

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 07-012863

Employee: James Broekhoven

Employer: Bass Pro, Inc. (Settled)

Insurer: Travelers Indemnity Company of America (Settled)

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.¹ We have read the briefs, heard the parties' arguments, reviewed the evidence, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Preliminaries

Employee had longstanding orthopedic problems in his lumbar spine. On January 25, 2007, employee suffered a new injury to his lumbar spine, which injury arose out of and in the course of his employment. Employee entered into a settlement with his employer to resolve employee's workers' compensation claim against employer. Employee proceeded to trial on his claim against the Second Injury Fund. The parties agree that employee is permanently and totally disabled. The issue for our consideration is whether the effects of the work injury considered in isolation caused employee to be permanently and totally disabled or whether it was the effects of the work injury in combination with employee's preexisting disabilities that caused employee to be permanently and totally disabled.

The administrative law judge found that "based on [employee's] testimony in December 2009,..his back condition did not interfere with his daily activities to any significant degree. The problems he is currently having, and the restrictions that have been imposed that interfere with his ability to work, arose from the last injury alone." The administrative law judge then concluded that employee is permanently and totally disabled solely as a result of the effects of his work injury. We disagree.

Findings of Fact

The administrative law judge's findings of fact are, for the most part, thorough and accurate. We adopt her findings to the extent they are not inconsistent with our findings, conclusions, award and decision as articulated herein.

As early as 1996, employee was diagnosed with degeneration and herniated discs in his lumbar spine. The orthopedic problems in employee's lumbar spine before the work injury are well-documented. Dr. Ferguson recommended employee undergo surgery at the time. Employee declined the surgical recommendation, opting instead for conservative treatment. Employee enrolled in back school at the Shealy Institute to learn how to protect his back while performing lifting and other physical activities.

¹ Statutory references are to the Revised Statutes of Missouri 2006, unless otherwise indicated.

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Employee stopped participating in vigorous athletic activities and exercises to protect his back. Employee altered his lifestyle and limited his activities to protect his back and prevent further injury.

Notwithstanding his low back problems, employee worked full-time for employer and successfully completed his duties until January 25, 2007, when he suffered the lift-and-twist accident at work that is the subject of this claim. After missing some time due to his work injury, employee returned to work for employer for approximately ten months. Employee did not return to work after his first surgery in January 2008. He subsequently underwent two more surgeries.

Credibility

The administrative law judge found that employee, at hearing, exaggerated the nature and extent of his preexisting back problems. The administrative law judge found that employee was not credible. We acknowledge that, in his deposition testimony and at hearing, employee's description of his prior back problems became increasingly more detailed. We are not entirely unsympathetic to the administrative law judge's concerns in this regard.

We note, however, that employee consistently testified that he was able to limit symptoms referable to his low back only by significantly limiting his level of physical activity. We find this evidence credible, particularly in view of the medical evidence documenting the seriousness of employee's preexisting spine condition.

Medical Evidence

Dr. Lennard was charged with employee's follow-up care and rehabilitation after his first two surgeries. Dr. Lennard issued a report on May 12, 2009, wherein he recommended a 20-pound lifting restriction and also recommended that employee limit bending to occasionally. Dr. Lennard believes employee's overall lumbar permanent partial disability is 30% of the body as a whole with 20% permanent partial disability attributable to the primary injury and 10% permanent partial disability attributable to employee's preexisting lumbar condition. Dr. Rahman performed another lumbar surgery after Dr. Lennard issued his May 2009 report so Dr. Lennard's opinions, while helpful, do not reflect employee's ultimate condition.

In April 2010, Dr. Weber performed an independent medical examination for the purpose of reviewing employee's "prior care and his function, activities, limitations, work, former physical examinations and determine his abilities and lack thereof." Dr. Weber believed employee should limit lifting to 20 pounds occasionally, five to ten pounds frequently. Employee should also limit pushing and pulling to 20 pounds. Employee should avoid frequent stooping, squatting, crawling, or repeated bending below the knees but can do some bending and twisting. Dr. Weber did not believe employee could return to an executive environment like his job for employer but believed employee could perform some phone, computing, reading or writing work.

Dr. Corsolini prepared a report dated July 2, 2010. Unfortunately the transcript does not appear to contain the complete July 2 report. The copy of the report in the record is only

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one page and ends with an incomplete sentence: "His need for..."² Fortunately, Dr. Corsolini testified by deposition. Dr. Corsolini believed employee has a 35% permanent partial disability of the body as a whole referable to the lumbar strain and that 10% of the permanent partial disability is due to his preexisting lumbar condition. Dr. Corsolini recommended that employee limit lifting and carrying to no more than 20 pounds on an occasional basis and that employee should not bend more than occasionally. Dr. Corsolini believed the lift/carry and bending restrictions are due solely to the work injury. Dr. Corsolini indicated in his report that employee had reached maximum medical improvement. Dr. Corsolini testified that "[employee's post-injury back problems] were simply extended versions of what I think was most likely present before 2007. In other words, they became symptomatic to the point he had surgery performed."

Dr. Volarich examined employee on November 11, 2010. Dr. Volarich believed employee sustained a 65% permanent partial disability of the body as a whole rated at the lumbar spine due to the work injury because it resulted in employee's disc herniations at L4-5 and L5-S1 causing bilateral lower extremity radicular symptoms requiring three surgical repairs. Dr. Volarich believed that immediately before the primary injury, employee was operating with a 20% permanent partial disability of the body as a whole rated at the lumbar spine. Dr. Volarich explained that employee's preexisting disability manifested itself through employee's low back discomfort and in employee's need to eliminate all strenuous work, sporting activities, and impact activities. As regards employee's present condition, Dr. Volarich believed employee should restrict or alter the way he performs many activities including lifting, bending, twisting, pushing, pulling, carrying, climbing, and other similar tasks. Dr. Volarich also believed employee should avoid remaining in a fixed position for any more than 30 minutes at a time including both sitting and standing. Employee should change positions frequently and rest when needed, including resting in a recumbent fashion. Finally, employee should participate in an appropriate stretching, strengthening, and range of motion exercise program and perform some non-impact aerobic conditioning such as walking, biking, or swimming to tolerance daily.

Dr. Volarich stated "it is my opinion that Mr. Broekhoven is permanently and totally disabled as a direct result of the work related injury of 1/25/07 in combination with his preexisting lumbar syndrome and psychiatric disorders." Dr. Volarich opined that "[t]he combination of his disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness..." Dr. Volarich explained that "[h]ad [employee] not had those preexisting disc problems, this current injury would not be nearly as bad, maybe a strain injury. And, you know, it was the preexisting problems that set him up to have the injury as bad as it was." Dr. Volarich agreed that employee's preexisting disabilities were hindrances or obstacles to employment or reemployment and that "those hindrances or obstacles" combined with "what happened in the last injury" to produce "this situation."

We find credible the testimony of Dr. Volarich. We find that before the work injury, employee had a 20% permanent partial disability of the body as a whole referable to the

² Tr. 615.

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lumbar spine. We find that as result of the work injury, employee sustained a 65% permanent partial disability of the body as a whole referable to the lumbar spine.

Employee reached maximum medical improvement on July 2, 2010.

Law

Section 287.200.1 RSMo provides, in relevant part:

If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability...the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes in this section provided...

Discussion

Our analysis is guided by the recent holdings in *Lewis v. Treasurer*³ and *Premium Standard Farms, Inc. v. Treasurer*.⁴

The *Lewis* court clarified the proper analysis of a permanent total disability claim against the Second Injury Fund. The *Lewis* court explained that to prevail on a claim for permanent total disability benefits from the Second Injury Fund, an injured worker must prove 1) he had a permanent partial disability or disabilities of such seriousness as to constitute a hindrance or obstacle to employment as of the time he sustained the work injury, and, 2) he is permanently and totally disabled as a result of the work injury and the preexisting disability or disabilities.

The *Premium Standard Farms* court articulated how we are to determine if a preexisting condition constitutes a hindrance or obstacle to employment or reemployment. In *Premium Standard Farms*, the court considered whether an injured worker's preexisting chronic obstructive pulmonary disorder (COPD) was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment. The Second Injury Fund argued that it should not be liable for the injured worker's permanent total disability benefits because the worker's preexisting COPD had not affected the worker's ability to do her job before the work injury. In rejecting the Second Injury Fund's argument, the court found that the Fund's focus on the lack of difficulties the pre-existing condition caused in the past was misplaced. Rather, the court held that "the focus should be on the potential the condition

³ *Lewis v. Treasurer*, ED100657 (Mo. App. E.D., June 30, 2014)

⁴ See *Premium Std. Farms, Inc. v. Treasurer*, 430 S.W.3d 351 (Mo. App. 2014).

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may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.”⁵

We believe that conditions of ill-being shown to have the potential to combine with a work injury in a synergistic manner constitute hindrances and obstacles to employment both because a properly-advised and reasonably prudent worker will, of necessity, avoid employments that pose an undue risk of increased harm, and because equally well-advised and prudent potential employers will also be disinclined to undertake the risk.

In this case the evidence establishes that prior to January 25, 2007, employee had serious medical conditions referable to his lumbar spine – degenerative disc disease and disc herniations. A unanimity of expert medical evidence and testimony establishes that employee had a preexisting disability referable to his low back. The clear, convincing and un rebutted testimony of Dr. Volarich establishes that these preexisting conditions of ill-being not only had the potential but did in fact combine with the work injury to cause a much greater level of disability than would otherwise have resulted from the relatively minor trauma employee sustained at work on January 25, 2007. To hold an employer potentially liable for payment of permanent total disability benefits in a case such as this appears to us unjust and contrary to the purpose of the Second Injury Fund.

Conclusions

As a result of the work injury, employee sustained a 65% permanent partial disability of the body as a whole referable to the lumbar spine. Employee reached maximum medical improvement on July 2, 2010. Employee’s preexisting lumbar spine condition constituted an obstacle or hindrance to employment or reemployment. Employee is permanently and totally disabled as a result of the effects of his work injury in combination with his preexisting disabilities.

Award

We reverse the administrative law judge’s conclusion that employee is permanently and totally disabled solely as a result of his January 2007 injury. Employee is permanently and totally disabled as a result of the effects of his January 2007 work injury in combination with his preexisting disabilities.

Employee is entitled to permanent total disability benefits from the Second Injury Fund. Beginning July 3, 2010, the day after employee reached maximum medical improvement for his work injury, the Second Injury Fund shall pay to employee \$342.32 per week for 260 weeks. Thereafter, the Second Injury Fund shall pay to employee \$718.87 per week for his lifetime, or until modified by law.

Ryan E. Murphy, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

⁵ *Id.*, at 356.

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The December 10, 2013, award and decision of Administrative Law Judge Margaret Ellis Holden is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 13th day of August 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: James Broekhoven

Injury No. 07-012863

Dependents: N/A

Employer: Bass Pro Inc.

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

Insurer: Travelers Indemnity Company of America

Hearing Date: 9/10/13

Checked by: MEH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? NO
2. Was the injury or occupational disease compensable under Chapter 287? YES
3. Was there an accident or incident of occupational disease under the Law? YES
4. Date of accident or onset of occupational disease: 1/25/07
5. State location where accident occurred or occupational disease was contracted: GREENE COUNTY, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment? YES
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted: INJURED HIS BACK WHILE TURNING AND PICKING UP A FILE.
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
14. Nature and extent of any permanent disability: 48.6%
15. Compensation paid to-date for temporary disability: \$93,247.72
16. Value necessary medical aid paid to date by employer/insurer? \$127,530.81

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1,984.00
- 19. Weekly compensation rate: \$718.87/\$376.55
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: N/A

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

- 22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$0) payable by SIF for 0 weeks, beginning N/A,
and, \$0 thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 23. Future requirements awarded:

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

RYAN MURPHY

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Broekhoven

Injury No. 07-012863

Dependents: N/A

Employer: Bass Pro Inc.

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

Insurer: Travelers Indemnity Company of America

Hearing Date: 9/10/13

Checked by: MEH

The parties appeared before the undersigned administrative law judge on September 10, 2013, for a final hearing. The claimant appeared in person represented by Ryan Murphy. The employer and insurer did not appear as the claim against the employer and insurer was previously settled. The Second Injury Fund appeared represented by Cara Harris.

The parties stipulated to the following facts: On or about January 25, 2007, Bass Pro Inc., was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Travelers Indemnity Company of America. On the alleged injury date of January 25, 2007, James Broekhoven was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. On or about January 25, 2007, the claimant sustained an accident which arose out of and in the course and scope of employment. The accident occurred in Greene County, Missouri. The claimant notified the employer of his injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the accident, the claimant's average weekly wage was \$1,984.00, sufficient to allow a compensation rate of \$718.87 for temporary and permanent total disability compensation, and a compensation rate of \$376.55 for permanent partial disability compensation. Temporary disability benefits

have been paid by the employer and insurer to the claimant in the amount of \$93,247.72. The employer and insurer have paid medical benefits in the amount of \$127,530.81. The parties agree that claimant reached maximum medical improvement on July 2, 2010. The attorney fee being sought is 25%.

ISSUES:

1. The nature and extent of permanent disabilities.
2. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Claimant testified on his own behalf. He is 67 years old with a date of birth of July 17, 1946. He graduated from high school and college with a Bachelor of Science in Business Administration, and also has an MBA from Drury University in 1974. He is married and has two children and four grandchildren. At the time of the January 25, 2007 work injury, claimant was working at Bass Pro, Inc. His title was Director of Risk Management, Safety and Environmental Services. As such, he was in charge of safety and risk management issues including liability claims and workers' compensation claims for Bass Pro, Inc. on a national level. Claimant worked in this position for 17 years before leaving in November 2007.

On January 25, 2007, he was on the phone, cradling the phone receiver between his left shoulder and his head. He was in a maneuver that was somewhat seated/ somewhat standing. He turned and twisted to his right to retrieve a large legal file. He testified the file was quite large and was overflowing. In the process of reaching back to grab the file, he was twisting and turning to bring the file back to his desk and he felt a tearing in his low back.

As a result of this tearing he had pain and sought medical treatment. He first sought conservative treatment through the form of physical therapy and injections, however, was later

referred for surgical intervention. Claimant ultimately had three surgeries, the first being on January 7, 2008, including a fusion at L4-5; the second surgery was on September 8, 2008, which was a discectomy on the right side of L5-S1; and the third surgery was on January 13, 2010, which was a discectomy and hemilaminectomy on the left at L5-S1.

Claimant continued to work following the January 2007 injury through November 15, 2007, at which time he was told that he was involuntarily terminated. As part of the involuntary termination he received a buyout. He testified he has not sought any employment since leaving Bass Pro, Inc. because he does not feel like his restrictions would allow for employment. Claimant reached maximum medical improvement on July 2, 2010.

On May 16, 2013, Claimant settled his claim with Bass Pro, Inc. for this injury for 48.6% permanent partial disability to the body as a whole.

Claimant testified regarding conditions that existed prior to the January 25, 2007 injury. In approximately 1992 he was diagnosed with sleep apnea and was prescribed a C-Pap Machine. Claimant testified the C-Pap Machine improved his sleep to the extent that it alleviated the stoppage of breathing; however, he still had some problems, especially with the mask. He testified he was eventually prescribed medications that helped him go to sleep and stay asleep.

Claimant testified regarding his low back condition prior to the January 25, 2007 injury. He testified in 1996 he was playing basketball and racketball as well as running. He would have flare ups of back pain that was not related to any one specific event. These would normally resolve. However, in late October 1996 he had an onset of back complaints that led him to being unable to move. He testified that at the point when he was unable to move an ambulance was called and he was taken to the hospital. On October 30, 1996, a CT of the lumbar spine showed moderate spinal stenosis at L4-5 and an MRI showed large defects at L4-5 and L5-S1, a central herniated nucleus pulposus at L4-5, and a herniated nucleus pulposus eccentric on the left at L5-

S1 most likely. He was diagnosed with a bulging disc at L3-4 and a herniated disc at L4-5 and L5-S1. Claimant testified that surgery was recommended to him; however, he wanted to avoid it and so he worked very hard with conservative treatment, including receiving an injection that was quite helpful, and attending the Shealy Back Institute, where he learned exercise techniques as well as other things that helped alleviate his back pain. Claimant testified his treatment at the Shealy Back Institute was for approximately 6 weeks in 1996, and possibly going into 1997.

Between 1997 and 2007 claimant was treated on one occasion. He saw Dr. Ben Lampert in September 2001. Dr. Lampert's records reflect a history given by the claimant of "He has been having back pain for about five years and at one point, had radicular pain radiating down the posterior aspect of the left leg to the lateral foot. He had an epidural steroid injection about five years ago which has resulted in improvement in his radicular pain until even today. His primary concern is the numbness that occurs in the lateral aspect of his leg and then the posterior aspect of the left calf. His pain only ranges between 0 and 3 out of 10 in severity and is only in the lower back, always precipitated by some activity such as running 100 yards or perhaps prolonged sitting. Lying down to sleep is when he notices the numbness in his calf and legs, which is somewhat bothersome." Dr. Lampert notes that the only effect the claimant is having is a sensation of numbness. Dr. Lampert recommended follow-up on an as needed basis and to continue his occasional use of nonsteroidal anti-inflammatory drugs. If this does not help, would suggest an epidural steroid injection. There is no other record of any treatment for the claimant's back until the January 25, 2007, injury.

At the hearing Claimant testified that following the 1996 back complaints, that he had a "total life makeover", in both his personal and professional life, where he changed how he did things and started to think before he did anything. He testified he tried to avoid lifting, if

possible, and he used proper lifting techniques when he had to lift. He also testified he stopped all impact activities, including racquetball, basketball, and jogging.

Claimant was deposed on two occasions prior to the hearing, on December 3, 2009, and March 2, 2011. At his first deposition, he testified as follows regarding his back condition after he had treatment in 1996 and before the January 2007 work injury:

Q: So when is the next time, then, you had any kind of problems with your back?

A: Well, it was on 1-25-07.

Q: Just prior to that, let's say, in the week before that, how were you getting along with your back?

A: Same as the prior ten years.

Q: No problems?

A: No.

Q: No difficulty?

A: (Shakes head.)

Q: Any kind of residual pain when you got up in the morning or any kind of problems that you related to your back within the week prior to this?

A: No.

Q: What about medications? Were you taking any medications for your back?

A: No.

Q: Prior to 1-25-07, had you ever seen a chiropractor?

A: No. I've never seen a chiropractor.

In the second deposition, the claimant testified, prior to a break taken when he talked to his attorney as follows:

Q: Okay. Now, this is something that I think Mr. Bullock touched on when he deposed you before, but I just want to be sure that I understand clearly what your condition was leading up to your injury in January of 2007. Were you having any residual back pain or back problems that interfered with your ability to work at Bass Pro leading up to your 2007 injury?

A: I was having minimal pain.

Q: What sort of pain are we talking about? Where was it located?

A: Well, I had—I had almost no pain unless I—unless I—unless I made a wrong move or did something unusual. But on a – on a day-to-day basis I had none—I had no pain to—that I can recall.

Q: So you don't recall anything that interfered with your work? Caused you to miss work? Anything like that?

A: Nothing that caused me to miss work, you know.

After several other questions, claimant's counsel asked for a break. After the break, claimant asked to revisit the questions set forth above. He then stated:

A: Okay. I did misinterpret the question, I caught the last part, but I didn't catch the first part.

Q: Okay.

A: I answered no, that it didn't cause me to miss work. I missed the first part. My counsel—well I missed the first part about that it – causing it to alter my work.

Claimant was asked how his prior back pain caused him to alter his work. He then proceeded to describe, for the first time to anyone connected with this case, he had to make changes in how he performed his work prior to January 2007. He said that he would have to ride a golf cart instead of walking like he used to, he had trouble with travel, would go to the cafeteria at non peak times, would be careful about how he moved files, and would no longer get into

boats for inspections and avoided stairs. Claimant later testified however that between 1996 and 2007 he was “doing pretty well, because I really took care of it. I – I did all of those things that—that I needed to do. And unless I lost focus, I did pretty well, and I didn’t have a lot of pain.” Even this new testimony in the March 2, 2011 deposition is vastly different from claimant’s testimony at the hearing, where he testified he had to go home every night after work and lie down due to pain.

At hearing, claimant testified further that his employment life was affected by his back complaints. His duties required him to travel. Lifting luggage was one of the biggest issues. He would go ahead and deal with it when he could not totally avoid it, but tried to use others to do it when he could. He used the people movers instead of walking. At times he had difficulty keeping up with his boss and other colleagues when traveling. He also testified that at times he would use a golf cart in the warehouse, or headquarters, to get around. He, likewise, testified that part of his job included inspecting boats, and he was no longer able to get into the boats; and he modified his lifting at work by trying not to lift files, trying to keep the files small, and again using proper lifting techniques. Claimant testified that by doing these things he did not completely alleviate the pain, but it helped to keep the pain bearable. He testified that prior to 2007 he had no specific written restrictions by any doctor with respect to his low back.

Also at the hearing, the claimant testified he believes some of the sleep medication he was using masked the pain of the low back. He also testified he used over-the-counter medication for his low back complaints, as well as other complaints prior to January 2007. Employee also testified prior to 2007 he used a TENS unit, which was supplied to him by the Shealy Back Institute. He has no idea why he has failed to mention that he had used the TENS unit in any previous depositions, or why it is not noted in any expert’s or doctor’s records.

Finally, claimant testified that following the 1996 back event, and prior to the January 2007 event, he had to go home and lie down after work and on weekends.

Claimant testified at the hearing that he presently has an ache in his low back. He has trouble standing and sitting, but he can cope if he can move around. He has weakness and numbness in his lower extremity. His right leg is numb at all times. It scares him to drive.

He also testified that currently he gets up and has breakfast with his wife. He will go back to bed at 7:00 and get up again between 10:00 and 11:00 a.m. He said he approaches every day as a day of physical therapy. He testified he goes to the YMCA and swims. He tries to go to the Y seven days a week, but hopes for five. He testified he believes that the swimming helps with his symptoms. He also uses the whirlpool and gets massages, at times, and will do stretching.

On cross examination by the Second Injury Fund, claimant testified that in his job at Bass Pro, Inc. he worked 50+ hours a week; he was available 24 hours a day, 7 days a week. He said he would typically put in more than 50 hours a week in the office and he was also available for work purposes when he was at home. He told Mr. Swearingin, in his report, that during his employment at Bass Pro, Inc. he would stand and walk 0-2 hours a day for a total of 2-4 hours, and would sit 2-4 hours at any one time for a total of 4-6 hours during the day. He also admitted that he told Mr. Swearingin he lifted 10-20 pounds in his job.

Claimant testified he traveled a lot in his job, including air travel and car travel. He would sometimes have overnight air travel and rent a car and drive. He testified it was not unusual for him to drive over 100 miles a day, when he was traveling.

Claimant admitted on cross examination he told Mr. Lalk that his back did not cause him to miss any work, he was “super aggressive and a workaholic and did not let any pre-existing

back trouble slow him down". He said at hearing that he totally missed the point of how it altered his work until he was later pressed on this issue.

Claimant further testified at hearing that prior to 2007 he missed no time from work due to low back complaints, other than the time he was hospitalized in 1996. He testified he misunderstood questions posed to him in his depositions of December 2009 and March 2011, when asked about ongoing complaints and problems at work.

He further testified he only recalls seeing one doctor specifically for back complaints between the 1996 episode and 2007, and that was Dr. Lampert, who he saw in 2001. He testified his primary care physician, Dr. Bentley, knew about his back complaints and he discussed them with him occasionally; however, he never saw him specifically for back complaints during that time.

For the first time at hearing, he testified he used a TENS unit from the time he obtained it from the Shealy Back Institute in 1996-1997 through 2002. Claimant has no idea why he never mentioned that in any deposition or to any doctor or other expert testifying in this case.

Claimant testified at hearing that although he answered the question in his previous deposition that he was not taking any medication for his back, he was now testifying that when he was taking the sleep aide, Benzodiazepine, he believes it was masking his pain for his back. He does believe it was helping his back now; however, he admits he testified in the previous deposition that he was not taking medication for his back.

During cross examination, claimant admitted he told Dr. Rahman about his prior injections, when he saw him in February 2007, and that he told him that he did well following the injections.

Claimant also admitted he did not mention any accommodations at work in his December 2009 deposition or to Mr. Lalk when he saw him in February 2011. He, likewise, testified he

misinterpreted the question regarding any changes at work the first time it was asked in his March 2011 deposition. After a conference with his attorney he came back in and answered it more fully, including the fact that he was using a golf cart in the warehouse at Bass Pro, Inc., and did have continuing complaints and problems. Claimant testified, in fact, that they did not have the 1,000,000,000 square foot warehouse at Bass Pro, Inc. prior to 1996; therefore, the use of the golf cart was not something that changed after 1996, but just something he did routinely once he began working at the warehouse. He testified the golf carts were available to anyone who needed to get around the warehouse quickly.

Claimant testified he typically uses a cane, but he did not bring it to the hearing. In his deposition of March 2, 2011, he testified that he did not use the cane before January 2007. He said that no doctor had prescribed it, his wife had just picked it up at a garage sale.

Claimant testified that while he was not lying down during the day at work before January 2007, he would lie down once he got home from work and on weekends, in part due to back pain. He also admitted he did not testify to lying down because of back pain prior to January 2007 in either of his depositions, again because he misunderstood the questions.

Claimant testified his headaches, which were once his primary problem, have almost resolved due to a 21 month taper off of Benzodiazepine. He testified his headaches did increase after the January 2007 injury.

Claimant also testified at the hearing that while he has concentration problems now he also had them prior to January 2007, although he admitted his job required him to make a lot of important decisions, to read records, and stay current on law, and that he never had disciplinary action or any problems performing the mental aspects of his job prior to January 2007.

Dr. Ted Lennard treated the claimant beginning in July 2007. He continued to follow him through his treatment and work conditioning program. An FCE placed the claimant at a

sedentary to light work capacity. The claimant was initially placed on maximum medical improvement on April 29, 2009. On May 12, 2009, Dr. Lennard rated the claimant with a permanent partial disability of 30% of the body as a whole, of this 20% he attributed to his work related injury of January 2007 and 10% to his non-work-related degenerative changes. Dr. Lennard imposed restrictions of 20 pounds lifting and occasional bending. He encouraged the claimant to continue his home exercise program and Lyrica for the next 12 months. He found no further treatment was necessary.

Dr. Lennard reviewed records in August 2009 regarding a question about a low pressure headache as the etiology of claimant's headaches and a request for an MRI of the head. Dr. Lennard stated that he was unable to state within a reasonable degree of medical certainty that the need for a headache evaluation, including an MRI, is related to his work injury or subsequent procedures.

Dr. Lennard again saw the claimant on February 9, 2010, for a follow up visit. The claimant was complaining of low back pain, soreness at the surgical site, numbness in his legs, and pulsating pressure in his head and neck after sitting for long periods of time. The claimant was unhappy that he had been told his neck pain was unrelated to his work injury and was also displeased with his two prior physical therapists. Dr. Lennard recommended a change in the rehabilitation providers and was going to discuss it with Dr. Rahman.

Dr. Thomas Corsolini treated claimant for his work injury. He saw him on March 9, 2010, at the request of the insurance company for purposes of evaluation and treatment management. He testified by deposition. Dr. Corsolini took a history of the January 2007 injury and claimant's subsequent surgeries. Dr. Corsolini recommended further physical therapy. Claimant reported to him that the physical therapy was helping, particularly the pool therapy.

On July 2, 2010, he performed a physical examination. Dr. Corsolini testified that the claimant was able to walk well without his cane, showed no indication of impaired balance, straight leg raise test did not produce any complaint of discomfort, his hip range of motion was normal with some minor low back pain reported with full external rotation. He could extend his lumbar spine about 20 degrees and flex to 60 degrees. Claimant could perform a squat, independently holding onto the countertop and had a normal amount of trunk rotation.

Dr. Corsolini found claimant to be at maximum medical improvement. He imposed restrictions of not lift or carry more than 20 pounds on an occasional basis and bending occasionally. He did not place any specific restriction on standing, walking, or sitting. He also recommended continued medications and exercises.

Dr. Corsolini rated claimant with a 35% permanent partial impairment to the body as a whole disability due to the January 2007 injury and a 10% permanent partial impairment to the body as a whole disability due to the pre-existing back problems. Dr. Corsolini did not believe claimant's pre-existing back condition was a hindrance or obstacle to his employment. When asked if the claimant's prior back condition combined with the January 2007 injury, Dr. Corsolini testified, "Well, they were simply extended versions of what I think was most likely present before 2007. In other words, they became symptomatic to the point he had surgery performed." Dr. Corsolini did not think his preexisting condition and his work injury combined to create any greater disability than the simple sum.

Dr. Chris Weber performed an Independent Medical Examination on April 13, 2010, for purposes of a claim for disability insurance. He stated that the purpose of the evaluation was not for diagnosis and treatment but "to review his prior care and his function, activities, limitations, work, former physical examinations and determine his abilities and lack thereof.

Dr. Weber's report states that the claimant reports that he can sit only a few minutes at a time, manage 15 minutes on a computer, and twenty minutes reading a book. Although the records suggest he stand no more than 30 minutes, the claimant reported at times he can only stand two to three minutes. He awakes without a headache but one develops over the course of a day. He drives infrequently and uses back roads.

Dr. Weber reviewed a surveillance video that showed the claimant sitting for 43 minutes eating a meal and an additional 54 minutes visiting with a friend, and driving in normal city traffic. Claimant also told him he can do some but not all of his taxes and some simple investing on his own. The claimant denied any significant interval of back pain after participating in the pain program at Shealy Center in the 1990's.

Dr. Weber imposed restrictions of not lifting more than 20 pounds infrequently, frequently lift 5-10 pounds and not do frequent stooping, squatting, crawling, or repeated bending below the knees. No pushing or pulling over 20 pounds. Could do some bending and twisting. He could tolerate sedentary activities for up to two hours at a time with a 15 minute break in a four-hour workday. If he worked over four hours he would need to recline. Not stand more than 10 minutes at a time, no more than a dozen times a day, and would be able to walk in and out of a workplace less than 100 yards a couple times a day. He can go up and down several flights of steps but not be expected to do so regularly. His mental function may be somewhat impaired and related to his medications or a mood disorder. He is able to drive.

Dr. Weber stated in his report, "It is unlikely that he would return to his old job or work in a similar competitive executive environment. He should be able to do some phone work, reading, writing, computing, answer calls, help with personal management, investment decisions, and manage his home."

Dr. David Volarich evaluated the claimant for purposes of an Independent Medical Examination on November 11, 2010, at the request of claimant's attorney. He also testified by deposition. Dr. Volarich had a history of claimant's prior back condition that arose in 1996 and the work injury of January 25, 2007. Claimant's complaints were low back pain, but no longer radiating if he overdoes it, he is very careful to avoid anything that would aggravate his back. Claimant told Dr. Volarich that he had an extremely hard time maintaining a fixed position either sitting or standing and after a few minutes felt like he was going to collapse. The heaviest thing he lifted was a gallon of milk, he tries to not bend, twist, push or pull. He uses a cane and his symptoms seem to progress as the day goes on.

When asked about difficulties before January 25, 2007, the claimant reported to Dr. Volarich that he could not recall any ongoing difficulties. Dr. Volarich notes that medical records show treatment for low back pain in 2001, but no treatment between 2001 and January 25, 2007. Claimant told Dr. Volarich that he could not recall any treatment. He also told him that he avoided impact activities and had been treated in the past at Shealy Institute with alternative medicine.

Dr. Volarich opined that the claimant was at maximum medical improvement for the work accident of January 27, 2007. He rated claimant with a permanent partial disability of 65% of the body as a whole related to his work injury, 20% permanent partial disability to the body as a whole related to his prior back condition, and stated disability exists as a result of claimant's psychiatric disorders, but Dr. Volarich deferred that assessment to a psychiatric evaluation. Dr. Volarich also found that the combination of his disabilities created a substantially greater disability than the simple sum and that a loading factor should be added.

Dr. Volarich opined that the claimant was unable to engage in any substantial gainful activity and it was his opinion that the claimant was permanently and totally disabled due to a

combination of the January 2007 work injury, his preexisting lumbar syndrome and psychiatric disorders.

Dr. Volarich imposed restrictions of avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing; not handle any weight over 20 pounds occasionally; not handle weight over his head or away from his body, nor carry weight over long distances or uneven terrain; avoid remaining in a fixed position for more than 30 minutes, including both sitting and standing; change position frequently, including lying down; and pursue appropriate stretching, exercise, and aerobic programs.

The claimant saw Wilbur Swearingin, a certified vocational rehabilitation counselor, on July 6, 2011, at the request of the employer. He also testified by deposition. Mr. Swearingin interviewed the claimant, reviewed medical records and depositions. Mr. Swearingin concluded that claimant had a hindrance or obstacle to his employment prior to his work injury in January 2007 and as a result of the work injury and his pre-existing disabilities, claimant is permanently and totally disabled.

Mr. Swearingin testified the claimant told him in his job at Bass Pro he worked 50+ hours a week, would stand 0-2 hours at a time for a total of 2-4 hours a day, would sit 2-4 hours at a time for a total of 4-6 hours in a work day and would lift anywhere from 10-20 pounds. He also testified claimant's Functional Capacity Checklist indicated that since the injury in January 2007 his ability to lift has been significantly impaired, to the extent that it is now "very difficult" to "impossible" or causes "great pain" to do.

Mr. Swearingin testified that someone who is only able to stand two to three minutes at a time and has to lie down during the day is permanently and totally disabled based on those conditions alone. On the Back Function Questionnaire that claimant completed at Mr. Swearingin's request, Employee stated as of July 2011, when he filled it out, he could sit less

than 30 minutes, walk for less than 20 minutes and sit for 2-4 hours. Mr. Swearingin admitted these capabilities were less than what the claimant was doing while employed for Bass Pro.

Mr. Swearingin acknowledged that prior to the work injury in January 2007 the claimant had no restrictions placed on him by any medical provider. He also testified that he believes claimant currently cannot return to his job at Bass Pro because his sitting and mobility are restrictions and his medications would play a role in his ability to do his job. Mr. Swearingin testified if claimant were capable of doing the activities as described by Dr. Weber, he might be employable on a part-time, homebound basis. Mr. Swearingin specifically testified that claimant has a lot of skills but is “unable to physically perform the work activities as expected in the open labor market, quality and quantitative expectations of an employer, eight hours a day, five days a week.”

The claimant saw Tim Lalk, a certified vocational rehabilitation counselor, on February 25, 2011. Mr. Lalk, saw claimant at the request of his attorney and testified by deposition.

Mr. Lalk interviewed the claimant and reviewed medical records. Mr. Lalk testified that prior to the January 2007 injury claimant had a hindrance or obstacle to his employment that limited his ability to work to no more than the sedentary level, and that in even many sedentary jobs he would need assistance. He also testified that claimant is permanently and totally disabled, however he deferred to the doctors on the cause.

Mr. Lalk testified that claimant told him he had worked at Bass Pro for 17 ½ years, that he made a lot of decisions regarding financial issues, insurance issues and claims being made against Bass Pro. Claimant also told him in his job he spent a lot of time on the phone, at times had to drive several hundred miles a day, at times did a lot of standing or walking and at times did a lot of extended sitting. Mr. Lalk understood claimant was on call 24 hours a day 7 days a week. Mr. Lalk understood that claimant left his employment with Bass Pro in November 2007,

prior to any of the three surgeries necessitated by the work injury, and that no matter what his recovery from those surgeries would have been, he could not have returned to his job, because he had already retired.

When Mr. Lalk saw the claimant, he reported to him that he was “super aggressive” and was a “workaholic” and didn’t let his back condition slow him down in the area of work. Mr. Lalk saw nothing that contradicted this statement by claimant in his deposition of December 2009, the only deposition Mr. Lalk had at the time he reached his opinions in this case. The March 2011 deposition was shown to him during his deposition.

Mr. Lalk understood prior to the January 2007 injury claimant had no restrictions placed on him for his back. He was also told by claimant that prior to the January 2007 injury his sleep apnea did not cause him any problems, including during the day. Mr. Lalk did not consider either claimant’s hypertension or his sleep apnea in reaching his opinions.

Claimant told Mr. Lalk he can stand for 10 to 15 minutes then he needs to sit down. He can stand or walk about 15-20 minutes and if he sits too long he has to lie down. Claimant told Mr. Lalk he lies down every day currently and the most he can lift is a gallon of milk. Mr. Lalk admitted, according the claimant’s description of his job at Bass Pro, there were times he was in a captive seated position while driving and times when he was standing and walking a lot. In the interview Mr. Lalk had with claimant, he told him of no specific difficulties he was having at work sitting and standing before 2007.

When the claimant saw Mr. Lalk, his primary problem was headaches, something which he did not have prior to the January 2007 injury. Mr. Lalk testified that prior to the January 2007 injury he had no information that claimant had any difficulty concentrating or being in noisy environments. Claimant did not tell Mr. Lalk he had to lie down during the day prior to the January 2007 injury.

Mr. Lalk testified that if he considered the headaches, the concentration problems and the need claimant had to lie down during the day, claimant is unemployable in the open labor market based on those factors alone. He also testified that just looking at claimant's back symptoms alone claimant is unemployable. Mr. Lalk testified that if he looked at the restrictions given by Dr. Volarich, Dr. Corsolini, and Dr. Weber, given the claimant's background he would be employable, rather it was what the claimant described of his symptoms and the need to lie down that made him unemployable. He explained, "Those restrictions provide some leeway for some individuals to work. But again the main concern was his ability to be up and active. Up meaning not lying down during the day."

After carefully considering all of the evidence, I make the following rulings:

1. The nature and extent of permanent disabilities.

Section 287.220.1 RSMo states that when an employee has a preexisting permanent partial disability sufficient to constitute a hindrance or obstacle to employment and subsequently sustains a compensable work injury resulting in additional disability, and these disabilities combine to create an additional permanent disability, the employer, at the time of the last injury, shall be responsible only for the degree or percentage of disability resulting from the last injury. After the disability from the last injury, standing alone, has been determined, the degree of disability attributable to all the injuries sustained is determined. The degree of disability from the last injury is deducted and the Second Injury Fund is liable for the balance. If the last injury, combined with prior injuries or disabilities, results in the claimant being unable to compete in the open labor market, and is thus permanently and totally disabled, the minimum standards for disability do not apply. If the claimant is found to be permanently and totally disabled, the Second Injury Fund is liable for benefits after the completion of payment by the employer for the disability due to the last injury.

Claimant is a very well educated and sophisticated individual with 17 years experience and expertise in the area of workers' compensation. I find it incredulous his claim that he did not understand the questions as they were posed in his first deposition and then in the second deposition before the break in which he had a discussion with his attorney and suddenly understood what he was being asked. I also note that his first deposition testimony is also consistent with medical history to Dr. Volarich in November 2010. At the hearing, and after settling his claim against the employer, his testimony progressively portrayed a greater degree of problems attributable to his condition before the last accident. For these reasons I do not find claimant credible. I am particularly skeptical of his testimony at the hearing.

I find the claimant's earlier testimony, particularly in the first deposition taken in December 2009, more credible than his testimony at the hearing. I give significantly more weight to his testimony in December 2009 than any later version he provides.

I find, based on his testimony in December 2009, that his back condition did not interfere with his daily activities to any significant degree. The problems he is currently having, and the restrictions that have been imposed that interfere with his ability to work, arose from the last injury alone.

2. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

Claimant is permanently and totally disabled due to the last injury alone. Therefore, I find that the Second Injury Fund has no liability.

Made by: /s/ Margaret Ellis Holden

Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation

