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

Injury No. 07-063983

Employee: Alan D. Borders

Employer: Francis Howell R-III School District

Insurer: Missouri United School Insurance Company

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

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, heard the parties' arguments, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Medical causation

The parties presented voluminous medical records and expert testimony on the issue whether the accident of May 17, 2007, was the prevailing factor causing employee to sustain any medical condition or disability. The administrative law judge thoroughly summarized all of this evidence. Then, on page 17 of his award, the administrative law judge resolved the issue of medical causation as follows: "The claimant has prevailed by proving that his work-related injury caused substantial permanent disability based on the great weight of the evidence."

We agree that employee met his burden of proof with respect to the issue of medical causation, but discern a need to supplement the administrative law judge's finding in order to apply the appropriate statutory test and to make clear what specific medical conditions we believe resulted from the accident. The test for medical causation applicable to this claim is set forth in § 287.020.3(1) RSMo, which provides, in relevant part, as follows:

> An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

We find persuasive the unanimous expert medical opinions from Drs. Volarich, Margherita, and Coyle that the accident caused employee to suffer a herniated disc in his lumbar spine at L5-S1. We acknowledge that the evaluating psychiatrists Drs. Stillings and Smith disagreed whether employee suffered any psychiatric injury as a result of the accident. Dr. Stillings opined that the accident caused employee to suffer a major depressive

disorder with an associated 25% psychiatric permanent partial disability of the body as a whole, as well as a pain disorder with an associated 10% psychiatric permanent partial disability of the body as a whole. Dr. Stillings also believed employee suffered from some preexisting psychiatric permanent partial disability stemming in part from the emotional and physical abuse employee endured at the hands of his father.

Dr. Smith, on the other hand, opined that the accident did not cause employee to suffer any psychiatric injury, and that employee presently suffers from the effects of preexisting somatization and personality disorders that account for what Dr. Smith described as a history of employee exaggerating his pain complaints. We note that on cross-examination, Dr. Smith conceded that she did not hew to the criteria set forth in the DSM[1] for establishing a diagnosis of somatization disorder, in that employee's history of pain complaints correlates to actual diagnosed conditions. We note also that Dr. Smith's opinions regarding employee's condition appear to stem largely from her own belief that an acute injury can never be the cause of a pain disorder, and that such issues are always personality-driven and thus preexisting by default.

After careful consideration, we find Dr. Stillings's medical causation opinion more persuasive. We find that the accident was the prevailing factor causing employee to suffer the resulting medical conditions of a herniated disc in his lumbar spine at L5-S1, a major depressive disorder, a pain disorder, and the disability associated therewith.

Nature and extent of permanent disability

The parties dispute whether employee is permanently and totally disabled, and if so, whether employer or the Second Injury Fund is liable for permanent total disability benefits. We defer to the administrative law judge's observations and findings with regard to employee's presentation at the hearing, and we ultimately agree with the administrative law judge that employee is permanently and totally disabled as a result of the primary injury considered in isolation, but we wish to provide some supplemental comments to clarify our reasoning.

Employer argues that the administrative law judge misunderstood Dr. Smith's testimony, pointing to the following statement on page 24 of the administrative law judge's award: "While Dr. Stillings diagnosed a pain disorder from the occurrence, Dr. Smith opined that the claimant had a disorder due to his reaction to the pain from the occurrence." Although we agree that this particular statement is somewhat unclear in that it is susceptible to a reading that suggests the administrative law judge believed Dr. Smith identified a disorder as *resulting* from the work injury, we are convinced from the context in which the statement appears that the administrative law judge fully understood Dr. Smith's testimony (as we do) to constitute an opinion that employee did not suffer any psychiatric injury whatsoever as a result of the accident. We have found the opinions from Dr. Smith lacking persuasive force, however.

We were more persuaded by the testimony from Dr. Stillings that employee is suffering from major depressive and pain disorders as a result of the primary injury. Combined with

[1] Diagnostic and Statistical Manual of Mental Disorders. Dr. Smith agreed that this text, developed by the American Psychiatric Association, establishes the criteria for diagnosing mental disorders.

the credible testimony from Dr. Volarich that employee should be permitted to recline when needed owing to the effects of the work injury, and the unanimous opinions from the vocational experts that this restriction renders employee unable to compete for work in the open labor market, and absent persuasive expert psychiatric evidence that employee's current experience of pain (and consequent need to lie down) is the product of the effects of employee's primary low back injury acting in combination with some partially disabling preexisting psychiatric condition of ill-being, we are convinced that the record best supports a finding that employee is permanently and totally disabled owing to the work injury considered in isolation. We so find.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued May 20, 2014, is attached and incorporated by this reference.

We approve and affirm 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 5th day of February 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

_____

Secretary

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Alan D. Borders

Dependents: N/A

Employer: Francis Howell R III School District

Additional Party: Second Injury Fund

Insurer: Missouri United School Insurance Company

Hearing Date: March 24, 2014

Injury No.: 07-063983

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

Checked by: EJK/kr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: May 17, 2007
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was throwing heavy bags of trash overhead into a trash dumpster when he twisted his back and felt pain.
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: Permanent total disability
15. Compensation paid to-date for temporary disability: $10,475.58
16. Value necessary medical aid paid to date by employer/insurer: $134,551.75

17. Value necessary medical aid not furnished by employer/insurer? $4,990.00

18. Employee's average weekly wages: $482.73

19. Weekly compensation rate: $321.82

20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	$4,990.00
Permanent total disability benefits from Employer beginning September 2, 2010, for Claimant's lifetime	Indeterminate

22. Second Injury Fund liability: No

TOTAL:	Indeterminate

23. Future requirements awarded: None

Said payments to begin September 2, 2010, and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dean L. Christianson, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Alan D. Borders	Injury No.: 07-063983
Dependents:	N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	Francis Howell R III School District	
Additional Party:	Second Injury Fund	
Insurer:	Missouri United School Insurance Company	Checked by: EJK/kr

This workers' compensation case raises several issues arising out of a work-related injury in which the claimant, a school custodian, suffered a herniated disc in his low back while lifting and throwing trash bags into a trash dumpster. The issues for determination are (1) Medical causation, (2) Liability for Past Medical Expenses, (3) Future medical care, (4) Permanent disability, and (5) Liability of the Second Injury Fund. The evidence compels an award for the claimant for medical expenses, future medical care, and permanent total disability benefits.

At the hearing, the claimant and Randall Carpenter testified in person, and the claimant offered depositions of David T. Volarich, D.O., Anthony J. Margherita, M.D., Joan M. Pernoud, M.D., Wayne T. Stillings, M.D., and J. Stephen Dolan, M.A., C.R.C., a memorandum from Randall Carpenter, records from the Social Security Administration, and voluminous medical records. The defense offered depositions of James J. Coyle, M.D., Russell C. Cantrell, M.D., Stacey L. Smith, M.D., Richard D. Wetzel, Ph.D., and Karen Kane-Thaler, M.S. Ed., C.R.C., a DVD, surveillance reports, and a copy of the claimant's Face Book page. The Second Injury Fund offered a deposition of James M. England.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On May 17, 2007, this then 35-year-old claimant, a school custodian, suffered an acute L5-S1 lumbar disc herniation while throwing fifty-pound trash bags into a trash dumpster. He was throwing them to a height of six feet while twisting to his left, when he felt a sudden stabbing pain in his lower back with numbness in his right leg.

On May 18, 2007, the claimant went to St. Luke's Urgent Care with low back pain radiating into his right hip after dumping trash into a dumpster on the previous day. See Exhibit H. He was scheduled for a program of physical therapy. On May 22, 2007, the claimant reported severe increased pain radiating into his right lateral thigh. See Exhibit H. When his complaints continued, he was referred to Dr. Doll, a physiatrist.

On June 18, 2007, Dr. Doll examined the claimant and diagnosed lumbosacral pain and moderate spondylosis at L5-S1. See Exhibit J. An MRI scan revealed degenerative changes along with a central and right central disc extrusion at L5-S1 abutting the S1 nerve root and a left foraminal disc extrusion at L4-5. Dr. Doll performed a course of epidural steroid injections with medication and therapy. On August 29, 2007, Dr. Doll examined the claimant who still complained of back and leg pain. Dr. Doll opined that the claimant was at maximum medical improvement and could return to full work activities. See Exhibit J.

