or other educational training.

Mr. Barker's employment history relates to labor oriented or physically demanding work. Subsequent to quitting school, he performed work for his father, including farm work. At the age of 17 he entered the work force and engaged in employment as a wage earner. He later obtained employment assembling boats at a factory in Lebanon, Missouri. Other employment includes work as a truck driver and heavy equipment operator.

In or around 1992 Mr. Barker obtained employment with the employer, Laclede County, Missouri (a governmental entity), working in the Road and Bridge department as a truck driver and backhoe operator. In this employment Mr. Barker performed a variety work, which included the following: driving a dump truck, putting up signs, patching roads, and installing culverts. The nature of his work duties required him to perform multiple physical movements including kneeling, standing, squatting, walking, sitting, reaching, and working overhead with his arms and hands. He was required to lift varying weights at work, and he typically lifted 100 pounds at a time without help. He was required to work in awkward positions. He was required to grip tools at work that weighed up to 45 pounds including air wrenches, ratchets, post drivers, and shovels. He worked 8 hours a day, 5 days a week, and averaged 40 hours a week with a 30 minute lunch break and 2 additional 15 minutes breaks during the day.

Mr. Barker continued in his employment with Laclede County until in or around 1996 or 1997, when he obtained employment with John Deere working as a truck driver. He engaged in this employment for approximately 8 years, continuing in this employment until approximately 2004 / 2005. In or around 2005 Mr. Barker returned to his employment with Laclede County, Missouri (a governmental entity), working again in the Road and Bridge department as a truck driver and backhoe operator. Mr. Barker's second period of employment with Laclede County involved work similar to his earlier period of employment. Mr. Barker continued to work for the employer, Laclede County, until in or around 2011.

According to Mr. Barker, he quit his employment with the employer because he was no longer able to perform his work duties because of the severity of his pain. He specifically noted that his work as a backhoe operator involved a lot of bouncing and jarring of his body against the seat and machine, and the employer was unwilling or unable to change his work duties or make accommodations that would allow him to work in a less physically demanding job.

#### *Prior Medical Conditions*

The parties did not identify any medical conditions or disabilities governing or impacting Mr. Barker's life prior to April 5, 2010. Not surprisingly, however, considering Mr. Barker's age

and employment history involving heavy physical labor, he presented with preexisting degenerative disc disease, with facet arthropathy. Yet, this medical condition was not identified as a preexisting disability, and did not hinder or serve as a potential hindrance or obstacle to Mr. Barker performing physical labor and engaging in employment activities.

Also, while not suffering from a preexisting permanent disability, prior to April 5, 2010, Mr. Barker enjoyed limited education. He attended school only through the 5<sup>th</sup> or 6<sup>th</sup> grade, as he performed poorly in special education classes and his father required him to leave school in order to provide assistance to the family.<sup>1</sup> With these limitations and challenges Mr. Barker never learned to read and write, and as an adult lacked the ability to read or write, and performed math skills at the third grade level. Notably, this reading deficiency and illiteracy served as a hindrance or obstacle to employment (or potential employment), as evidenced by the employer declining to employ Mr. Barker in certain sedentary employment positions without him first obtaining greater literacy skills; but the medical records and evidence presented by the parties do not indicate that this illiteracy is causally related to a learning disability or otherwise a medical condition that would support a claim of permanent disability attributable to establishing Second Injury Fund liability.

### *Accident*

On April 5, 2010, while engaged in employment and performing his work duties for the employer, Mr. Barker sustained an injury to his low back. This injury occurred as Mr. Barker was attempting to attach two large drain pipes that were approximately two feet in diameter and weighed approximately 150 pounds. In order to connect the pipes he had to lift one end. As he bent over and lifted the pipe, twisting it to the right in order to fit it to the connecting pipe, Mr. Barker experienced an immediate, severe knife like pain in his low back that radiated into his right hip.

Immediately subsequent to suffering this injury Mr. Barker reported the incident to his supervisor Danny Disming. Thereafter, the employer referred Mr. Barker to St. John's Occupational Medicine for medical treatment, and thereafter began providing him with medical care.

### *Continuing Employment*

During the course of receiving treatment provided by the employer and insurer for care of his low back injury, Mr. Barker continued to engage in employment. This employment involved light duty work, and occurred in part because of the accommodations allowed by the employer. In July 2010, however, Dr. Mcqueary released Mr. Barker from medical care, and determined that he could return to work without permanent restrictions. Following this release Mr. Barker resumed his regular employment, but began to experience progression in frequency and intensity in the level of his low back and right leg pain, which never completely resolved.

Later, in March 2011, Mr. Barker returned to see Dr. Mcqueary, and based on this subsequent examination Dr. Mcqueary issued a new medical opinion that prescribed a release to

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<sup>1</sup> Mr. Barker's wife, Becky Barker, noted that Mr. Barker was one of 16 children in his family, and he was expected at a very young age to provide assistance to the family.

work with certain permanent work restrictions. Following this exam, the employer continued to provide Mr. Barker with employment and attempted to accommodate the work restrictions. Yet, according to Mr. Barker, he continued to work, at times beyond the work restrictions, and continued to experience significant pain. During this period Mr. Barker took time off from work, utilizing sick leave, annual leave, comp time, etc.

In or around April / May 2011, and in light of Mr. Barker expressing complaints of pain and having difficulty performing his work, as well as there being differences of opinion regarding Mr. Barker's work restrictions, the employer and insurer referred Mr. Barker back to Dr. Jordan for further exam, including an FCE. This FCE resulted in Dr. Jordan issuing permanent work restrictions, which, in combination with Mr. Barker's illiteracy, precluded the employer from being able to continue employing Mr. Barker. The employer subsequently terminated Mr. Barker from employment on or about May 20, 2011, and Mr. Barker has not engaged in any employment since this date.

### *Medical Treatment*

On April 6, 2010, and at the direction of the employer, Mr. Barker presented to Dr. Glas at St. John's Occupational Medicine with complaints of right sided low back pain with sitting, standing, or walking. In providing a history to Dr. Glas, Mr. Barker indicated that he injured his low back the day before while lifting a two foot in diameter section of pipe with another employee. Upon examining Mr. Barker, Dr. Glas noted that Mr. Barker was not able to stand erect, and noted he had no history of prior back injury. Dr. Glas further noted objective paraspinous spasms in the right lumbosacral area and a SI joint that was markedly tender.

Dr. Glas provided Mr. Barker with follow-up treatment. On April 12, 2010, Mr. Barker returned to Dr. Glas complaining of continued right sided low back pain with radiation into the thigh and groin. Two days later, on April 14, 2010, Mr. Barker returned to Dr. Glas reporting some improvement in the low back pain with continued unilateral spasm, difficulty bending, and difficulty lifting. Dr. Glas objectively noted right side lumbar paraspinous spasm, and mild to moderate discomfort to percussion over the spinous process at the thoracic lumbar junction. Dr. Glas continued to schedule Mr. Barker for follow-up treatment.

On April 21, 2010, Mr. Barker returned to Dr. Glas showing only slow improvement. His pain was worse in the right hip and thigh, and his motion was still restricted. In discussing his examination and findings, Dr. Glas noted that Mr. Barker presented with tenderness to percussion over the lower lumbar spinous process, and that he could only squat with hand assistance and only manages 30 degrees of flexion before he has to use his hands to brace himself. In light of continuing symptomology, Dr. Glas referred Mr. Barker to Dr. Jordan for further evaluation and treatment.

On April 22, 2010, Mr. Barker presented to St. John's Occupational Clinic reporting right sided low back pain radiating down the right leg and groin. St. John's Occupational Clinic ordered an MRI of the lumbar spine.

In follow-up treatment with Dr. Jordan, on May 6, 2010, Mr. Barker presented to St. John's Occupational Clinic reporting that he had missed approximately two weeks of work

because of this injury, and that the medication was not improving his condition. Dr. Jordon noted that Mr. Barker was still having right buttock pain and radicular symptoms down his thigh and calf. In light of these continuing symptoms, Dr. Jordan prescribed additional physical therapy for Mr. Barker, and a diagnostic study in the nature of an MRI of the lumbar spine.

On May 17, 2010, Mr. Barker underwent an MRI of the lumbar spine. This diagnostic study revealed spondylosis and mild bulge and moderate facet arthropathy of the lumbar spine at the level of L4-L5 with mild subarticular thecal sac effacement. The study further revealed an annular fissure of the lumbar spine at the level of L2-L3 with mild to moderate facet arthropathy, and mild lateral recessed stenosis bilaterally at the level of L4-L5.

Following this study, on May 20, 2010, Mr. Barker underwent an injection of the right SI joint with Kenalog. Later, on July 1, 2010, Mr. Barker presented to St. John's Occupational Clinic reporting that while raking at work he felt intense pain in his low back and radiating, burning pain into his right buttocks and extremities.

On October 22, 2010, Mr. Barker presented to Kevin Bays, D.C. (Bays Chiropractic). In providing Dr. Bays with a medical history Mr. Barker reported that the incident of April 5, 2010, was the cause of his current condition. Mr. Barker further reported that the pain is constant on the right side and mostly sharp, traveling down the right leg to the foot. Additionally, Mr. Barker reported experiencing a burning sensation in the leg as well as numbness and tingling. Based on this examination, Dr. Bays recorded that the constant pain interferes with Mr. Barker's work, sleep, daily routine, and recreation.

On or about March 8, 2011, Mr. Barker presented to Fred Mcqueary, M.D., for an examination and evaluation, apparently at the request of Mr. Barker outside the purposes of workers' compensation. In taking an updated history, Dr. Mcqueary notes that Mr. Barker was continuing to engage in his employment with Laclede County and is performing light duty work, and not performing the heavy pipe laying that he had previously done for the county. However, Dr. Mcqueary notes that Mr. Barker is continuing to operate trucks, and further notes the following:

Some days he has 2 drive a dump truck. On rare occasions he has to drive a backhoe. On both of these occasions, his pain is much worse. He would like to have his workday limited to just driving a pickup. Indicates he discuss this with his boss, and he indicated that if you could come a note to that effect, they would accommodate that.

In light of this examination, Dr. Mcqueary noted that Mr. Barker was continuing to have difficulties with his "degenerative disc disease and overlying sprain/strain," but opined that Mr. Barker did not require any specific additional intervention relative to the "workers' compensation situation." Yet, Dr. Mcqueary offered to Mr. Barker the option of long-term pain management, but Mr. Barker declined such treatment. Notably, at the time of this visit, Mr. Barker requested Dr. Mcqueary to issue a note placing tighter work restrictions upon him. In response, Dr. Mcqueary cautioned Mr. Barker that such "notes can sometimes lead to people losing jobs. Recognizing this risk, Mr. Barker responded with an affirmation that "he is ready for that potential outcome."

Subsequently, based on this examination and in response to Mr. Barker's request for tighter work restrictions, Dr. Mcqueary issued a work status note that states the following:

**Work Status**

This patient would be best served by limiting his driving to the pickup, and avoiding the dump truck and backhoe.

**Work/School Excuse**

Lester was seen in our office 3/8/11. Please excuse from: duties as outlined above for at least one year period.

Notably, according to Dr. Mcqueary, this work status report did not change his earlier findings that were discussed and made part of his independent medical evaluation in July 2010.

On or about May 2, 2011, and at the direction of the employer and insurer, Mr. Barker received a functional capacity evaluation at St. John's Lebanon. The results of this evaluation indicated that Mr. Barker demonstrated no symptom magnification; while the validity profile proved invalid in 2 of 4 categories tested. Also, this functional capacity evaluation indicated that Mr. Barker did not demonstrate tolerance for any repetitive activities despite good effort, and that his material handling fitness was poor. As a consequence of this FCE, it was recommended that Mr. Barker be given restrictions that limited his lifting to be 14 - 17 pounds occasionally, 7-9 pounds frequently, and 3 pounds constantly. The results of FCE further note that Mr. Barker would be unable to perform at these levels over an extended period of time.

On May 5, 2011, Mr. Barker presented to Dr. James Jordan, who adopted the physical exertional limitations of the FCE, and permanently restricted Mr. Barker to lifting 14 pounds occasionally, 7 pounds frequently, and 3 pounds constantly.

*Independent Medical Examinations*

**Fred Mcqueary, M.D.**

Fred Mcqueary, M.D., an orthopedic surgeon affiliated with St. John's Health System, provided testimony through the submission of his medical records and medical report. Dr. Mcqueary performed an independent medical examination of the employee, Lester Barker, on or about July 20, 2010. At the time of this examination, Dr. Mcqueary took a history from Mr. Barker, reviewed various medical records, and performed a physical examination of him. The history obtained by Dr. Mcqueary includes recitation of the following:

The patient reports he had no problems with his back until he was injured by job on April 5. That time. He was lifting a heavy culture with another employee. He felt something pull in his back, but continued working that day. That evening, the pain became quite severe. He saw Dr. Glas, who took him off work for 2 weeks. He was then referred to Dr. Jordan. Dr. Jordan prescribed physical therapy and

placed him on light duty. He did this for 3 weeks, and then was released, regular duty. He's been driving a truck rather than doing his usual activity of running a backhoe. He feels a truck as he is using running tobacco, but it still aggravates his back. Some. He apparently returned to see Dr. Jordan on one occasion and was told he may need to consider a job change. He's been told at all he has is arthritis in his back.

Patient also underwent a sacroiliac injection. Dr. Jordan, but this was not helpful. He is continuing to do the therapeutic exercises, which he has previously been instructed him.

He describes the pain as being 50% of the back and 50% of the right leg. The leg pain involves the buttock, lateral thigh and occasionally the lateral calf to the ankle. Distal numbness of the leg. There is intermittent. Whole leg weakness. His DOS of bladder bowel control. The pain is sharp, stabbing and burning in character. The pain is increased by standing or walking. The pain is relieved by changing positions. There is mild nighttime pain. He is taking ibuprofen and hydrocodone for pain control. He does not smoke or use tobacco.

In light of his examination and evaluation of Mr. Barker, Dr. Mcqueary offered an impression and propounded the following comments:

Mr. Barker with preexisting degenerative, facet arthropathy and minimal final stenosis on his imaging study. He describes an acute injury, which sounds like a sprain strain type of injury. This most likely would represent an annular tear. He does have evidence of an annular fissure at L2-3. Most annular tears are not visible on MRI scan, so I would not be surprised if he did have an annular tear at a lower level. An annular tear at L4-5 or L5-S1 could cause these sorts of radiating pain that he complains of. There is no hard evidence of radiculopathy on his exam. He is actually all in all pretty functional at this time, despite his complaints of continued pain. He is quite concerned about what the future holds.

With this impression, Dr. Mcqueary diagnosed Mr. Barker with an acute sprain / strain, overlying diffuse degenerative change in his lumbar spine. Notably, in rendering this opinion, Dr. Mcqueary opines that the April 5, 2010, accident is the prevailing factor in causing the acute injury, "despite his pre-existing degenerative issues."<sup>2</sup> Further, based on this diagnosis, Dr. Mcqueary concluded that Mr. Barker was not a surgical candidate, and should be afforded "nonoperative and noninterventional management..."

In addition, Dr. Mcqueary opined that Mr. Barker was at maximum medical improvement, and presented with a permanent partial impairment of 10 percent to the body as a whole. Moreover, Dr. Mcqueary opined that Mr. Barker did not need to be governed by work restrictions, and that he would allow Mr. Barker to return to his employment performing regular work duty. Similarly, Dr. Mcqueary encouraged Mr. Barker to continue with his exercises on a daily basis.

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<sup>2</sup> In referencing the contribution for cause of this injury, Dr. Mcqueary opines that the contribution from the April 5, 2010, incident is 60 percent, and the contribution from the preexisting degenerative changes is 40 percent.

In a subsequent addendum to his initial report, on August 20, 2010, Dr. Mcqueary opined that Mr. Barker was not governed by work restrictions. Mr. Barker did not have “any work restrictions for either the pre-existing portion of the injury, or the work-related portion of the injury.”

**David T. Volarich, D.O.**

David T. Volarich, M.D., a physician practicing in the specialties of occupational medicine, nuclear medicine and independent medical consultations, provided testimony through the submission of his medical report. Dr. Volarich performed an independent medical examination of the employee, Lester Barker, on August 18, 2011. At the time of this examination, Dr. Volarich took a history from Mr. Barker, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Barker, Dr. Volarich opined that the April 5, 2010, lifting and twisting incident was the prevailing factor in causing Mr. Barker to sustain an injury to his low back. According to Dr. Volarich, the nature of this injury involved a bulging disc of the lumbar spine at the level of L4-L5 with intermittent right leg radicular symptoms, as well as aggravation of degenerative disc disease and degenerative joint disease of the lumbar spine at the levels of L1-L2 and L2-L3.

In considering the nature and extent of the permanent disability caused by this work injury, Dr. Volarich opined that Mr. Barker was at maximum medical improvement, and had sustained a permanent partial disability of 30 percent to the body as a whole. Further, in considering whether Mr. Barker presented with any permanent disability referable to his low back at the time of the work injury, Dr. Volarich opined that Mr. Barker did not present with any permanent disability, and thus determined there was no disability to apportion between the work injury and the preexisting degenerative disc disease.

Also, Dr. Volarich opined that the nature of Mr. Barker’s medical condition, causally related to the April 5, 2010, accident, necessitates receipt of additional or future medical care in order to cure and relieve him from the effects of the injury. In describing the nature of this medical care, Dr. Volarich opines that Mr. Barker is not presently a surgical candidate. However, according to Dr. Volarich, Mr. Barker will require ongoing care for his pain syndrome including narcotics, muscle relaxants, physical therapy, and treatment at a pain clinic, including epidural steroid injections, nerve root blocks, trigger point injections, TENS units, and similar treatment.

Finally, in considering the question of Mr. Barker’s employability Dr. Volarich does not specifically address this issue or render an opinion. Rather, Dr. Volarich offers an opinion of permanent disability, and prescribes a list of work restrictions. In this regard, Dr. Volarich propounds the following comments:

With regard to work and other activities referable to the spine,

1. He is advised to avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks.

2. He should not handle any weight greater than 20 pounds, and limit this task to an occasional basis assuming proper lifting techniques.
3. He should not handle weight over his head or away from his body, nor should he carry weight over long distances or uneven terrain.
4. He is advised to avoid remaining in a fixed position for any more than about 30 minutes at a time including both sitting and standing.
5. He should change positions frequently to maximize comfort and rest when needed.
6. He is advised to pursue an appropriate stretching, strengthening, and range of motion exercise program in addition to non-impact aerobic conditioning such as walking, biking, or swimming to tolerance daily.

### *Vocational Opinions*

#### Phillip Eldred, C.R.C.

Phillip Eldred, C.R.C., a vocational consultant, testified by deposition in behalf of Mr. Barker. Mr. Eldred performed a vocational evaluation of Mr. Barker on January 4, 2012. At the time of his evaluation, Mr. Eldred took a vocational history from Mr. Barker, performed a vocational profile and performed certain vocational testing. Among these vocational tests include the WRAT-4, which analyzed Mr. Barker's ability to read, spell and utilize math computations. Notably, through this testing, according to Mr. Eldred, "on word reading [Mr. Barker] scored at the first grade, sixth month, spelling at first grade, fourth month, and math computation at first grade, ninth month."

In light of his examination and evaluation of Mr. Barker, Mr. Eldred opined that Mr. Barker possesses limited ability to obtain education opportunities, "and therefore, realistically cannot be vocationally retrained due to his low academic ability and his physical restrictions." Mr. Eldred further opined that the restrictions and limitations governing Mr. Barker render him at less than a sedentary work level, and he is unemployable in the open and competitive, gainful employment market.<sup>3</sup> Notably, in rendering this opinion, Mr. Eldred acknowledges that he is relying upon all medical opinions, including the opinion of Dr. Volarich. Further, Mr. Eldred opined that this permanent total disability is attributable solely to the work injury of April 5, 2010. Vocationally, according to Mr. Eldred, prior to April 5, 2010, Mr. Barker was not governed by any preexisting medical conditions that would constitute a hindrance or obstacle to employment.

In considering the academic deficiencies of Mr. Barker, Mr. Eldred opined that a vocational consultant was not qualified to give a diagnosis of learning disability and that no

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<sup>3</sup> Mr. Eldred notes that Mr. Barker imposes upon himself additional restrictions, which include having to lie down during the day, five to six times, in order to obtain relief from his back and leg pain. According to Mr. Eldred, these restrictions alone, if accepted, render Mr. Barker unemployable in the open and competitive labor market.

doctor had identified his academic deficiencies as a pre-existing condition. Notably, Mr. Eldred propounded the following testimony:

Q After reviewing all of these medical records, has any doctor identified his limited education as a pre-existing condition?

A No.

Q Has any doctor stated that his limited education was a hindrance to Mr. Barker's work?

A No.

Q You had an opportunity to review Mr. Barker's prior employment; is that correct?

A That's correct.

Q We know he performed farm work for many, many years; is that right?

A Yes.

Q We know he worked for Laclede County Road & Bridge for approximately six years doing what he did at the time of his last injury; is that correct?

A Yes.

Q We know he worked as a truckdriver for John Deere for eight years from around 1996 to approximately 2004?

A Yes.

Q We also know that he went back from approximately 2004 to 2011 to again work for Laclede County Road & Bridge?

A Yes.

Q Is it fair to say based upon everything you've learned that Mr. Barker enjoyed a long record of successful employment?

A Yes.

Q Was his limited education an obstacle to obtaining these employments?

A No.

In addition, Mr. Eldred opined that Mr. Barker had no transferable skills to engage in sedentary work, even if he could perform work at the sedentary level. He is now unable to perform any of his past work and that Mr. Barker would have problems being retrained in a formal training program due to his constant pain and low academic test scores. Thus, Mr. Eldred opined that a reasonable employer would not hire Mr. Barker given an understanding of his functional limitations, age, and education.

On cross-examination Mr. Eldred acknowledged that if he considered the opinions and restrictions provided by Drs. Glas and McQueary only, thus excluding the restrictions imposed

by Dr. Volarich or the self-imposed restrictions identified by Mr. Barker, his vocational opinion would differ; Mr. Barker would be able to work within each of the physical demand categories defined in his report, including very heavy work. However, if he considered Mr. Barker's employability solely on the restrictions prescribed by Dr. Jordan, based on his review of Mr. Barker's FCE report, Mr. Barker would not be able to return to the sedentary work level, and would thus be unemployable in the open and competitive labor market.

As to the latter issue, on redirect, Mr. Eldred propounded the following testimony:

Q. Dr. Jordan gave work restrictions on May 5<sup>th</sup> of 2011; is that right?

A. Yes.

Q. And he gave those work restrictions with the benefit of the functional capacity evaluation that was performed a few days earlier?

A. Yes.

Q. Later on Dr. Volarich gave restrictions also with the benefit of the functional capacity evaluation; is that correct?

A. Yes.

Q. And you testified earlier Mr. Barker is unemployable in the open labor market based upon the medical restrictions of Dr. Jordan and Dr. Volarich?

A. Yes.

Q. And those were both provided with the benefit of an FCE; is that right?

A. Yes.

Q. Is it your opinion that Mr. Barker's unemployable in the open labor market based upon the last injury alone?

A. Yes.

James England, C.R.C.

James England, C.R.C., a vocational consultant, testified by deposition in behalf of the employer and insurer. Mr. England performed a vocational evaluation of Mr. Barker on June 26, 2012. At the time of his evaluation, Mr. England took a vocational history from Mr. Barker, performed a vocational profile and personal interview of Mr. Barker, reviewed various medical records and the deposition of Mr. Barker, and performed certain vocational testing. Among these vocational tests include the WRAT-3, which analyzed Mr. Barker's ability to read, spell and utilize math computations. Also, Mr. England administered to Mr. Barker the reading comprehension portion of the Adult Basic Learning Examination.

In light of his examination and evaluation of Mr. Barker, Mr. England noted that Mr. Barker scored at only the first grade level on word recognition; he demonstrated reading comprehension at the second grade level; and he tested at the third grade level on arithmetic. Further, while Mr. Barker demonstrated the minimal ability to add and subtract, he was unable to

multiply or divide even whole numbers, let alone fractions and decimals. Additionally, in his attempt to complete the Adult Basic Learning Examination, Mr. Barker was able to answer only 12 questions out of 40 correctly, "and finally reached the point where he could not even read and understand the questions." Mr. England thus concluded that Mr. Barker demonstrated reading comprehension at the second grade level.

Notably, in recognizing Mr. Barker's demonstrated illiteracy, Mr. England endeavored to determine whether Mr. Barker presented with a learning disability, and sought to secure copies of his educational transcripts and test scores as a child. Mr. England was partially successful in securing a transcript, but not necessarily test scores. In providing testimony relative to this issue, Mr. England did not opine specifically that Mr. Barker suffered from a learning disability; rather, Mr. England simply states that Mr. Barker possesses "significant learning problems." In commenting on Mr. Barker's academic or literacy challenges, Mr. England propounded the following comments:

All in all this man is functioning so poorly academically that he would not be able to handle jobs that involve reading, writing, recordkeeping or financial transactions. He is essentially limited to tasks that can be learned through observation.

I sent off to the school districts to try to get copies of his transcripts with test scores indicating how he performed in school. I was able to get a transcript back from the Lebanon School District. The transcript did not provide any test scores per se but did document the fact that this gentleman was in a special education program and that he made all C's and D's in his school subjects making essentially all D grades his last year in school with the exception of Pys. Ed. Despite being in a Special Education Program. Obviously if one looks at his transcript as well as the result of the testing that I administered to him we have an individual who appears to have significant learning problems and has had all the way back to when he was in school. This has severely limited his choices of occupations throughout his work life.

In light of his evaluation of Mr. Barker, Mr. England opined that if he assumed only the physical restrictions noted by the doctors, Mr. Barker would be precluded from performing his past work but would not be precluded from entry level work such as security guard positions, or "perhaps working as a courier delivering small parcels or packages, functioning in some light assembly / packing jobs, etc." However, on cross-examination, Mr. England acknowledged that according to the FCE, Mr. Barker's material handling fitness is poor, and that poor material handling fitness would preclude his ability to obtain competitive, gainful employment in these positions.

Preeminently, according to Mr. England, the greatest challenge to Mr. Barker obtaining employment relates to his inability to read and write. In speaking to this concern, Mr. England propounded the following comments:

The primary impediment to him returning to work of course is the fact that he cannot read and write. With those limitations many of the jobs I have listed above

would be ruled out. About the only position left for someone considering the physical restrictions that this gentleman has along with the pre-existing difficulty he has from a neurocognitive standpoint, he is likely going to be limited to only more sedentary packing and assembly positions. Essentially all the other types of service employment would be ruled out by his academic deficiencies. In the end if he is unable to find work in the open labor market I believe it will clearly be due to a combination of his pre-existing learning problems in combination with the physical restrictions and not just as a result of the last injury in isolation.

And during the taking of his deposition Mr. England propounded the following testimony:

Q In your report you mentioned that even given his physical restrictions and his academic background there were still jobs available that he could perform. What were those?

A Well, I think the only thing that would be left would be the packing or assembly work would be the only other kind of job that wouldn't require reading and math and things like that. But I think it will still be hard for him to compete for those just because he probably can't even fill out a job application. It's the combination of those things. I don't think the physical problems by themselves would prevent him from doing, as I indicated in the report, several kinds of work. It's the fact that he's 62, can't read and write, and you know, has no GED or high school education. Those are the things, in combination, that I think would prevent him from being able to go out and actually get a job.

Finally, Mr. England emphasizes that if Mr. Barker had a high school education, he would be able to compete in the open labor market. Mr. England further testified that there is no medical evidence establishing that Mr. Barker's academic deficiencies or inability to read or write are the result of a diagnosed medical condition or learning disability. Mr. England added that if Mr. Barker chose to engage in literacy classes, and if he was able to learn to read and write, it would open up significant opportunities for him to engage in entry level service employment - "[I]t would make a big difference in his overall ability to find jobs that are out there in the work force."

*Testimony Re: Literacy Classes*

Several witnesses testified in behalf of the employer and insurer, who provided testimony indicating that the employer, Laclede County, was prepared to offer literacy and computer training classes for Mr. Barker. Yet, Mr. Barker declined to participate in such classes. These testimonies are summarized below:

Linda Cansler

Linda Cansler is the deputy clerk for Laclede County. Ms. Cansler testified that in behalf of Laclede County she offered Mr. Barker an employment position in the county jail if Mr. Barker completed literacy and computer training classes.

On cross-examination, Ms. Cansler acknowledged she was neither a medical doctor nor a certified vocational expert. She offered no testimony as to the likelihood of Mr. Barker successfully completing a formal training program in his current condition. She was unaware of Mr. Barker's medical history and had not reviewed his medical records and permanent restrictions to determine whether Mr. Barker could safely perform employment in the county jail.

### Danny Rhoades

Danny Rhoades is the presiding commissioner for Laclede County. According to Mr. Rhoades, Linda Cansler and he had a meeting with Mr. Barker to explore the possibility of getting Mr. Barker literacy and computer training in order to help him find positions in the sheriff's office and the jail, employment positions that required literacy and computer skills.

On cross-examination, Mr. Rhoades acknowledged he was not a medical doctor, not a certified vocational expert, and had not examined Mr. Barker or reviewed his medical records in order to determine what, if any, employment Mr. Barker was capable of safely performing. He offered no testimony as to the likelihood of Mr. Barker successfully completing a formal training program in his current condition.

### *Present Complaints*

Mr. Barker has not worked since leaving employment with Laclede County Road and Bridge on May 20, 2011. According to Barker, he continues to experience ongoing difficulties and problems as a result of the injury of April 5, 2010. He complains of pain, lost motion, spasm, stiffness and diminished endurance with his low back. Additionally he notes that he continues to experience pain, numbness and tingling that extends into his right lower extremity. He further states:

- The affect of these symptoms make it difficult for him to stand, walk, run, and climb; he has difficulty walking on uneven ground, bending and lifting.
- He has difficulty squatting, stooping, kneeling, crawling, and prolonged exposure to fixed positions as well as pushing and pulling maneuvers that require twisting of his lumbar and cervical spine.
- His activities of daily living are affected as well. Driving his personal vehicle is difficult especially if he has to drive on long trips or over bumpy roads.
- He has difficulty getting in and out of a bathtub due to back pain and has difficulty putting on socks and shoes.
- He awakens from sleep due to low back and right leg pain and has difficulty doing house work such as carrying groceries or laundry.

In addition, Mr. Barker's wife of 38 years, Rebecca Barker, testified in behalf of the employee. According to Mrs. Barker, she has not worked outside the home during their marriage, but rather has relied upon Mr. Barker's long and steady record of employment for their family's financial support. She further testified and confirmed that Mr. Barker is unable to read and write, although she is not aware of any medical records or reports that refer to Mr. Barker having a learning disability.

## **FINDINGS AND CONCLUSIONS**

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

### **I. Accident & Injury**

The evidence is supportive of a finding, and I find and conclude that on April 5, 2010, the employee, Lester Barker, sustained an injury to his low back, which arose out of and in the course of his employment with the employer, Laclede County, a governmental entity. This injury occurred as Mr. Barker was attempting to attach two large drain pipes that were approximately two feet in diameter and weighed approximately 150 pounds. In order to connect the pipes he had to lift one end. As he bent over and lifted the pipe, twisting it to the right in order to fit it to the connecting pipe, Mr. Barker experienced an immediate, severe knife like pain in his low back that radiated into his right hip.

Notably, at the time of this work injury Mr. Barker presented with preexisting degenerative disc disease, with facet arthropathy. Yet, the nature of this medical condition was substantially asymptomatic; it did not cause Mr. Barker to suffer any preexisting permanent disability, and did not hinder or serve as a potential hindrance or obstacle to him performing physical labor and engaging in employment activities involving heavy physical labor.

The attending physician, Fred Mcqueary, M.D., opined that the April 5, 2010, work incident caused Mr. Barker to sustain an injury in the nature of an acute sprain / strain, with evidence of an annular fissure of the lumbar spine at the level of L2-L3, overlying diffuse degenerative change in the lumbar spine. He further described this acute injury as an annular tear likely involving the lumbar spine at the level of L4-L5 or L5-S1. The nature of this injury caused Mr. Barker to experience continuing and unresolved low back pain, with radicular pain and numbness extending into his right lower extremity. In rendering this opinion, Dr. Mcqueary noted that an annular tear would not necessarily be seen or evident in an MRI diagnostic study.

Accordingly, after consideration and review of the evidence, I find and conclude that the work injury of April 5, 2010, caused Mr. Barker to sustain an injury in the nature of an acute sprain / strain, including an annular tear, involving the lumbar spine at the level of L4-L5 or L5-S1.

Further, this injury included an annular fissure of the lumbar spine at the level of L2-L3, and an aggravation of preexisting and asymptomatic degenerative changes in the lumbar spine.

## II. Medical Care

The employee seeks an award for payment of past medical expenses, as well as future medical care. The adjudication of this issue requires consideration of Section 287.140 RSMo, which provides, in pertinent part:

1. [T]he employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.
10. The employer shall have the right to select the licensed treating physician, surgeon, chiropractic physician, or other health care provider; provided, however, that such physicians, surgeons or other health care providers shall offer only those services authorized within the scope of their licenses[.]

An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo.App. 1995). It is only when the employer fails to do so that the employee is free to pick his own provider and assess those costs against his employer. *Id.* Therefore, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. *Id.*

### *Past Medical Expenses*

The employee seeks an award for payment of past medical expenses in the amount of \$250.00. This claim relates to treatment provided to Mr. Barker by Dr. Mcqueary, a physician with St. John's Regional Health Center, on March 8, 2011. In support of this claim, the employee submits two different medical statements, which are discussed below:

- The first statement is entitled "Statement of Account for Physician Services" and is from St. John's Clinic. This statement refers to a March 8, 2011, new patient, level III office visit by Dr. Mcqueary, and a charge of \$156.00. (The statement further reflects a co-payment of \$40.00, an insurance payment of \$54.41, an insurance contractual adjustment of \$61.59, and a zero balance.)
- The second statement is an Itemized Statement of Account, dated May 25, 2011, and is from St. John's Regional Health Center. This second statement refers to a March 8, 2011, established patient, level II office visit by Dr. Mcqueary, and a charge of \$94.00. (The statement further reflects a HB Self Pay Lock Box payment of \$45.12, an insurance payment of zero dollars, an insurance contractual adjustment of \$48.88, and a zero balance.)

The medical care provided to Mr. Barker on March 8, 2011, for which he seeks payment, relates only to a single exam performed by Dr. Mcqueary. During this exam Dr. Mcqueary did not order any diagnostic studies or other lab work, and none appear to have been given to Mr. Barker. There is no basis for Mr. Barker incurring two separate medical charges for the same office visit. Consequently, it is the belief of the undersigned judge that the two statements refer to a single office visit provided by Dr. Mcqueary, and the first statement reflects incorrectly a charge premised on Mr. Barker being a new patient, which the provider subsequently corrected with the second statement. Accordingly, the actual expense incurred by Mr. Barker for the treatment provided by Dr. Mcqueary on March 8, 2011, is in the amount of \$45.12.

Also, in context of adjudicating the issue of liability, consideration must be given to the nature and purpose of Mr. Barker receiving this treatment from Dr. Mcqueary on March 8, 2011. According to Mr. Barker, he requested the employer to provide him with additional medical care because he was continuing to experience significant low back pain with lower extremity pain and numbness as a consequence of the work injury, and the March 8, 2011, visit was in response to his request for treatment. Mr. Barker thus asserts that the medical care provided by Dr. Mcqueary on March 8, 2011, was reasonable, necessary and causally related to the April 5, 2010, incident.

The employer and insurer deny authorizing or selecting Dr. Mcqueary to provide this treatment, contending that no such request was made by Mr. Barker. In this regard, Linda Cansler, deputy clerk for Laclede County, testified that Mr. Barker did not make any request to obtain additional medical care. The employer and insurer further argue that the medical records of Dr. Mcqueary support their contention that the March 8, 2011, office visit occurred at the request of Mr. Barker, and related more to an employment issue than the work injury.

Notably, the medical records of Dr. Mcqueary indicate that the March 8, 2011, office visit was for an examination and evaluation at the request of Mr. Barker. Further, Dr. Mcqueary considered the examination to have occurred outside the purposes of workers' compensation, insofar as Mr. Barker was endeavoring to obtain a prescription for work restrictions, which he could provide to his employer and effect a change in his work duties.

Finally, in regard to this issue, it is noted that prior to the March 8, 2011, examination, Dr. Mcqueary evaluated Mr. Barker, and released him from care on July 20, 2010. And prior to the March 8, 2011, examination, Dr. Mcqueary opined that Mr. Barker had reached maximum medical improvement, and presented with a permanent partial impairment of 10 percent to the body as a whole relative to the April 5, 2010, work incident. Additionally, at the time of the March 8, 2011, examination, Mr. Barker was continuing to engage in his employment with Laclede County, but was not performing the heavy pipe laying that he had previously done for the county. Also, Mr. Barker was continuing to operate trucks, including a dump truck, and on rare occasions a backhoe, which, according to Mr. Barker, worsened his back pain.

After consideration and review of the evidence, I find and conclude that the treatment provided to Mr. Barker on March 8, 2011, occurred at his request, and was for the sole purpose of securing a medical prescription excusing him from having to operate the dump truck or backhoe. I further find and conclude that he obtained this treatment without first giving the employer and insurer opportunity to select the health care provider, and provide this additional treatment

for him. This treatment was thus incurred at the expense of Mr. Barker, for which he is responsible. The request for payment of past medical expenses is denied.

*Future Medical Care*

The employee seeks an award for future medical care relying principally upon the medical opinion of Dr. Volarich. In regard to this issue, Dr. Volarich opines that as a consequence of the April 5, 2010, accident, Mr. Barker continues to suffer low back pain with radicular complaints, characterized by Dr. Volarich as “pain syndrome.” Dr. Volarich further opines that while Mr. Barker is not a surgical candidate, the nature of this condition necessitates receipt of ongoing pain management. Dr. Volarich identifies this treatment to involve narcotics, muscle relaxants, physical therapy, and treatment at a pain clinic, including epidural steroid injections, nerve root blocks, trigger point injections, TENS units, and similar treatment.

Dr. Mcqueary does not necessarily disagree with Dr. Volarich relative to this concern. In this regard, following the July 20, 2010, examination of Mr. Barker, Dr. Mcqueary opined that the April 5, 2010, accident was the prevailing factor in causing the acute injury, despite the pre-existing degenerative issues; and, he further opined that based on this diagnosis, although not a surgical candidate, Mr. Barker should be afforded “nonoperative and noninterventional management...” Later, in March 2011, while acknowledging that Mr. Barker was continuing to have difficulties with his “degenerative disc disease and overlying sprain/strain,” but opining that Mr. Barker did not require any specific additional intervention relative to the “workers’ compensation situation,” Dr. Mcqueary offered to Mr. Barker the option of long-term pain management.

After consideration and review of the evidence, I find and conclude that as a consequence of the April 5, 2010, accident, Mr. Barker continues to suffer low back pain with radicular complaints. In light of this continuing pain, causally related to the work injury of April 5, 2010, Mr. Barker is in need of additional medical care in order to cure and relieve him from the effects of the work injury. Accordingly, in light of the foregoing, the employer and insurer are ordered to provide the employee with such medical care recommended by Dr. Volarich and Dr. Mcqueary, and which is reasonable, necessary and causally related to the work injury of April 5, 2010.

### III.

#### Permanent Disability Compensation

The parties readily acknowledge that the April 5, 2010, accident caused the employee to suffer certain permanent disability. The parties, however, dispute whether the employee is permanently and totally disabled; and, if so, whether he is permanently and totally disabled as a consequence of the work injury, considered alone. The adjudication of this issue requires consideration of Section 287.020.6, RSMo, and applicable case law. Section 287.020.6, RSMo 1994 states:

The term ‘total disability’ as used in this chapter [Chapter 287] 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.

In giving meaning to this provision the courts have provided instruction and guidance. “The test for permanent total disability is whether, given the claimant’s situation and condition, he or she is a competent to compete in the open labor market. [citation omitted] The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant’s present physical condition, reasonably expecting the claimant to perform the work for which he or she is hire.” *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo. App. 1992).

Also, where permanent total disability is alleged, the Administrative Law Judge must first consider the liability of the employer in isolation by determining the degree of disability due to the last injury. *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1,4 (Mo. App.W.D. 2007). If the claimant (employee) is not permanently and totally disabled from the last accident, then the degree of disability attributable to all injures is determined. 227 S.W.3d at 4. Further, in considering employer liability several additional principles bear reprise.

The inability to return to any employment means the inability to perform the usual duties of the employment in a manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849 (Mo. App. S.D. 1995). In determining whether the claimant can return to employment, Missouri law allows the consideration of the claimant’s age and education, along with physical abilities. *BAXI v. United Technologies Automotive*, 956 S.W.2d 340 (Mo. App. E.D. 1997). While “total disability” does not require that the claimant be completely inactive or inert, *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 826 (Mo. App. S.D. 1996), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. Banc 2003), it does require a finding that the employee is unable to work in any employment in the open labor market, and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo. App. S.D. 2001), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003). The central question is: In the ordinary course of business, would any employer reasonably be expected to hire Claimant in his [or her] physical condition? *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D.2000) *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003).

In asserting his claim, Mr. Barker contends that the work injury of April 5, 2010, causes him to be governed by work restrictions that restrict him to less than full sedentary work, and these restrictions in combination with his inability to read and write, render him unemployable in the open and competitive labor market. Mr. Barker relies principally upon the medical opinion of Dr. Volarich, the medical opinion of Dr. Jordan (who adopted the physical exertion limitations of the May 2, 2011, FCE and permanently restricted Mr. Barker to lifting 14 pounds occasionally, 7 pounds frequently, and 3 pounds constantly), and the vocational opinion of Mr. Eldred. The employee further asserts that if the restrictions imposed by Dr. Jordan are accepted as true, even Mr. England (vocational expert for employer and insurer) opines that he is unemployable in the open and competitive labor market.

The employer and insurer dispute Mr. Barker’s contention that he is permanently and totally disabled. Although acknowledging that Mr. Barker sustained an acute injury on April 5, 2010, the employer and insurer assert that the work injury does not cause the employee to be

governed by work restrictions. In this regard, the employer and insurer rely principally upon the medical opinions of Dr. Mcqueary and the vocational opinion of Mr. England. In this context, the employer and insurer assert that Dr. Mcqueary did not impose any permanent work restrictions relative to the work injury, and Dr. Mcqueary limits Mr. Barker only to not operating a dump truck or backhoe. And assuming no more than these restrictions, the employer and insurer contend, Mr. England opines that the employee is employable in the open and competitive labor market.

The employer and insurer further contend that the greatest obstacle to the employee finding employment is his illiteracy, which the employer and insurer acknowledge is a significant obstacle to employment (or potential employment), as evidenced by the employer declining to employ Mr. Barker in certain sedentary employment positions without him first obtaining greater literacy skills. Notably, the employer and insurer acknowledge that the medical records and evidence presented by the parties do not indicate that this illiteracy is causally related to a learning disability or otherwise a medical condition that would support a claim of permanent disability.<sup>4</sup>

Thusly, the employer and insurer argue that while Mr. Barker's illiteracy may be a hindrance or obstacle to him obtaining employment, his inability to read or write cannot be considered as a factor in determining whether he is permanently and totally disabled, insofar as it is not a learning disability and not a permanent disability. The employer and insurer premise this argument on *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 866 (Mo. App. 1997), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). This argument and the employer and insurer reliance on *Tiller*, however, are misplaced. The principle enunciated in *Tiller* relates to factors appropriate for consideration of Second Injury Fund liability. In determining Second Injury Fund liability, without showing that an employee's illiteracy or inability to read and write relates to a learning disability, then the condition cannot be a permanent disability. And if it is not a permanent disability, then it cannot be a factor in determining Second Injury Fund liability.

Notwithstanding, illiteracy or inability to read and write is a factor and relevant consideration for determining whether an employee is employable in the open and competitive labor market. Adjudication of a person's employability in the open and competitive labor market requires the Division (or judge) to continue to evaluate each employee as he or she presents himself or herself before the division (or court), including giving consideration to not only the employee's inability to read or write, but the employee's age, education, job experience and skills (none of which is a preexisting permanent disability) in determining whether the employee is employable in the open and competitive labor market. Thus, in taking Mr. Barker as we find him at the time of the April 5, 2010, accident, consideration must be given to his inability to read and write, as well as his age, education, job experience and skills, in determining whether the

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<sup>4</sup> Apparently, neither party secured an examination to determine whether Mr. Barker suffers a learning disability. Mr. England appears to have understood this concern, and solicited school records to determine whether Mr. Barker had previously being diagnosed with a learning disability. These records reflected Mr. Barker being in special education classes, but never referenced or established the existence of a learning disability diagnosis. Mr. England thus refers to Mr. Barker's illiteracy as "learning problems." Accordingly, while Mr. Barker may have learning problems, and may suffer from a learning disability, the evidence does not allow a finding of Mr. Barker having a "learning disability." Any such finding would be speculative and disallowed for adjudication of Mr. Barker's permanent disability.

injury caused by the April 5, 2010, accident, considered alone, renders him unemployable in the open and competitive labor market. See, *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 499 (Mo. Ct. App. 2001) *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

Mr. Barker's illiteracy, as well as his age and education (or lack thereof), seriously impair his employability. In many respects, Mr. Barker is the "egg shell" plaintiff (or claimant) that is commonly referred to in law school to explain the concept and significance of taking individuals as you find them. Because most workers enjoy a significant higher level of literacy than that possessed by Mr. Barker, most employees would not be rendered unemployable by an injury that changes their employment status from having no work restrictions and being permitted to engage in heavy work to having work restrictions and being limited to sedentary work. However, unlike most individuals, Mr. Barker may be rendered unemployable by suffering an injury that produces lesser restrictions; because he is illiterate, 62 years of age and lacks any education beyond the 6<sup>th</sup> grade.

In light of the foregoing, the determination of whether Mr. Barker is permanently and totally disabled depends significantly on which physician opinion, and the specific restrictions prescribed, are accepted as true by the undersigned judge to govern Mr. Barker's activities. Only if it is determined that the restrictions governing Mr. Barker are limited to those prescribed by Dr. Mcqueary or Dr. Glas, which excludes not only the restrictions imposed by Dr. Volarich but the restrictions imposed by Dr. Jordan (who adopted the physical exertion limitations of the May 2, 2011, FCE and permanently restricted Mr. Barker to lifting 14 pounds occasionally, 7 pounds frequently, and 3 pounds constantly), may Mr. Barker be adjudicated as being employable in the open and competitive labor market.

In addressing this issue, it is noteworthy that Mr. Barker enjoys an excellent work history up to the date of the April 5, 2010, work injury, and this work history is exceptionally long. While in the 6<sup>th</sup> grade and at approximately 12 years of age, Mr. Barker was taken out of school in order to provide financial and other support for his family. For all intents and purposes, at this early age Mr. Barker embarked on adulthood; he assumed the responsibilities of a working adult and began working full-time. And for the next 50 years he continued to engage in regular employment, consistently performing heavy physical labor.

At the time of his work injury, Mr. Barker was performing physical work as he had done for the prior 50 years. Prior to April 5, 2010, Mr. Barker successfully performed his job duties, which included driving dump trucks, operating a backhoe, installing culverts weighing 150 pounds, and gripping tools that weighed up to 45 pounds. He worked eight hours a day, five days a week, and averaged 40 hours per week.

This work history and work ethic possessed by Mr. Barker enjoys corroboration from Mr. Barker's wife of 38 years, Rebecca Barker. Mrs. Barker testified that she did not work outside the home during their marriage. Rather, she relied upon Mr. Barker's long and steady record of employment for their family's financial support. She further testified and confirmed that Mr. Barker is unable to read and write, and his employment involved heavy physical labor.

In evaluating the evidence I note that Mr. Barker appeared at trial and provided testimony regarding his medical conditions, restrictions, and daily activities. This testimony includes statements by him that he continues to experience ongoing difficulties and problems as a result of the injury of April 5, 2010. He complains of pain, lost motion, spasm, stiffness and diminished endurance with his low back. Additionally, he notes that he continues to experience pain, numbness and tingling that extends into his right lower extremity. He further states:

- The affect of these symptoms make it difficult for him to stand, walk, run, and climb; he has difficulty walking on uneven ground, bending and lifting.
- He has difficulty squatting, stooping, kneeling, crawling, and prolonged exposure to fixed positions as well as pushing and pulling maneuvers that require twisting of his lumbar and cervical spine.
- His activities of daily living are affected as well. Driving his personal vehicle is difficult especially if he has to drive on long trips or over bumpy roads.
- He has difficulty getting in and out of a bathtub due to back pain and has difficulty putting on socks and shoes.
- He awakens from sleep due to low back and right leg pain and has difficulty doing house work such as carrying groceries or laundry.

Yet, is Mr. Barker believable? Are his symptoms and complaints of pain, as well as his limitations and restrictions real? The employer and insurer suggest no, arguing that Mr. and Mrs. Barker own 30 to 35 cattle, and Mr. Barker performs work associated with the care and feeding of the cattle. The employer and insurer further suggest that Mr. Barker is not working because he lacks the motivation to work. In this regard, the employer and insurer note that the employer offered to provide Mr. Barker with literacy classes, and upon learning to read and write he would have sedentary employment opportunities with Laclede County.

Mr. Barker responded to this concern noting that the work with the cattle involved minimal physical labor, as he could use the equipment to do most of the work. Further, Mr. Barker noted that the cattle have always been owned and managed by his wife, while he engaged in employment outside of the home, and she provided care for the cattle as well. Additionally, Mr. Barker noted that he was not required to move quickly or work continuously without taking time to rest and engage in this activity at his own pace. Also, Mr. Barker noted that at times during the day he has the opportunity to lie down, and the nature and severity of his pain requires him during most days to lie down.

As to the question of being offered literacy classes, Mr. Barker initially denied being offered the opportunity to learn to read and write. Later, he indicated that he did not know or understand the meaning of "literacy classes", but continued to assert that no one offered to help him learn to read or use a computer. In considering this issue, I do not doubt that the employer offered to provide Mr. Barker with literacy classes, and the employer should be commended for making such an offer. Yet, the offer occurred in the context of litigation and the employer and insurer defending against a claim of permanent total disability. Further, considering Mr. Barker's

age, and 50 plus years of struggling without having any ability to read and write, it is understandable that Mr. Barker would not be eager or desirous to pursue such a program, particularly if he is not receiving any income or temporary disability compensation. The response of Mr. Barker is not viewed by the undersigned as a lack of work ethic or desire not to work.

In light of the foregoing, having reviewed and considered all the evidence, as well as having had an opportunity to observe in person Mr. Barker at the hearing, I find Mr. Barker credible, reliable and worthy of belief. It is noteworthy that Mr. Barker's physicians, as well as the vocational experts, including Mr. England, found Mr. Barker to be likeable and credible. I thus accept substantially as true Mr. Barker's complaints of pain and limitations.<sup>5</sup> I find that Mr. Barker worked a physically demanding job without limitations up to the date of the last injury. He performed this work without limitations until sustaining the April 5, 2010, accident and suffering the injury to his low back.

The work injury of April 5, 2010, causes Mr. Barker to be governed by restrictions and limitations. In seeking to identify the work restrictions appropriate for Mr. Barker, the employer and insurer arranged for Mr. Barker to undergo a functional capacity evaluation prescribed by Dr. Jordan, a treating physician selected by the employer and insurer. This FCE was performed on or about May 2, 2011, at St. John's in Lebanon, Missouri. The results of this evaluation indicated that Mr. Barker demonstrated no symptom magnification. It further indicated that Mr. Barker did not have any tolerance for any repetitive activities despite good effort, and that his material handling fitness was poor.

As a consequence of this FCE, it was recommended that Mr. Barker be given restrictions that limited his lifting to be 14 - 17 pounds occasionally, 7- 9 pounds frequently, and 3 pounds constantly. The results of this FCE further note that Mr. Barker would be unable to perform at these levels over an extended period of time. And following this FCE, on May 5, 2011, Mr. Barker presented to Dr. James Jordan, who adopted the physical exertional limitations of the FCE.

The physicians offer differing opinions as to the restrictions governing Mr. Barker. Having found Mr. Barker credible, and accepting as true his complaints of pain and limitations, I resolve the differences in medical opinion in favor of Dr. Jordan. In this regard, Dr. Jordan is a treating physician selected by the employer and insurer. Further, Dr. Jordan is a physician practicing in occupational medicine, which affords to him particular expertise in prescribing work restrictions. Additionally, in adopting the restrictions and limitations recommended by the FCE, Dr. Jordan issued permanent restrictions, which, in combination with Mr. Barker's illiteracy, remove Mr. Barker from being employable in the open and competitive labor market. The FCE, and the permanent restrictions adopted by Dr. Jordan, corroborate substantially and independently the testimony of Mr. Barker.

Accordingly, I find and conclude that as a consequence of the April 5, 2010, work injury, Mr. Barker is governed by the permanent restrictions prescribed by Dr. Jordan. Based on these

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<sup>5</sup> Although Mr. Barker states that he lies down each day, and considers this need to be part of his self-imposed work restrictions, the need to lie down during the day is not a permanent work restriction prescribed by Dr. Jordan. Thus, in accepting Dr. Jordan's restrictions, I would not make the need to lie down a permanent work restriction governing Mr. Barker's work activity.

restrictions, Mr. Barker is limited to lifting 14 - 17 pounds occasionally, 7- 9 pounds frequently, and 3 pounds constantly. According to Mr. England, the vocational expert secured by the employer and insurer, these restrictions, in combination with the limitations caused by his illiteracy, Mr. Barker is rendered unemployable in the open and competitive labor market. Thus, both vocational experts agree that if the restrictions prescribed by Dr. Jordan are accepted as the restrictions governing Mr. Barker, then Mr. Barker is permanently and totally disabled.

Therefore, after consideration and review of the evidence, I find and conclude that the physical restrictions caused by the accident of April 5, 2010, in combination with the limitations caused by his illiteracy, the employee is unemployable in the open and competitive labor market. Similarly, I find and conclude that as a consequence of the accident of April 5, 2010, considered alone, the employee is permanently and totally disabled. The employer and insurer are thus ordered to pay to the employee, Lester Barker, the sum of \$340.55 per week for the employee's lifetime. The payment of permanent total disability compensation by the employer and insurer is effective as of May 5, 2011, when he reached maximum medical improvement. (It is on this date that Dr. Jordan determined that Mr. Barker was at maximum medical improvement and prescribed permanent work restrictions.)

In rendering this decision, I am not unmindful of the unique challenges and concerns that this decision may bring. To be sure, the physical restrictions produced by the work injury of April 5, 2010, considered alone, would not render Mr. Barker unemployable. Without consideration of Mr. Barker's illiteracy, in combination with the work injury, Mr. Barker would be employable in the open and competitive labor market. However, Mr. Barker's inability to read and write, which has burdened him for more than 50 years, must be considered in determining his employability. And the employer and insurer, in this case, failed to prove that Mr. Barker's illiteracy was caused by a learning disability – a concern noted by the employer and insurer's vocational expert. Without such evidence of a learning disability, the employer and insurer may not legally shift liability to the Second Injury Fund for Mr. Barker being unemployable.<sup>6</sup>

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable. The Award is subject to modifications as provided by law.

Made by: \_\_\_\_\_  
L. Timothy Wilson  
*Administrative Law Judge*  
*Division of Workers' Compensation*

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<sup>6</sup> Although the adjudication of this claim did not include a Claim for Compensation against the Second Injury Fund, the employer and insurer would not have been precluded from defending its liability by establishing and presenting evidence to support a defense that liability for permanent total disability should lie with the Second Injury Fund.