On August 13, 2008, Dr. Coyle examined the claimant and diagnosed a probable acute L5-S1 lumbar disc herniation caused by the 2007 accident. See Exhibit K. A repeat MRI scan revealed a L5-S1 disc herniation with right sided foraminal impingement. See Exhibit K. Dr. Coyle recommended a surgical repair, if the claimant could stop smoking and control his diabetes. See Exhibit K. On March 10, 2009, the claimant began a consultation at Pike Medical Clinic to control his diabetes and was eventually cleared for his back surgery. See Exhibit O. The claimant also successfully stopped smoking. On March 5, 2010, Dr. Coyle performed an L5-S1 decompression and arthrodesis. See Exhibit K. He thereafter followed up with Dr. Coyle and underwent a physical therapy program. On September 1, 2010, Dr. Coyle opined that the claimant was at maximum medical improvement but did not place any restrictions on the claimant's activities. See Exhibit K.

After this procedure, the claimant improved, and testified that he was doing very well when Dr. Coyle discharged him from care. However, over the next several months he worsened. He testified that his right leg and back have continued to "go out" on him, causing him to walk in a hunched over position. He brought a cane to trial and indicated he had been using this for approximately four months, though only when it feels like his back is going to go out on him.

After being discharged by Dr. Coyle, Claimant did not receive medical treatment for some time. He testified that he had no insurance, had no money, and was homeless -- living in his car. However, he has more recently become insured through Medicare, such that he has been able to return to his primary care physician, Dr. Onik, for medication and exercises. He also now sees Dr. Jennifer, a pain management physician, for other medications. He has also seen Dr. Manchanda, a back specialist, for an MRI and pain patches. He also saw Dr. Brothers in a clinic. She ordered an MRI at the request of Dr. Manchanda. Claimant testified that in October of 2013 he underwent a drug screen at Pike County Memorial Hospital. He said that this was ordered by Dr. Jennifer as he had been taking Tramadol, and the physicians wanted to be sure this was out of his system before he began taking Vicodin. Claimant identified Exhibit V as bills which he has incurred for the treatment described above.

On September 11, 2013, the claimant went to Pike County Memorial Hospital for low back pain radiating into his right leg and received conservative treatment. See Exhibit X. On September 25, 2013 he underwent an MRI scan of his lumbar spine revealing multilevel degenerative disc disease with post surgical changes at the L5-S1 level. On October 11, 2013 a urine test for traces of the Tramadol was negative.

The claimant testified that he continues to have constant "unbearable" back pain that becomes worse from time to time. When it worsens it will last for one or two days. During these times he sits with his legs propped up, using ice and heat on his back. He will either sit in his

recliner or he will lie in his bed. He felt that he develops these worsening symptoms approximately every other day. They seem to be brought on by various activities, including walking. He said he recently had such an episode when he was simply standing at his sister's home, speaking with her in the kitchen. He testified that sitting becomes very difficult for him as he develops a sharp pain in his lower back with numbness in his right leg.

The claimant also testified that he continues to have leg complaints. He generally has some problems in his right leg which are "not terrible", but then he has flare-ups. He said that approximately twice per week his right leg will "go out on him". On one such occasion he fell but did not injure himself.

The claimant testified that in a typical day he will arise, make coffee, and try to help out around the house. He will help with some light dusting, or with folding clothes. Occasionally he will do something such as hang a picture. He tries to wash dishes, though this takes him all day because he cannot stand at the sink for extended periods. He is unable to launder clothing because he cannot bend over to put clothes into the machines. He is able to perform some light vacuuming. He is not able to scrub the floors because of the problems with his knees. He does not work in the yard and pays a neighbor to mow his lawn. He testified that he does drive, though his legs swell up when he does so. He did not drive to the trial, but rather, his sister drove him. They stopped one time in a drive of approximately 35 minutes, at which time he got out of the car and stretched. He testified that his sleep is very bad, as he tosses and turns due to his back complaints. He says that he will go to bed at 9:00 p.m., but then will awaken at 11:00 p.m. He will sit on the bed for an hour, and then lie on his pillows all night. Many times he will nap during the day.

The claimant can comfortably stand for thirty to forty minutes, and sit for thirty minutes. He felt he could walk comfortably approximately one block. If he pushes himself beyond these extremes, then he has worsening symptoms. If he goes to a store such as a Wal-Mart, he will lean on a cart or try to use an electric scooter. However, even doing this, he develops soreness in his back, legs and shoulders. He tries to stay away from stairs due to the problems he has with his knees. He is able to take care of his personal needs, though his wife will often help him put on his shoes because of his difficulty in bending. He stated that he reclines four to five hours per day due to his back.

The claimant takes numerous medications:

Medication	Condition	Medical provider
Vicodin	pain relief	Dr. Jennifer
Lexapro	depression	Dr. Jennifer
Metformin	diabetes	Dr. Onik
Lantus	diabetes	Dr. Onik
Lisinopril	blood pressure	Dr. Onik
Pain patches	pain relief	Dr. Manchanda
Omeprazole	ulcers	Dr. Onik
Ibuprofen and Tylenol	pain relief	Over the counter.

The claimant attended special education classes through the 11th grade but never obtained a GED or vocational training. His wife has a computer and he can do "a little bit" on it, such as play some games. He has a Facebook page, though any information added to his page is done by his wife.

The claimant testified that his last employment was his job with this employer for three and one-half years as a custodian cleaning classrooms, mopping, stripping floors, changing light bulbs, sweeping, taking out trash, moving tables, and buffing floors. He worked with machines such as buffers, scrubbers and a squeegee machine. He would lift weights up to 50 or 60 pounds. Prior to working for employer, the claimant worked for a variety of employers. He has worked for Bodine Aluminum for one year on an assembly line, though this job ended when he sustained an injury to a knee. He has worked for a sod farm for three years, cutting and stacking sod. He has worked for a tree nursery for four or five years, planting and pulling trees. He has also worked for a tree trimming service for four years, climbing and trimming trees away from power lines. The claimant testified that he has applied for work at Wal-Mart and AutoZone since Dr. Coyle discharged him but was not offered any positions and did not turn down any positions.

Pre-existing Conditions

The claimant testified that he has had problems with his vision since he was born. He testified that he is blind in his left eye, though his right eye is doing well. He testified that his vision problems have caused him to have severe headaches for many years. When he was young, he would miss school because of headaches. He testified that he had difficulty at work for this employer mixing chemicals, because he could not read the chemical labels. Other workers had to perform these tasks for him. As with his schooling, he sometimes had to leave work because of the headaches and dizziness which were brought on by his visual problems.

Claimant has had diabetes for some time. He testified that at age nine he was diagnosed with "borderline" diabetes. He was not medicated at the time, but rather, controlled the condition with diet. Even so, his diabetes resulted in both headaches and blurred vision. There were many times when he had to sit in a darkened room with the lights turned off. As he got older, he complained of having headaches every day or two, which interfered with his work with Employer. On one occasion he passed out at work. He was not taken to a hospital, though he was given an injection of insulin. There were other times at work when he would vomit due to the effects of the diabetes. He would then leave work and go home.

The claimant testified that he fell from a tree at age eight or nine, and had surgery on his left elbow. He testified that his left elbow swells and locks on him, and cannot be fully extended diminishing his work capacity in activities where he had to reach over his head. He testified that others helped him with overhead activities.

Pre-existing Low Back Condition

On August 9, 1996, the claimant had suffered back pain for two weeks and had a pilonidal abscess drained from his low back in the St. Joseph Health Center emergency room. He testified that he continued to have problems with "boils" after that. See Exhibit S.

On September 12, 2001, he injured his low back when he fell five and one-half feet after a ladder collapsed under him at work and he landed on his knees and twisted his back. See Exhibit P. He was diagnosed with thoracolumbar back pain with left sacroiliac joint dysfunction. See Exhibit P. Dr. Pearson treated the condition conservatively and eventually released the claimant to return to work full duty. The claimant eventually settled a workers' compensation claim based on a 5% permanent partial disability to the lumbar spine. See Exhibit T. On December 31, 2004, the claimant returned to the St. Joseph Health Center emergency room for an abscess. See Exhibit S. On January 17, 2006, the claimant suffered a back injury while throwing trash into a dumpster at work. He went to St. Luke's Urgent Care complaining of back and leg pain after throwing trash into a dumpster the previous day and received pain medication and home exercises. See Exhibits H, T. He then returned to full duty on January 23, 2006, but continued to complain about back pain after that date. See Exhibit H.

Pre-existing Low Right Knee Condition

In October 2003, the claimant injured his right knee while at work when he stepped on an air hose and twisted his knee. He went to Tri-County Occupational Health Services and was diagnosed with a contusion and sprain of the right knee. See Exhibit P. He was then referred to an orthopedic surgeon following an MRI scan showing tears in his knee. See Exhibit P. On October 16, 2003, Dr. Miller examined the claimant's right knee and found swelling and a tear in his knee. See Exhibit N. On October 24, 2003, Dr. Miller surgically repaired the claimant's right knee with final diagnoses of: anterior horn medial meniscus tear; complex tear, lateral meniscus; medial femoral condyle osteophyte; grade IV chondromalacia, lateral femoral condyle. See Exhibit M. The claimant completed a physical therapy program and was then placed on a light duty working program. See Exhibit N. On February 18, 2004, the claimant attained maximum medical improvement. See Exhibit N. The claimant settled his workers' compensation claim with his employer on the basis of a 27.5% permanent partial disability of the right knee. See Exhibit T. The claimant testified that his then employer, Bodine Aluminum, terminated his employment. On September 14, 2012, the claimant went to Pike County Memorial Hospital with right knee pain and received conservative medical care. See Exhibit O. The claimant testified that his knee constantly swells and once in awhile he will wear a brace, particularly if it is cold outside, as cold weather tends to aggravate his knee. The claimant testified that when he was working he had trouble performing work on ladders, kneeling, or with using scrubbing machines. The claimant testified that he uses elevators as much as possible, because his knee pops and swells while using stairs.

The claimant also had a left knee injury on September 30, 2007, which was treated conservatively. See Exhibit T.

Claimant's Learning Deficiencies

The claimant testified that he has had learning deficiencies since his childhood. The claimant attended an elementary school where he was diagnosed with delayed language development, and intelligence testing revealed that the claimant has borderline intellectual functioning as of 1983. See Exhibit W. At that time, he was placed into the "educable mentally retarded" program, and diagnosed with "mild mental retardation". See Exhibit W. He testified that when he was in school he was "made fun of" by other students because of his inability to

read and because of his droopy left eyelid. He also testified that he grew up with an abusive father. He said that it seemed that he was depressed and anxious while growing up, and that these symptoms seemed to worsen when his father died. At that point he stayed home and did not talk to anyone. He testified these feelings persist to this day. He testified that he has never felt comfortable being around people and that it always seemed to him that people were talking about him. There were many occasions when he would sit alone in his room and cry. He was never seen by a doctor before the work accident for these problems.

He testified that since the 2007 accident, his depression has continued and that he argues with his wife over a lot of things which seem to be related to the fact that he is not able to do anything. He testified that he has contemplated suicide on several occasions since the accident, such as on the night that his employment was terminated. On that day he drove to the river and walked into the water. He testified that the police were called and that they came out and got him. He said that he still thinks about suicide. He now sees Dr. Jennifer for medications related to his depression and anxiety.

Social Security Disability Forensic Evaluations

On August 16, 2011, Dr. Georgia Jones evaluated the claimant pursuant to his claim for Social Security Benefits and diagnosed (1) depressive disorder, not otherwise specified, and (2) personality disorder not otherwise specified. See Exhibit W. She opined that the claimant had a Global Assessment of Functioning of 60 and that the claimant's condition could improve with psychiatric treatment, to include medication and psychotherapy. See Exhibit W. On August 25, 2011, Dr. Inna Park pursuant to his claim for Social Security Benefits conducted a physical examination and found diabetes, right shoulder pain, and post-surgical lumbar spine pain with decreased motion. See Exhibit W. On October 5, 2011, Dr. Jennifer Vorachack, a psychologist, evaluated the claimant pursuant to his claim for Social Security Benefits and opined that the claimant has an IQ in the "borderline" range. See Exhibit W. She diagnosed a reading disorder, a mathematics disorder, and a disorder of written expression. See Exhibit W. She opined that the claimant had a Global Assessment of Functioning of 60. See Exhibit W. Other diagnoses were suggested but deferred. The claimant reported to her that he has difficulty completing complex activities of daily living due to comprehension problems. See Exhibit W.

Wayne A. Stillings, M.D.

Dr. Stillings, a board certified psychiatrist, evaluated the claimant on May 9, 2012, reviewed medical records and performed psychiatric testing. See Dr. Stillings deposition, pages 5-7. The claimant reported that his childhood was emotionally and physically abusive. See Dr. Stillings deposition, page 7. At one point, the claimant's father threatened to kill him. See Dr. Stillings deposition, pages 7-8. The claimant reported that he had acquired his father's bad temper. See Dr. Stillings deposition, page 8. The claimant reported he was early-on diagnosed with a low IQ and was teased by other students at school, such that he has developed a paranoid construct to his personality structure. See Dr. Stillings deposition, pages 8-9. The claimant reported that people are talking about him behind his back and laughing at him. See Dr. Stillings deposition, page 9. The claimant has low self esteem. See Stillings deposition, page 9. The claimant reported that his prior psychiatric and learning difficulties interfered with his work. He would sometimes miss work or be tardy. See Dr. Stillings deposition, page 9. Sometimes, he

would leave work early or have conflicts with his bosses. See Dr. Stillings deposition, page 9. There were times when he would quit jobs without having another job. See Dr. Stillings deposition, page 9. He was not always as quick or persistent as other workers. See Dr. Stillings deposition, page 10.

Dr. Stillings performed a psychiatric evaluation and ordered psychiatric testing. Dr. Stillings provided the claimant with an audio version of the testing because his ability to read was insufficient to comprehend all of the questions. See Dr. Stillings deposition, page 11. The testing revealed that the claimant had a high-point on the depression scale, as well as some basic personality defects such as insecurity, feelings of inadequacy, anger, and distrustfulness. See Dr. Stillings deposition, page 11. An IQ test found the claimant to have a score of 71, placing him in the "borderline" IQ range. See Dr. Stillings deposition, page 12. Testing of the claimant's reading skills showed he was at the second grade level in reading, and first grade level in spelling. See Dr. Stillings deposition, page 12.

Dr. Stillings diagnosed: (1) dysfunctional family of origin (pre-existing 5/17/07); (2) post traumatic stress disorder, chronic and severe (pre-existing); (3) major depressive order (5/17/07 work injury); (4) pain disorder associated with both psychological factors and a general medical condition (5/17/07 injury); (5) borderline intellectual functioning (pre-existing); (6) learning disabled (pre-existing); and (7) personality disorder with paranoid, impulsive, passive-aggressive, depressive, avoidant and dependent personality features (pre-existing). See Dr. Stillings deposition, page 13. He opined that these conditions caused a 25% permanent partial disability due to the major depressive disorder and a 10% permanent partial disability due to the pain disorder, both attributable to the 2007 accident. See Dr. Stillings deposition, page 14. He opined that the pre-existing conditions resulted in a 45% permanent partial disability of a body. See Dr. Stillings deposition, pages 14-15. He testified that these conditions would combine and concur with each other to create a greater overall sum, such that claimant is permanently and totally disabled. See Dr. Stillings deposition, page 15.

Dr. Stillings also opined that the claimant requires further psychiatric treatment that is attributable to the 2007 accident including medication and psychotherapy. See Dr. Stillings deposition, page 16.

Dr. Stacey L. Smith, M.D.

Dr. Smith, a board certified psychiatrist, evaluated the claimant on August 23, 2013, and took a report from the claimant that he gets mad, that people talk about him, and that he can't do anything anymore. See Dr. Smith deposition, page 10. The claimant described his mood as "dragged down" and that he has passive death thoughts of an ongoing nature. See Dr. Smith deposition, page 11. Based on her evaluation, she diagnosed: (1) malingering; (2) symptom exaggeration; (3) somatization disorder (pre-existing); (4) partner relational problems; and (5) parent/child conflict. See Dr. Smith deposition, page 20. She testified that the claimant's somatization disorder was not caused by the work accident. See Dr. Smith deposition, page 23. She stated that Claimant was not purely malingering. She also diagnosed the claimant with: personality disorder not otherwise specified, moderate to severe (pre-existing); prominent histrionic paranoid and antisocial traits; rule out borderline intellectual functioning. See Dr. Smith deposition, page 27. She concluded that the claimant has a GAF score of 58 to 60 which

shows "some impairment". See Dr. Smith deposition, page 30. She testified that the claimant would not be a good candidate for psychotherapy, but that he could be helped with medication. See Dr. Smith deposition, page 31.

Dr. Smith also testified that she received no medical records which pre-existed the 2007 accident, nor any medical records for conditions existing before May of 2007. See Dr. Smith deposition, page 36. She testified that when she asked Claimant to perform the "serial threes" testing he was unable to successfully do this. See Dr. Smith deposition, page 39. The claimant was not able to spell the word "world" backwards, nor was he able to successfully subtract $1.35 from $5.00. See Dr. Smith deposition, page 40. She noted that the claimant had no positive Waddell's testing in his therapy records. See Dr. Smith deposition, page 40. She testified that the claimant had moderate impairment from a psychiatric standpoint prior to his accident of May 17, 2007. See Dr. Smith deposition, pages 61-62.

Richard D Wetzel, Ph.D.

Dr. Wetzel, a psychologist, was asked by Dr. Smith to evaluate the test data performed by Dr. Stillings. See Dr. Wetzel deposition, pages 6-7. Based on his evaluation of the psychological testing, he offered suggestions as to what conditions the claimant may have, and specifically did not formally diagnose any conditions. See Dr. Wetzel deposition, page 9. He opined that the claimant was paying attention to the questions and answering them in a consistent fashion. See Dr. Wetzel deposition, page 12. He testified that the claimant reported a high number of symptoms. See Dr. Wetzel deposition, page 13. He stated that he believed that the claimant was exaggerating. See Dr. Wetzel deposition, pages 14, 15.

Following his review of the studies, Dr. Wetzel opined that the claimant was depressed and anxious, and that he had a pattern consistent with a personality disorder. See Dr. Wetzel deposition, page 24. He also suggested that the claimant has a learning disability.

Dr. Wetzel also testified that he only had records from Dr. Stillings and Dr. Smith, along with some school records from "the St. Charles School District about his early school records". See Dr. Wetzel deposition, page 32. He did not have any other records to review. He stated he had seen no testing of the claimant's reading, writing or arithmetic skills. See Dr. Wetzel deposition, page 34. He stated that the claimant was in the borderline intelligence range which means "you are in the bottom 10% of the population". See Dr. Wetzel deposition, page 35. He said that the testing suggested that the claimant has a neurotic disorder with both anxiety and depression. See Dr. Wetzel deposition, page 44. He said the testing also showed the claimant would probably be benefited by psychiatric treatment aimed at symptom relief, stress reduction and reality orientation. See Dr. Wetzel deposition, page 46. He also suggested that the claimant may have a personality disorder not otherwise specified. See Dr. Wetzel deposition, page 47. He stated that the claimant has antisocial features, passive aggressive features and borderline features. See Dr. Wetzel deposition, page 48. He stated that the claimant's personality disorder "would account for the malingering". See Dr. Wetzel deposition, page 51. He testified that persons with the personality disorders are much more likely to malinger than persons who don't have them. See Dr. Wetzel deposition, page 51. He stated that a person with a personality disorder can have difficulty in social and occupational areas of life because they have a harder time controlling their behavior and they get into difficult situations with people more often. See

Dr. Wetzel deposition, pages 53, 54. He stated that persons with a personality disorder are less suited for almost any kind of job position. See Dr. Wetzel deposition, page 54.

David T. Volarich, D.O.

On March 5, 2012, Dr. Volarich examined the claimant and reviewed his medical records. The claimant reported back pain radiating down the back of his right leg to his foot which improved after surgery, but then returned over time. He reported that his symptoms create difficulties with bending, twisting, pushing, pulling and lifting. See Dr. Volarich deposition, page 12. He complained of flare-ups in his low back and pain with activities such as walking more than 15 minutes. See Dr. Volarich deposition, page 13. He complained that he could not run or jump and that lifting a case of soda caused increased pain. See Dr. Volarich deposition, page 13. The claimant stated that he tried to walk, but that he usually sat in a rocking chair to relieve his symptoms. See Dr. Volarich deposition, page 13. He said that his wife has to tie his shoes for him and that he is unable to perform most activities around the house. See Dr. Volarich deposition, page 13. He complained that driving more than 20 to 30 minutes caused increased symptoms, and therefore the need to stop for breaks. See Dr. Volarich deposition, pages 13, 14. He has difficulties with falling asleep and staying asleep. See Dr. Volarich deposition, page 14.

Claimant also complained of significant pre-existing conditions including lost motion in the left elbow with weakness and numbness in the left arm as well. See Dr. Volarich deposition, page 14. He complained of having trouble with both ankles, more so on the right. He wore inserts in his shoes due to popping, buckling and pain. See Dr. Volarich deposition, page 15. His right knee stayed swollen such that he would wear a brace from time to time. See Dr. Volarich deposition, page 15. He had difficulty with stairs, ladders, stooping, squatting, crawling and kneeling. See Dr. Volarich deposition, page 15. These problems slowed him down in his employment. Claimant also had problems with his vision. He stated that these problems would cause headaches, for which he would take medication and he would recline to relieve his symptoms. See Dr. Volarich deposition, page 17. He indicated that he sometimes missed details at work due to his vision, and he had difficulty reading. See Dr. Volarich deposition, page 17.

Dr. Volarich found that Claimant was truthful and provided good effort in his examination. See Dr. Volarich deposition, page 21. This was shown in the objective testing of his grip strength, as well as in the consistency of other motions during examination. See Dr. Volarich deposition, page 22.

On examination, Claimant was found to have a number of positive findings of injury. He was found to have weakness in his legs that was consistent with the previous impingement of the nerve root at the L5-S1 level. See Dr. Volarich deposition, page 19. There was lost range of motion in the lumbar spine, and a trigger point upon examination. See Dr. Volarich deposition, pages 21, 22. Claimant had a positive straight leg raising test with the right leg, which the Doctor attributed to scar tissue which formed after the surgical procedure. See Dr. Volarich deposition, page 23. Claimant had lost range of motion in the left elbow. Claimant had atrophy in his right thigh and lost motion in the right knee, along with crepitus in the knee which was moderately severe. See Dr. Volarich deposition, page 26. There was also patella mistracking in the knee. See Dr. Volarich deposition, page 27.

Based on his examination, Dr. Volarich diagnosed the following medical conditions due to the 2007 accident: herniated nucleus pulposis at L5-S1 with an annular tear causing bilateral lower extremity radicular symptoms; and status post anterior and posterior lumbar fusions with instrumentation at L5-S1. See Dr. Volarich deposition, page 28. Dr. Volarich diagnosed the following pre-existing medical conditions: mild lumbar syndrome; right knee internal derangement, status post arthroscopic partial medial and lateral menisectomies with excision of osteophyte of the medial femoral condyle; micro-fracture with chondroplasty of the lateral femoral condyle; post-traumatic arthropathy of the right knee; left elbow puncture wound with foreign body; status post removal of foreign body from left elbow; ptosis and amblyopia of the left eye; minor bilateral ankle strains; and non-insulin dependent diabetes mellitus without evidence of end organ disease. See Dr. Volarich deposition, page 28. He opined that the claimant had a 45% permanent partial disability of the body due to the 2007 accident. See Dr. Volarich deposition, page 29. He opined that the claimant had the following pre-existing permanent partial disabilities: 5% of the lumbar spine; 40% of the right knee; 30% of the left elbow; 20% of the body referable to the diabetes mellitus; and a visual disability. See Dr. Volarich deposition, pages 30, 31. Dr. Volarich testified that the conditions combined to create a greater overall disability. See Dr. Volarich deposition, page 31. He opined that the claimant is permanently and totally disabled as a result of the permanent partial disability 2007 accident combined with the pre-existing permanent partial disabilities. See Dr. Volarich deposition, page 34. He testified that the claimant would require additional medical care due to his back injury, including medication, treatment at a pain clinic, injections and similar treatments. See Dr. Volarich deposition, page 35. After reviewing Dr. Pernoud's medical report, Dr. Volarich opined that the claimant's visual permanent partial disabilities combine with the other physical problems to create a greater overall disability. See Dr. Volarich deposition II, page 6.

Anthony J. Margherita, M.D.

Dr. Margherita, a board-certified physiatrist, examined the claimant on August 12, 2012, and found that the claimant's left shoulder was elevated, meaning that his alignment was not correct in his pelvic height and testified that these were findings associated with individuals who have sustained a lumbar spine injury. See Dr. Margherita deposition, pages 8, 9. He testified that the body tries to compensate for weakness by finding a position of comfort. He also found a positive Trendelenburg's sign on the left side, meaning that the claimant has weakness around his left pelvis. See Dr. Margherita deposition, page 10. He found the claimant's gait to be shortened on his right side, which is due to an attempt to shorten the stride and produce fewer symptoms. See Dr. Margherita deposition, page 11. Claimant had pain in his right heel when walking on his heels, which was due to "impact stress". See Dr. Margherita deposition, page 11. Claimant had a "flat back", which is a loss of the normal curvature of the lumbar spine, which in turn causes more stress on the spine. See Dr. Margherita deposition, pages 11-12. Dr. Margherita opined that this is a frequent finding following surgery. He found the claimant to have a positive straight leg raising test on the right at 45 degrees, suggesting that there is still residual nerve tension. See Dr. Margherita deposition, page 12. The claimant had decreased strength in the right hip flexors, which the Doctor attributed to the continuing nerve problems at the L5 level. See Dr. Margherita deposition, pages 14, 15. The claimant had an absent right ankle jerk, showing that there is nerve problems at the S1 distribution as well. See Dr. Margherita deposition, page 15. The claimant had decreased sensation in the right lateral lower leg distribution, consistent with an L5 nerve root problem. See Dr. Margherita deposition, page 15.

Dr. Margherita diagnosed L5 radiculopathy with a failed back syndrome due to the 2007 accident. See Dr. Margherita deposition, page 16. Dr. Margherita discussed the claimant's increase in symptoms following his surgical procedure. See Dr. Margherita deposition, page 17. He opined that it is not uncommon to develop increased symptoms following such a procedure because while the nerve was decompressed in the surgery, it is still damaged to some degree. See Dr. Margherita deposition, page 17. He testified that the claimant has continued disability as seen in his limited mobility and continued nerve irritation. See Dr. Margherita deposition, page 18. He testified that the claimant is limited in any type of heavy manual labor, as well as any lifting activity. See Dr. Margherita deposition, pages 18-19. He testified that the claimant suffers from a 45% permanent partial disability of the lumbar spine from the work accident, and that the claimant needs restrictions where his lifting is limited to no more than 40 to 45 pounds. See Dr. Margherita deposition, pages 19-20. He opined that the claimant will need further medical treatment in the future as a result of his injury, including a trial of a dorsal column stimulator and pain medication. See Dr. Margherita deposition, pages 20-21.

Joan M. Pernoud, M.D.

Dr. Pernoud, a board certified ophthalmologist, examined the claimant on January 10, 2013, and diagnosed ptosis, which is a condition where an eyelid is droopy and therefore impairs vision. See Dr. Pernoud deposition, page 7. She opined that the claimant's right eyelid had Marginal Reflex Distance, meaning that it is abnormal. See Dr. Pernoud deposition, page 8. She testified that this reflected a significant loss in his visual field in the right eye. See Dr. Pernoud deposition, page 8. She also found a mild amblyopia, otherwise known as a "lazy eye". See Dr. Pernoud deposition, pages 9-10. The claimant also had abnormal findings on visual examination See Dr. Pernoud deposition, pages 10-11.

Based on her examination, Dr. Pernoud diagnosed: (1) congenital ptosis of both upper eyelids, more prominent on the left; and (2) amblyopia of the left eye. See Dr. Pernoud deposition, page 12. Both conditions pre-existed the 2007 accident. See Dr. Pernoud deposition, page 13. Per the Missouri regulations she calculated the claimant's permanent partial disability: 33% loss in the right eye and 59% loss in the left eye. By combining the claimant's binocular visual loss, she arrived at a total number of weeks of disability at 168.4 weeks. See Dr. Pernoud deposition, page 17.

James J. Coyle, M.D.

Dr. Coyle, a board certified orthopedic surgeon, evaluated and treated the claimant for his work injury and found that the claimant had an extruded disc herniation at L5-S1 on the right which was acute and caused by the accident of May 17, 2007. See Dr. Coyle deposition, pages 9-10. He recommended that the claimant have surgery, but that he first had to stop smoking. After the claimant had stopped smoking, the Doctor determined that the claimant had poorly controlled diabetes. See Dr. Coyle deposition, pages 12-13. Unfortunately, the claimant had again begun to smoke, and he was then again advised to stop smoking. See Dr. Coyle deposition, page 15. Another MRI revealed that the disc herniation had migrated distally compressing both nerve roots with severe foraminal stenosis. See Dr. Coyle deposition, page 16. Dr. Coyle performed a

bilateral laminotomy and a microlumbar discectomy and a fusion using iliac crest bone graft performed both posteriorly and anteriorly. See Dr. Coyle deposition, page 18.

Following the surgery, Dr. Coyle treated the claimant with medication and physical therapy. The claimant indicated that he was walking and no longer smoking. See Dr. Coyle deposition, page 21. He also indicated that he was feeling much better. See Dr. Coyle deposition, page 21. In follow up visits, the claimant developed increased low back pain. See Dr. Coyle deposition, page 22. As the claimant continued with his therapy he indicated that his leg symptoms had improved and that he continued to walk. See Dr. Coyle deposition, page 23. At the claimant's last visit on September 1, 2010, the claimant reported that he felt very good. See Dr. Coyle deposition, page 24. Dr. Coyle released him at maximum medical improvement and has not examined the claimant since that time. He did not place any work restrictions on the claimant from the work injury. See Dr. Coyle deposition, page 26. On the other hand, he advised the claimant that "anything that you don't think you can do, you ought not to do". See Dr. Coyle deposition, page 26. He opined that the claimant suffered a 20% permanent partial disability of the body as a whole referable to the 2007 injury. See Dr. Coyle deposition, page 29.

Russell C. Cantrell, M.D.

Dr. Cantrell, a board certified physiatrist, testified that he evaluated the claimant on June 6, 2012, and reviewed his medical records. See Dr. Cantrell deposition, page 5. He testified that Claimant had "non physiologic pain behaviors". See Dr. Cantrell deposition, page 9. The claimant had limitations in the range of motion in his lumbar spine with a decrease in lumbar lordosis. See Dr. Cantrell deposition, page 9. He did not find evidence of weakness in the claimant's lower extremities. See Dr. Cantrell deposition, page 11. After ordering and reviewing x-rays he arrived at the following diagnoses: chronic low back pain with loss of segmental motion due to the L5-S1 fusion; and degenerative facet and disc disease at other segments within the lumbar spine. See Dr. Cantrell deposition, page 13. He opined that the claimant had reached maximum medical improvement "regarding his low back injury dating back to 2006". See Dr. Cantrell deposition, page 13. He opined that the claimant should have restrictions of 50 pounds on his lifting. See Dr. Cantrell deposition, page 13. He stated that if the claimant continues to have complaints of numbness or tingling in his lower extremities, then these would likely be related to his diabetes. See Dr. Cantrell deposition, page 14. He stated that the claimant was not in need of any further medical treatment as a result of the accident with Employer and Insurer. See Dr. Cantrell deposition, page 15.

On cross examination Dr. Cantrell indicated that the claimant did complain of a tingling sensation in his right posterior thigh at the time of the examination. See Dr. Cantrell deposition, page 17. He indicated that this could be caused by the claimant's disc herniation, as well as other potential causes. See Dr. Cantrell deposition, pages 17, 18. The claimant complained to Dr. Cantrell that his pain complaints were aggravated by prolonged sitting and standing. See Dr. Cantrell deposition, page 18. The Doctor found that performing lumbar extension would markedly increase the claimant's lumbar complaints. See Dr. Cantrell deposition, page 20. Dr. Cantrell indicated that he had no knowledge of whether the claimant had any psychiatric treatment or problems in the past. See Dr. Cantrell deposition, page 22. He was similarly not aware of any testing of the claimant's intelligence. See Dr. Cantrell deposition, page 22.

Expert Vocational Testimony

Stephen Dolan

Stephen Dolan, a board certified rehabilitation specialist, evaluated the claimant, reviewed records, and performed testing. See Dolan deposition, pages 8-9. He testified that the claimant's work experience was in the unskilled category. See Dolan deposition, page 12. He also testified that the claimant could not secure employment in positions where depth perception is important such as driving jobs, mechanical jobs, machinery repair and machinery installation, due to his visual disability and his low IQ. See Dolan deposition, pages 12, 13. He testified that the claimant would not be able to pass the tests required to obtain a truck driver's license. See Dolan deposition, page 13. Mr. Dolan opined that the claimant's disability to his left elbow limits his ability to perform jobs such as typing or data entry. See Dolan deposition, page 14. He opined that the claimant's pre-existing knee condition seriously impacts the claimant's employability and prevents the claimant from performing a lot of bending, stooping and crouching, eliminating construction laborer jobs, stocking jobs, or material handling jobs. See Dolan deposition, page 15. He testified that the claimant's lack of experience with a computer would affect his employability because he would be unable to perform any job where computer use is critical. See Dolan deposition, page 17. He also testified that the claimant's low IQ would make it unlikely he would be able to learn how to use a computer. See Dolan deposition, page 17.

Mr. Dolan's testing found that the claimant recognizes words at the second grade level, comprehends sentences at the third grade level and performs math at the third grade level and that these scores mean that the claimant is functionally illiterate. See Dolan deposition, page 18.

Mr. Dolan testified that the claimant had previously operated a fork lift, and that this skill would transfer to another job in which he had to operate similar equipment, but the claimant's physical restrictions would prevent him from performing this activity at this time. See Dolan deposition, page 20. He opined that the claimant is not employable in the open labor market. See Dolan deposition, page 22.

Karen Kane-Thaler

Ms. Kane-Thaler, a certified vocational consultant, interviewed the claimant and reviewed his medical records. She testified that the claimant's past employment involved positions that either had no skills required, or were very low in the semi-skilled category. See Kane-Thaler deposition, page 12. Such jobs would use visual or verbal learning for performing the jobs. See Kane-Thaler deposition, page 12. She testified that she contacted employers in the St. Charles and Louisiana, Missouri markets to see if there were any positions for which the claimant may qualify. See Kane-Thaler deposition, page 17. She opined that the claimant was employable in the open labor market concerning the restrictions placed on him for the injury to his back and his subsequent back surgery. See Kane-Thaler deposition, page 19.

On cross examination she indicated that the claimant's lack of a GED would hinder him in obtaining certain positions. See Kane-Thaler deposition, pages 23-24. She also indicated that the claimant's preexisting borderline intelligence would affect his employability. See Kane-

Thaler deposition, page 24. Ms. Kane-Thaler testified that if she were to follow the conclusions of Dr. Volarich or Dr. Stillings, then the claimant would be unemployable in the open labor market. See Kane-Thaler deposition, page 44. She also testified that if Claimant were to obtain a position, he might have difficulty in maintaining that position. See Kane-Thaler deposition, page 49.

James M. England, Jr.

Mr. England reviewed the claimant's medical records, but did not interview the claimant. See England deposition, page 10. Based upon his review of this information, he concluded that if the claimant had no restrictions placed upon him, as indicated by Dr. Coyle, then he would be able to return to work. See England deposition, page 15. He also concluded that if he assumed Dr. Volarich's restrictions, then the claimant would not be able to sustain regular employment in the open labor market as a result of the May 17, 2007, injury. See England deposition, page 17. Mr. England testified that the claimant's pre-existing left elbow, knee, visual conditions, and his headaches, dizziness and blurriness constitute a hindrance or obstacle to employment. See England deposition, pages 25-27. He opined that the claimant's lack of a GED limits the options he has in employment, and testified that the claimant is functionally illiterate. See England deposition, page 28.

MEDICAL CAUSATION

"The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job." Royal v. Advantica Rest. Group, Inc., 194 S.W.3d 371, 376 (Mo.App.W.D.2006) (citations and quotations omitted). "Determinations with regard to causation and work relatedness are questions of fact to be ruled upon by the Commission." Id. (citing Bloss v. Plastic Enters., 32 S.W.3d 666, 671 (Mo.App.W.D.2000)). Under the statute, "[a] n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. § 287.020.2. On the other hand, "[a]n injury is not compensable because work was a triggering or precipitating factor." Id. Awards for injuries 'triggered' or 'precipitated' by work are nonetheless proper *if* the employee shows the work is the prevailing factor in the cause of the injury. Thus, in determining whether a given injury is compensable, a work related accident can be both a triggering event and the prevailing factor."

"[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence." Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, "logic and common sense," or an ALJ's personal views of what is "unnatural," cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) ("The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert."). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

The claimant bears the burden of proving that not only did an accident occur, but it resulted in injury to him. Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman, supra. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Id. Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra. Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995)Silman, supra at 175, 176. This requires claimant's medical expert to establish the probability claimant's injuries were caused by the work accident. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Id.

In this case, the claimant testified that on May 17, 2007, the claimant, a school custodian, suffered an acute L5-S1 lumbar disc herniation while throwing fifty-pound trash bags into a dumpster. He was throwing them to a height of six feet while twisting to his left, when he felt a sudden stabbing pain in his lower back with numbness in his right leg. The claimant received conservative medical care with injections and physical therapy, without sufficient diminution of his painful condition.

On August 13, 2008, Dr. Coyle examined the claimant and diagnosed a probable acute L5-S1 lumbar disc herniation caused by the 2007 accident. See Exhibit K. A repeat MRI scan revealed a L5-S1 disc herniation with right sided foraminal impingement. See Exhibit K. On March 10, 2009, the claimant began a consultation at Pike Medical Clinic to control his diabetes and was eventually cleared for his back surgery. See Exhibit O. The claimant also successfully stopped smoking. On March 5, 2010, Dr. Coyle performed an L5-S1 decompression and arthrodesis. See Exhibit K. He thereafter followed up with Dr. Coyle and underwent a physical therapy program. On September 1, 2010, Dr. Coyle opined that the claimant was at maximum medical improvement but did not place any restrictions on the claimant’s activities. See Exhibit K.

Dr. Coyle, Dr. Volarich, Dr. Cantrell, Dr. Stillings, and Dr. Margherita all opined that the claimant suffered significant permanent disability from the occurrence. The claimant has prevailed by proving that his work-related injury caused substantial permanent disability based on the great weight of the evidence.

LIABILITY FOR PAST MEDICAL EXPENSES

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 1994.

> The intent of the statute is obvious. 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. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, 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. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

> We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. Id. at 111, 112.

At the hearing, the claimant presented medical bills (Exhibit V) with medical records from Pike County Memorial Hospital (Exhibit X) for radiological examinations and laboratory tests in September and October 2013 related to the claimant's low back pain in the amount of $4,990.00, virtually paid entirely by Medicare ($3,720.40) and Medicaid ($794.40). Pike County Memorial Hospital was not paid for $475.00 related to a Tramadol drug screen on October 11, 2013.

The claimant also submitted a billing statement from Pike County Clinic in the amount of $732.00 for medical services rendered to the claimant from March to December 2013 also paid entirely by Medicare ($34.00) and Medicaid ($698.00). However, the medical records submitted at the hearing relate to medical services rendered to the claimant in 2009. This aspect of the claim is denied for lack of proof of the medical services provided.

Based on the evidence, the claimant is awarded $4,990.00 for past medical expenses largely paid by Medicare and Medicaid. The record discloses no lien filed on behalf of the Missouri Medicaid program. However, Missouri law as well as Federal law imposes a responsibility on the claimant and the claimant's legal counsel to ensure that the interest of

Medicare and the Missouri Medicaid programs are protected as a condition of receiving benefits from those public agencies. For example, see Section 287.266, RSMo 2000.

FUTURE MEDICAL CARE

Pursuant to section 287.140.1, an employer is required to provide care "as may be reasonably required to cure and relieve from the effects of the injury." This includes allowance for the cost of future medical treatment. Pennewell v. Hannibal Regional Hospital, 390 S.W.3d 919, 926 (Mo. App. E.D. 2013) citing Poole v. City of St. Louis, 328 S.W.3d 277, 290-91 (Mo. App. E.D. 2010). An award of future medical treatment is appropriate if an employee shows a reasonable probability that he or she is in need of additional medical treatment for the work-related injury. Id. Future care to relieve [an employee's] pain should not be denied simply because he may have achieved [maximum medical improvement]. Id. Therefore, a finding that an employee has reached maximum medical improvement is not necessarily inconsistent with the employee's need for future medical treatment. Id.

In determining whether medical treatment is “reasonably required” to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 519 (Mo.App. W.D 2011). Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. *Id.* The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. Id. Application of the prevailing factor test to determine whether medical treatment is required to treat a compensable injury is reversible error. Id. at 521.

"The worker's compensation act permits the allowance for the cost of future medical treatment in a permanent partial disability award." Sharp v. New Mac Electric Cooperative, 92 S.W.3d 351, 354 (Mo. App. S.D. 2003). There is no requirement for a claimant to prove specific medical treatment will be required in order for payment of future medical expenses to be made available. Id. What is required is proof there is a "reasonable probability" that additional medical care will be needed to treat the work-related injury. Id.

Dr. Volarich and Dr. Margherita opined that the claimant requires ongoing anti-inflammatory medication, muscle relaxers, oral steroids, and narcotic pain medication with respect to conditions stemming from his back injury of May 17, 2007. Dr. Stillings opined that the claimant required additional medical care that flowed from the accident. Dr. Smith opined that the accident was half of the reason that the claimant required additional medical care. Based on the weight of the evidence the claimant is awarded future medical care to cure and relieve the effects of his work-related injury by a medical provider selected by the employer, unless the employer does not timely designate a medical provider. In that event, the claimant will have no alternative to selecting his own medical provider at the employer’s expense.

PERMANENT DISABILITY

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders

v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). The standard for determining whether Claimant was permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. Joultzhouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997).

The difficult aspect of this decision is to determine the extent of the claimant's permanent disability from the 2007 accident at work. The first step in determining the outcome in this case is to consider (1) the extent of disability from the May 17, 2007, accident; and (2) whether that disability renders claimant unemployable on the open labor market.

The claimant sustained a significant injury to his lumbar spine during the May 17, 2007 accident resulting in a large, acute herniated disc, which necessitated surgery and fusion at one level of his lumbar spine. The forensic medical evaluations revealed two different conclusions. Dr. Coyle, the treating surgeon, and Dr. Cantrell, a physiatrist, opined that the claimant needs no restrictions on his activities as a result of this injury and surgery. On the other hand, Dr. Volarich opined that the claimant requires restrictions on his activities as a result of the accident of May 17, 2007:

- Avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks to an as needed basis;
- Do not handle weights greater than twenty pounds, and limit this task to an occasional basis assuming proper lifting techniques;
- Do not handle weight overhead or away from the body, and do not carry weight over long distances or uneven terrain;
- Avoid remaining in a fixed position for any more than about thirty minutes at a time including both sitting and standing;
- Change positions frequently to maximize comfort and rest when needed, including resting in a recumbent fashion;
- 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. See Dr. Volarich deposition, page 36 and Deposition Exhibit 2.

Three different vocational experts evaluated the claimant's employability from his accident of May 17, 2007, and found that the claimant's past employment involved unskilled or very low semi-skilled positions. See Dolan deposition, page 12. Mr. Dolan opined that the claimant's work experience was in the unskilled category. See Dolan deposition, page 12; Kane-Thaler deposition, page 12. In addition, the vocational experts concluded that if they assume Dr. Volarich's restrictions, then Claimant is unemployable on the open labor market based solely on the accident of May 17, 2007. See Dolan deposition, page 12; Kane-Thaler deposition, page 44; England deposition, page 17. Ms. Kane-Thaler testified stated that this also held true if she followed the opinions of Dr. Stillings. See Kane-Thaler deposition, page 44.

The claimant testified that he continues to have back complaints which are "unbearable" and has pain at all times, which becomes worse from time to time. When it worsens it will last for one or two days. During these times he sits with his legs propped up, using ice and heat on his back. He will either sit in his recliner or he will lie in his bed. He develops these worsening symptoms approximately every other day, and they seem to be brought on by various activities, including walking. He said that sitting becomes very difficult for him as he develops a sharp pain in his lower back with numbness in his right leg. The claimant also testified that he continues to have leg complaints. He generally has some problems in his right leg which are "not terrible", but then he has flare-ups. He said that approximately twice per week his right leg will "go out on him". On one such occasion he fell but did not injure himself. He said that in a typical day he will arise, make coffee, and try to help out around the house. He will help with some light dusting, or with folding clothes. Occasionally he will do something such as hang a picture. He tries to wash dishes, though this takes him all day because he cannot stand at the sink for extended periods. He is unable to launder clothing because he cannot bend over to put clothes into the machines. He is able to perform some light vacuuming. He is not able to scrub the floors because of the problems with his knees. He does not work in the yard and pays a neighbor to mow his lawn. He testified that he does drive, though his legs swell up when he does so. He did not drive to the trial, but rather, his sister drove him. They stopped one time in a drive of approximately 35 minutes, at which time he got out of the car and stretched. He testified that his sleep is very bad, as he tosses and turns due to his back complaints. He says that he will go to bed at 9:00 p.m., but then will awaken at 11:00 p.m. He will sit on the bed for an hour, and then lie on his pillows all night. Many times he will nap during the day. The claimant testified he can comfortably stand for thirty to forty minutes, and sit for thirty minutes. He testified that he could walk comfortably approximately one block. If he pushes himself beyond these extremes, then he has worsening symptoms. If he goes to a store such as a Wal-Mart, he will lean on a cart or try to use an electric scooter. However, even doing this, he develops soreness in his back, legs and shoulders. He tries to stay away from stairs due to the problems he has with his knees. He is able to take care of his personal needs, though his wife will often help him put on his shoes because of his difficulty in bending. He stated that he reclines four to five hours per day due to his back.

On the other hand, the employer argued that the claimant's current condition is either exaggerated or that the condition is not a result of the 2007 accident. In its well written brief, the employer argues:

> As a result of the May 17, 2007 accident, Claimant developed symptoms of right greater than left low back pain and radicular pain and numbness extending posteriorly down his right leg. Claimant underwent a course of conservative treatment, including physical therapy and injections, which seemed to bring his symptoms to resolution. In fact, on several occasions Claimant advised the physical therapist and Dr. Doll he felt great and was allowed to return to full duty work. However, approximately one year later, Claimant returned to active medical treatment when he was evaluated by Dr. Coyle. Dr. Coyle recommended surgery which was postponed for approximately a year and a half due to Claimant's diabetes and Dr. Coyle's requirement of smoking cessation. Once Claimant underwent surgery on March 5, 2010, he reported complete resolution of his leg symptoms, and as he did subsequent to Dr. Doll's treatment, reported to

Dr. Coyle he was "feeling great". (Ex. K, Ex. 1, Depo. Ex. 10) Following the surgery Claimant was noted to be able to walk up to seven miles a day, ceased taking any medications, and was "able to squat, toe walk and heel walk and bend forward to 90 degrees at the waist." (Ex. 1, p. 24) Dr. Coyle characterized Claimant as having a "very good outcome", and noted Claimant "was not in need of anything", including specific work restrictions. (Ex. 1, pgs. 26, 27)

However, as after his release at maximum medical improvement by Dr. Doll, Claimant testified within four to five months following his release from Dr. Coyle he re-developed symptoms including numbness in his leg and pain and a give way sensation in his low back. These complaints were documented by Doctors Volarich and Margherita, with Dr. Margherita noting the complaints had redeveloped without any specific incident. Despite developing the complaints documented by Doctors Volarich and Margherita; however, Claimant never contacted Dr. Coyle to request re-evaluation. Nor is there any evidence in the record Claimant ever requested additional evaluation or treatment from Employer/Insurer. As Dr. Coyle noted, these facts stand in "significant contrast" to Dr. Volarich's observations and documentation of Claimant's complaints. (Ex. 1, p. 33)

Also in significant contrast are Claimant's abilities per his testimony and his actual actions and demeanor. Although Claimant repeatedly advised examining physicians he could not sit for long periods of time without experiencing increased symptoms and testified at trial he could not sit for longer than thirty minutes, he was repeatedly noted by evaluators to be able to sit for long periods of time during evaluations without requiring breaks or being noted to change position. Further, during the course of the hearing, Claimant was observed to sit without apparent discomfort for seventy minutes with only a single five-minute break after sitting for fifty minutes. At no point during the trial was Claimant observed to move uncomfortably or change position. Additionally, although Dr. Margherita noted Claimant felt he required a cane, Claimant was not observed to use a cane in the surveillance footage nor were there any pictures of Claimant requiring a cane in his Facebook pictures. In fact, the surveillance footage demonstrated Claimant able to move in an unrestricted manner without the use of a cane.

While both Doctors Volarich and Margherita would suggest the May 17, 2007 injury as the cause of Claimant's current complaints and symptoms, the more credible explanation is found in the opinions and testimony of Doctors Smith and Wetzel. When Dr. Smith performed her psychiatric evaluation of Claimant, she diagnosed pre-existing somatization disorder, a condition where individuals "typically have pain complaints as part of their presentation." (Ex. 4, p. 22) Dr. Wetzel elaborated on this, testifying Claimant's symptom reporting on the MMPI-2 and MCMI-III tests were "so marked it suggests malingering" and were suggestive of a characterological inclination to complain or be self-pitying. (Ex. 5, pgs. 15, 41) These findings and testimony of Doctors Smith and Wetzel appear consistent with and supported by the examination findings of Dr. Cantrell.

> Dr. Cantrell specifically identified physical examination findings of non-physiologic pain behaviors, which led that physician to conclude many of Claimant's subjective complaints were inconsistent with his subjective findings. Even Dr. Margherita acknowledged an element of the failed back syndrome he diagnosed could be due to psychosocial influences; influences similar to those identified and diagnosed by Doctors Smith and Wetzel. Further, it is important to note Dr. Margherita's diagnosis of failed back syndrome is not the same as a failed fusion, nor is his diagnosis supported by either neurological or objective findings, but rather Claimant's subjective complaints.
>
> The opinions of Doctors Smith and Wetzel, supported by the physical examination findings of Dr. Cantrell and the inconsistencies in the evidence, more credibly explain Claimant's alleged ongoing complaints and symptoms than does Claimant's testimony or the opinions of Doctors Margherita or Volarich. The opinions of those experts leads to the conclusion not only had Claimant reached maximum medical improvement at the time of his release from Dr. Coyle, but also Claimant's current condition of ill-being and his associated complaints are not the result of the May 17, 2007 accident. See Employer Brief.

The employer, thus, appears to contend that the claimant completely recovered with no residual disability from the occurrence as of September 1, 2010, and that his increased complaints of low back pain were the result of the claimant somatizing the pain as a result of a pre-existing somatization disorder, a condition where individuals "typically have pain complaints as part of their presentation" and that the claimant is malingering.

The employer cites the claimant's inconsistent use of his cane and inconsistencies between statements and actions regarding the length of time he can sit. At the hearing, the claimant testified for 43 minutes before standing up to testify for 13 minutes. He then testified in a sitting position for an additional 9 minute before the hearing took an eight-minute recess. After the recess, he sat to testify for about 20 minutes during cross-examination. Thus, sitting or standing in a stationary position for over thirty minutes was a problem for the claimant. This is not terribly inconsistent with his estimate that he could sit in a stationary position for up to a half hour at a time. The findings of the Administrative Law Judge on the claimant's position while testifying differ from those of defense counsel.

The claimant's gait while walking in the August 2012 video presented by the defense seems to be consistent with Dr. Volarich's findings in this March 2012 examination in which he found that the claimant was "able to walk bare foot and flat foot … without foot drop, limp, or ataxia. He can toe walk, heel walk, and tandem walk, as well as stand on either foot without difficulty." See Dr. Volarich deposition, deposition exhibit 2, page 9. Dr. Volarich found that the claimant's gait problem is squatting and returning to a standing position after squatting and walking on his heels. See Dr. Volarich deposition, deposition exhibit 2, page 9. The video surveillance does not reveal squatting or heel walking. Dr. Cantrell reported that the claimant had pain on extension and in certain other movements, but did not report that the claimant had any limp, foot drop, or ataxia while walking. Even with that presentation, Dr. Volarich recommended the restrictions that the vocational experts contend make the claimant

unemployable in the open labor market when added to the claimant's age, education, and past relevant work history.

A chief difference is whether the claimant's condition is the result of a pre-existing somatization disorder or a pain disorder resulting from the occurrence. None of the forensic experts opined that the claimant had any pre-existing permanent partial disability from a somatization disorder or that the condition was in any way disabling before the 2007 accident. Dr. Smith referred to a somatization disorder as "a maladaptive response/coping style." She opined that the claimant is not purely malingering and that he has some pain related to his psychological disorder. She described the condition as:

> [A] psychiatric condition that tends to develop early on in life and is relatively stable across the lifespan, and it is a disorder where individuals express psychological conflicts through physical symptoms, pseudoneurologic symptoms. They tend to be pan symptomatic over time in multiple bodily spheres in both physical and neurologic and psychiatric. The complaints tend to be dramatic. And there is a histrionic component to the presentation. And such individuals typically have prominent pain complaints as part of their presentation. And then when one looks at the medial history over time, you will tend to see the pain complaints coming up here and again, but usually with a high tenor to the intensity of the complaint. See Dr. Smith deposition, pages 21, 22.

She opined that the accident was not the cause of the somatization disorder, but the situation "provided a setting for some expression of … exaggeration and … malingering. But I want to underscore that I don't think he's purely malingering." See Dr. Smith deposition, page 23. While Dr. Stillings diagnosed a pain disorder from the occurrence, Dr. Smith opined that the claimant had a disorder due to his reaction to the pain from the occurrence. Based on the entire record, it is likely that the claimant has a pain syndrome from the occurrence as well as a coping style that produces a reaction different than that of others, a personality trait or personal trait. Some individuals cope with pain by denying the condition, while others are histrionic in coping with pain. Since the claimant has no history of a somatization disorder interfering with his life activities and no history of the condition at all, the occurrence appears to be the prevailing factor causing the claimant's pain and his response to the pain.

The analysis of "employability" requires an inquiry into whether the claimant can compete with others. In such a scenario, workers with restrictions and limitations due to residual pain compete against those who are without, and all of them operate within an economy in which job openings are flooded with qualified applicants for low skill positions. Based the weight of the evidence in the record, the claimant is not employable in the open labor market, because of his need to constantly re-position himself, including the need to rest and recline during the day resulting from the accident of May 17, 2007, when combined with his age, education, and past relevant employment history. Therefore, the claimant is awarded permanent total disability benefits from the employer and its insurer.

SECOND INJURY FUND

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in '[a]ll cases of permanent disability where there has been previous disability.'" For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined...."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

Given the above findings, the Second Injury Fund has no liability, because the claimant's last injury in and of itself resulted in the claimant's permanent, total disability. However, in order to complete the record, the claimant suffered from several pre-existing permanent partial disabilities: a 5% pre-existing permanent partial disability to his low back, a 27 ½% pre-existing permanent partial disability to his right knee, a 35% pre-existing permanent partial disability from his psychological conditions, a 15% pre-existing permanent partial disability to his left elbow, a 10% pre-existing permanent partial disability from his non insulin dependent diabetes, a 59% pre-existing permanent partial disability to his left eye, and a 33% pre-existing permanent partial disability to his right eye.

Made by: /s/EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation