

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

Injury No. 09-019616

Employee: Kent Buerk
Employer: King Glass Distributors, Inc.
a/k/a King Auto Glass
Insurer: National Union Fire Insurance Company of Pittsburgh
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 4, 2014. The award and decision of Administrative Law Judge Edwin J. Kohner, issued November 4, 2014, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 11th day of June 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Kent Buerk Injury No.: 09-019616
Dependents: N/A Before the
Employer: King Glass Distributors, Inc. a/k/a King Auto Glass **Division of Workers' Compensation**
Additional Party: Second Injury Fund Department of Labor and Industrial Relations of Missouri
Insurer: National Union Fire Insurance Company of Pittsburgh Jefferson City, Missouri
Hearing Date: September 8, 2014 Checked by: EJK/lsn

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: February 13, 2009
5. State location where accident occurred or occupational disease was contracted: Franklin 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:
The claimant suffered neck and back injuries while carrying a 65 pound windshield across a muddy surface.
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: Neck, back
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: \$27,528.79
16. Value necessary medical aid paid to date by employer/insurer: \$203,936.88

- 17. Value necessary medical aid not furnished by employer/insurer? \$12,139.63
- 18. Employee's average weekly wages: \$663.105
- 19. Weekly compensation rate: \$442.07/\$404.66
- 20. Method wages computation: Average of four weeks without absences during the 13 weeks before the accident

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

| | |
|---|---------------|
| Unpaid medical expenses: | \$12,139.63 |
| 82 weeks of temporary total disability (with credit for \$27,528.79 previously paid) \$ | 8,720.95 |
| 2 weeks of disfigurement from Employer | \$ 809.32 |
| Permanent total disability benefits from Employer beginning November 30, 2010, \$442.07 per week for Claimant's lifetime | Indeterminate |

- 22. Second Injury Fund liability: No

TOTAL: Indeterminate

- 23. Future requirements awarded: See Additional Findings of Fact and Rulings of Law

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: Ronald D. Edelman, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

| | | | |
|-------------------|---|------------------------------------|-----------|
| Employee: | Kent Buerk | Injury No.: | 09-019616 |
| Dependents: | N/A | Before the | |
| Employer: | King Glass Distributors, Inc. a/k/a King Auto Glass | Division of Workers' | |
| Additional Party: | Second Injury Fund | Compensation | |
| Insurer: | National Union Fire Insurance Company of Pittsburgh | Department of Labor and Industrial | |
| | | Relations of Missouri | |
| | | Jefferson City, Missouri | |
| | | Checked by: | EJK/lsn |

This workers' compensation case raises several issues arising out of a work-related injury in which the claimant, an automotive glass replacement technician, suffered neck and back injuries while carrying a 65 pound windshield across a muddy surface. The issues for determination are (1) Liability for Past Medical Expenses, (2) Future medical care, (3) Rate, (4) Temporary Disability, (5) Permanent disability and disfigurement, and (9) Second Injury Fund liability. The evidence compels an award for the claimant for medical expenses, future medical care, temporary total disability benefits, and permanent total disability benefits.

At the hearing, the claimant testified in person and offered a deposition of Robert P. Poetz, M.D., Gary Weimholt, a vocational counselor, and the claimant, various correspondence from the claimant's attorney, medical bills, a medical bill summary, a trial stipulation, employee wage and attendance records, and voluminous medical records. The defense offered depositions of James M. England, a vocational counselor and James J. Coyle, M.D.

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 February 13, 2009, this now 43 year-old claimant, an automotive glass replacement technician, suffered neck and back injuries while carrying a 65 pound windshield across a muddy surface. The injury occurred as the claimant attempted to install a windshield at a muddy site. He slipped and twisted his back resulting in immediate neck and back pain. He finished the installation and reported the incident by phone to his employer who suggested he go to a chiropractor. See claimant deposition, pages 46-48. He went to Dr. Anderson, who provided chiropractic treatment for the condition. He testified that the chiropractor told him it was more serious than he could take care of and he should consult a back specialist. The claimant paid the chiropractor and told his employer that he needed to see a specialist. On March 24, 2009, the claimant's employer referred the claimant to Dr. Lamble at Mercy Clinic. See claimant deposition, page 50 and Exhibit 24. On March 24, 2009, Dr. Lamble examined the claimant, recommended an MRI, and took him off work. See Exhibit 7. The claimant testified that

between February 13, 2009 and March 24, 2009 he did not work or receive a salary or temporary total disability benefits and testified that he could not work during this period. After the MRI, the claimant went to Dr. Coyle on April 22, 2009, who took a medical history of the February 2009 work-related injury and a history of prior lumbar surgeries in 2007. He noted the claimant's complaints of neck pain, bilateral upper extremity pain and tingling as well as pain in the lumbar spine and posterior thigh pain. He noted a disc protrusion at C5-6. He recommended further conservative treatment and epidural steroid injection. He limited the claimant to 20 pounds lifting. Dr. Coyle opined that the February 2009 work-related injury was the prevailing cause of the claimant's current condition and need for treatment. See Exhibit 8.

Dr. Coyle provided medical care for the claimant's condition from April 22, 2009, through November 30, 2010 at which point Dr. Coyle opined that the claimant was at maximum medical improvement. See Exhibit 8. The parties stipulated the claimant attained at maximum medical improvement on November 30, 2010. During this period he was not released to unrestricted work and no work within the varied limitations was offered by Employer. See Exhibit 28.

On April 29, 2009, Dr. Gregory Smith performed a right C6 selective nerve root injection under fluoroscopy and diagnosed C5-6 disc herniation with right cervical radicular pain overlapping C6 pattern. See Exhibit 9.

Dr. Coyle referred the claimant to Dr. Doll, an orthopedist, for management of conservative treatment and injections. Dr. Doll provided medications, exercise programs, and therapy from May through August 2009. See Exhibit 10. On June 4, 2009, a lumbar spine MRI of the lumbar spine revealed a central annular tear at L4-5 with a broad based disc bulge and facet degenerative changes resulting in mild to moderate neuroforaminal encroachment without central canal compromise and a lateralized disc herniation at L5-S1 resulting in severe right neuroforaminal encroachment and degenerative changes resulting in moderate to moderately severe left neuroforaminal encroachment without central canal compromise. See Exhibit 11. On September 29, 2009, Dr. Coyle examined the claimant and recommended cervical spine surgery, because conservative treatment had not relieved the claimant's cervical spine problems and radiculopathy. See Exhibit 8.

On October 20, 2009, Dr. Coyle performed an anterior cervical discectomy and arthrodesis at C5-6 with Synthes machined allograft spacer, infuse bone morphogenic protein & Slim-Loc anterior cervical plate for a C5-6 cervical disk prolapse with cervicgia and right upper extremity radiculopathy. See Exhibits 8, 14. On November 9, 2009, Dr. Coyle examined the claimant, prescribed medication, and directed him to return in a month. See Exhibit 8.

On December 8, 2009, Dr. Coyle examined the claimant and reviewed the claimant's history of prior low back surgeries and the onset of new back symptoms after the accident. He interpreted the June 5, 2009, lumbar spine MRI to reveal a recurrent herniation of L5-S1 right and annular tear and disc prolapse at L4-5. Dr. Coyle recommended a new MRI. On December 16, 2009, Dr. Coyle reviewed the additional diagnostic study and opined that the claimant had pre-existing degenerative lumbar spine changes and pre-existing post-surgical changes. He opined that the February 13, 2009, work injury was the prevailing factor causing the claimant's current symptoms which were related to the recurrent herniation at L5-S1. Dr. Coyle also opined

that if the claimant had surgery, he would need a lumbar fusion because he had already had two prior surgeries at L5-S1 and because of the problems at L4-5 this would need to be incorporated. He referred claimant to Dr. Doll for consideration of epidural steroid injections and physical therapy. He noted the claimant was off work due to his cervical spine. See Exhibit 8.

On January 6, 2010, Dr. Doll conducted an extensive physical evaluation and review of diagnostic studies relating to the claimant's low back and found:

Complaints are low back pain with radiation down the right leg to his heel, occasional left leg symptoms. Right foot feels tingly. Difficulty w/ ROM of his low back. Taking Tylenol extra strength 4 X day. Has used Cyclobenzaprine to help with sleep. Lumbar MRI study with & without contrast done 12/8/2009 showed post-operative changes on right at L5-S1. Spondylosis, post-operative scarring & a small right paracentral disc protrusion identified at L5-S1. Posterior disc bulging with posterior high intensity zone at L4-5 noted. PE. Moderate restriction in lumbar spine FOM as he moves in a slow & guarded fashion. SLR positive on right, negative left. Patrick's test negative bilaterally. Passive trunk rotation negative bilaterally Full strength in lower extremities with no focal sensory deficits. DTR's intact & symmetric. IMPRESSION: 1. Persistent low back pain with lower extremity pain & paresthesia. 2. Lumbar disc herniation at L5-S1. 3. History of lumbar discectomy in 2007. PLAN: Meds discussed & offered. PT 2 X week for lumbar spine only. Home exercise program suggested & therapist to be notified of cervical condition. Work restrictions are no lifting over 20 lbs. & avoid repetitive bending, twisting & squatting. See Exhibit 10.

The claimant began a ten-week course of physical therapy that continued from January 8, 2010, through February 2, 2010. See Exhibit 15.

On January 13, 2010, Dr. Doll administered a right transforaminal injection under fluoroscopy. On January 20, 2010, Dr. Doll reported that after the right L5-S1 transforaminal injection under fluoroscopic guidance, the claimant had improvement for 2-3 days. He noted improvement in his right posterolateral thigh and left posterolateral thigh with reduction in the intensity of symptoms. However, the claimant's condition returned to its baseline, and the claimant reported pain extending down the right leg through the posterior calf to his heel with tingling in his feet and achiness and soreness in his low back. The physical examination remained unchanged. Dr. Doll recommended a right S1 selective nerve root injection under fluoroscopy for additional diagnostic & therapeutic purposes. On January 27, 2010, Dr. Doll performed a right selective nerve root injection under fluoroscopic guidance. See Exhibit 10. On February 4, 2010, Dr. Doll reported to Dr. Coyle the following observations after right S1 selective nerve root injection:

Patient reports no improvement. A trial of Lyrica resulted in no improvement. Patient continues to have significant low back pain with radiation into the lower extremities right greater than left. The patient reports no improvement with physical therapy. Dr. Doll's impression is 1. Persistent low back pain with lower extremity pain and paresthesia. 2. Lumbar disc herniation at L5-S1. 3. History of lumbar discectomy in 2007. Dr. Doll's treatment plan indicates that having

attempted physical therapy, restrictions, medications and spinal injections and considering the lack of response he doubts significant improvement will result from conservative treatments. The patient may benefit from surgical intervention and should be reassessed by Dr. Coyle. See Exhibit 10.

On January 20, 2010, Dr. Coyle noted progress with regard to the cervical spine but observed that the claimant had discomfort extending his arms for an extended time when driving. Dr. Coyle restricted the claimant from overhead work or lifting over twenty pounds. See Exhibit 8. On February 17, 2010, Dr. Coyle examined the claimant and reported that the cervical spine fusion looked solid. On the lumbar spine, Dr. Coyle opined that the claimant would require a two level decompression at L4-5 and L5-S1 and recommended a posterolateral fusion using iliac crest bone graft using anterior interbody arthrodesis with machined allograft spacers, infuse bone morphogenic protein, and anterior band plating. He recommended no lifting over 20 pounds and no repetitive bending over 40 degrees in reference to the lumbar spine. On March 25, 2010, Dr. Coyle reported that the claimant was scheduled for lumbar spine surgery and thought he was doing well with his cervical spine taking over-the-counter medications and no narcotics. He suggested no cervical spine restrictions and lumbar restrictions of no lifting over 10 pounds and no repetitive bending over 30 degrees. See Exhibit 8.

On April 11, 2010, Dr. Coyle performed the following lumbar surgical procedures: (1) Revision decompression to L4-5, L5-S1, posterolateral arthrodesis L4 through S-1 with autologous left iliac crest bone graft, placement of an epidural catheter; (2) Anterior lumbar interbody fusion arthrodesis L4-5, L5-S1 with Synthes machined allograft spacers, Infuse bone morphogenic protein, Synthes anterior tension band plate. See Exhibit 17.

Dr. Coyle followed the claimant post-operatively through July 2010. On June 21, 2010, he recommended therapy and the claimant gradually increased his physical limits at each visit. On July 26, 2010, the claimant reported some return of his posterior neck pain, and Dr. Coyle recommended therapy for that as well as the lumbar spine. On August 24, 2010, the claimant reported intermittent pain in his right lower extremity. Dr. Coyle recommended transition to conditioning in therapy. On September 21, 2010, the claimant had a good physical exam but reported intermittent back pain. Dr. Coyle opined that the claimant could work observing "normal safety precautions". On October 27, 2010, Dr. Coyle noted that the claimant was complaining about low back pain, but the employer had not provided him with work. Dr. Coyle offered no specific work restrictions but suggested normal safety precautions with bending, twisting and lifting. X-rays showed a mature solid fusion. Dr. Coyle anticipated maximum medical improvement at the next visit.

On November 30, 2010, Dr. Coyle examined the claimant for the last time and opined that the claimant could flex about 70 degrees but complained of intermittent posterior thigh pain and low back stiffness. Dr. Coyle reported a negative SLR test bilaterally and intact motor strength and sensation in the lower extremities. Prior x-rays had shown a solid fusion. He was not working, because his employer had told him they had no work available. Dr. Coyle ordered an FCE and opined that the claimant was at maximum medical improvement from both his cervical and lumbar injuries. See Exhibit 8. The claimant performed the FCE on December 7, 2009, but it was not offered into evidence.

On April 26, 2011, Dr. Coyle opined that the claimant suffered a 15% permanent partial disability of the cervical spine and a 25% permanent partial disability of the lumbar spine exclusively from this occurrence in addition to his pre-existing low back condition. See Exhibit 8.

Medical treatment after release by Dr. Coyle

On October 9, 2012, the claimant went to Dr. Tieffenbrunn for neck and back pain which by his history was due to the work accident and also reported right knee pain. On January 27, 2013, Dr. Tieffenbrunn prescribed medication. The claimant reported intermittent tingling in the hands and in the left leg. See Exhibit 18.

On December 19, 2012, Dr. Jamie Haas, a neurologist, examined the claimant for neck and back pain. The claimant complained of pain and tightness in the neck and headaches with recurrent numbness and pain down the right arm worse with any lifting with the right arm. He complained his joints seemed sore. He had pain radiating down the back of both legs and into his feet worse on the left. He had trouble sleeping with the pain and states he has severe pain down his right arm at night and neck and back stiffness. Dr. Haas opined that he may need to revisit the surgeon or try pain management for injections. On January 8, 2013, cervical and lumbar spine MRI's ordered by Dr. Haas revealed (1) status post discectomy and anterior fusion at C5-6, (2) mild central canal stenosis at C4-5 and C5-6, (3) mild/moderate bilateral foraminal stenosis at C5-6, and (4) mildly prominent uvula. See Exhibit 19.

On January 23, 2013, about two years after Dr. Coyle's last evaluation of the claimant, the claimant requested additional medical treatment for chronic pain therapy noting that the claimant had sought treatment and wished to continue treatment with Dr. Tieffenbrunn for pain medication, Dr. Moore for pain therapy injections, and Dr. Haas, a neurologist. See Exhibits 25, 28. No treatment was tendered by the defense. The claimant testified that the employer/insurer had not provided any medical treatment or payment for medications since his release by Dr. Coyle on November 30, 2010.

On February 5, 2013, Dr. Moore, a pain management specialist, evaluated the claimant and recommended a Medrol dose pack and Lyrica in addition to the claimant's current medications. He discussed a cervical ESI and a spinal cord simulator trial. On February 17, 2013, Dr. Moore examined the claimant and diagnosed cervical radiculopathy, degeneration of cervical intervertebral disc, cervicgia, peripheral neuropathy, lumbar radiculopathy, and lumbar post-laminectomy syndrome. Dr. Moore reported that the Medrol dose pack did not improve his pain. Therefore, he offered the patient L5-S1 transforaminal epidural steroid injections, and he prescribed Flexeril for neck pain. See Exhibit 20.

Pre-existing Conditions

On June 30, 1992, the claimant suffered a work-related injury when he fell 20 feet off a ladder injuring his back, hip, knee and neck and experienced severe pain. See Exhibit 1. A medical record in the Division's file from Barnes Care dated July 21, 1992 documents claimant was suffering from neck pain, mid and lower back pain and possible nerve root irritation. See Exhibit 1.

On June 19, 2007, Dr. Robert Heim performed two lumbar spine surgeries. See Exhibit 5. A July 31, 2007, MRI documented a large extruded disc at L5-S1 lateralizing to the right with mass effect on the right S1 nerve root, degenerative findings, and an annular tear and disc bulge at L4-5. See Exhibit 5. In light of that MRI finding, Dr. Dooley examined the claimant August 15, 2007, for radicular symptoms in the right leg and reported that the claimant "has had episodes of low back pain on and off for some time which has been relieved by chiropractic care." See Exhibit 5. Dr. Dooley reported that the claimant's symptoms began in mid-June without any participating cause and that the claimant "has not had any injuries. The pain was been constant and unremitting. He has had an MRI which was interpreted as showing a large L5-S1 herniated disc on the right" See Exhibit 5. Dr. Dooley also reported that the claimant "has had some neck pain in the past and sought chiropractic care for that and has been told that x-rays showed some loss of lordotic curve." See Exhibit 5.

On August 15, 2007, Dr. Heim examined the claimant for an onset of low back pain two months earlier while performing work duties as an auto glass repairman. The claimant apparently advised Dr. Heim that he could not relate his symptoms to a specific inciting event but that they developed while he was at work. The claimant reported prior episodes of low back pain which was treated with chiropractic care. Dr. Heim opined that straight leg raising was positive for right leg radicular symptoms. He reviewed the MRI and opined that it was indicative of disc desiccation at L4-5 and L5-S1 with an annular bulge and annular tear at L4-5 and a large right-sided disc herniation at L5-S1. On September 4, 2007, Dr. Heim performed a right L5-S1 microdiscectomy. The indications for surgery were listed as right lower extremity pain and paresthesia and a right L5-S1 herniated nucleus pulposus. Intraoperatively, Dr. Heim did in fact find a moderate size disc herniation "causing considerable ventral compression on the nerve root." See Exhibit 5. The pre-operative diagnoses was right L5-S1 herniated nucleus pulposus. Dr. Heim described a procedure wherein he removed the herniated disc. On September 14, 2007, Dr. Heim examined the claimant and reported that initially the claimant had no pain after surgery, but subsequently pain was developing in his right buttocks and radiating into his right thigh and calf. On October 24, 2007, an MRI and revealed: (1) An annular tear and disc bulge at L4-5 but no evidence of herniation, (2) Post-operative changes at L5-S1 with impression upon the dura lying near the right S1 nerve root, and (3) a recurrent disc herniation was suspected.

On November 12, 2007, Dr. Heim performed a second lumbar spine surgery, a right L5-S1 microdiscectomy with a pre-operative diagnosis was listed as recurrent right L5-S1 herniation nucleus pulposus. On January 4, 2008, Dr. Heim examined the claimant and noted that the claimant had improvement in his right lower extremity pain. However, he was still having intermittent right posterior thigh pain which required medication to control the symptoms.

Physical therapy was prescribed and Dr. Heim anticipated the need for a functional capacity evaluation to determine whether claimant might be able to return to his former occupation. On February 19, 2008, the claimant underwent a functional capacity evaluation and demonstrated the ability to perform in the heavy work demand category, however, it was noted that claimant reported stabbing pain and pin and needles in his right posterior thigh prior to the FCE. He estimated the level of pain at 3 to 4 out of 10. During the FCE, claimant reported that his pain ranged up to a 6 out of 10 and that following the test he described a stabbing and burning pain in the right posterior thigh that radiated 6 out of 10.

On February 27, 2008, Dr. Heim reviewed the FCE, opined that the claimant was at maximum medical improvement, and could resume his work activities. He reported that the claimant had “persistent right lower extremity radiculopathy which will likely continue to a nagging factor in the future.” See Exhibit 5. Dr. Heim noted that the claimant was using medication to control his symptoms and rated the claimant with a 15% permanent partial disability “based on his persistent right lower extremity radicular symptoms.” Dr. Heim assigned permanent restrictions for claimant to refrain from “no highly repetitive bending, stooping or twisting and to refrain from lifting more than 70 pounds.” See Exhibit 5, February 27, 2008 “summary report”. On May 28, 2008, the claimant settled his workers’ compensation case based on a 15% permanent partial disability to the low back.

Robert P. Poetz, D.O.

On March 8, 2011, Dr. Poetz examined the claimant, took a medical history, and reviewed the claimant’s medical records. Dr. Poetz described the patient’s chief complaints as follows:

Since I fell, I have pain along my mid back which wraps around both sides of my ribs. The pain is along each side of the spine, and then it turns into tightness as it wraps around my sides. The muscles in my neck tighten up more so on the right and I get excruciating headaches. There’s usually two days a week that my head throbs where I have to be in the dark and keep the curtains closed. I had headaches before surgery, and then they gradually returned after surgery. The headaches form by getting a huge knot at the base of my head and around my right ear. I usually wake up with a headache in the middle of the night and they can last 24 to 36 hours. My lower back also still hurts and I have pain down my legs. Ninety percent of the time the pain occurs on my right side. It will travel to the back of my thigh, skip my calf, and then go into my foot. I have numbness and tingling in the bottom of the foot since the day I had an epidural. I have no feeling to light touch at the bottom of my foot. I don’t pick up much weight. I have lots of pain in my right shoulder and biceps. My right hand locks up out of nowhere and is painful. Sometimes I drop things when the locking occurs. Sleeping is miserable. I toss and turn all night. I’m irritable and tired of hurting and sitting at home. I can’t travel or take many vacations. My pain increases with standing, walking, sitting, and dreary weather. See Dr. Poetz deposition, pages 18-19.

Dr. Poetz testified that both the cervical fusion and the lumbar fusion performed by Dr. Coyle resulted in the implanting of prosthetic devices in the spine. See Dr. Poetz deposition, pages 26-27, 30. Dr. Poetz testified that fusion results in greater stress on adjacent levels of the spine and may result in additional damage to the spine at adjacent levels. See Dr. Poetz deposition, page 31. Dr. Poetz testified that fusion hardware sometimes begins to deteriorate or screws begin to back up and it is not unusual for those things to be revised. See Dr. Poetz deposition, page 33. Dr. Poetz recommended that the claimant should have an evaluation by an orthopedic surgeon with imaging to review the status of his fusions at least every six months. See Dr. Poetz deposition, pages 32-33. He also recommended that a physician monitor and prescribe appropriate pain medication to relieve the claimant’s current pain condition, because

the claimant is consuming a toxic dose of over-the-counter medications. See Dr. Poetz deposition, page 35.

Dr. Poetz opined that the claimant suffered from the following disabilities from the 2009 work-related accident: (1) a 35% permanent partial disability of the cervical spine for the disc herniation, bilateral upper extremity radiculopathy and resulting discectomy and fusion at C5-6, (2) a 20% permanent partial disability at the thoracic spine, and (3) a 30% permanent partial disability at the lumbar spine, reference the 2/13/2009 injury and revision decompression at L4-5 and L5-S1 and fusion L4 through S1.

He also opined that the claimant suffered pre-existing disabilities: (1) 5% permanent partial disability at the thoracic spine, and (2) 20% permanent partial disability at the lumbar spine for prior L5-S1 disc herniation and recurrent disc herniation and two micro-discectomies in 2007. He opined that the pre-existing disabilities and those resulting from the February 13, 2009 injury combined to give a greater overall disability than their simple sum by a factor of 20%. See Dr. Poetz deposition, pages 36-40. Dr. Poetz opined that the claimant is permanently and totally disabled due to the injuries of February 13, 2009, combined with his pre-existing conditions and disabilities. See Dr. Poetz deposition, Deposition Exhibit 2. In his deposition, Dr. Poetz opined that even excluding the pre-existing disabilities the claimant would be disabled as a result of the disability related to the accident of February 13, 2009, in and of itself. He testified that the work restrictions prescribed by Dr. Poetz would be the same if only considering disability and injury of February 13, 2009. Dr. Poetz testified that the claimant was performing his full duties at work and had no apparent limitations on his ability after the 2007 injury and before the 2009 injury. He opined that the claimant's chief complaints all arose after the February 13, 2009, injury. Dr. Poetz testified that the claimant's complaints prior to the February 13, 2009, injury in regard to his low back were occasional soreness after a strenuous day at work and resolved with a hot shower. Dr. Poetz testified that the claimant had no history prior to February 13, 2009, of headaches, sleep disturbance, or pain at levels of 6 out of 10. Dr. Poetz testified that regardless of the pre-existing disabilities rated to the low back or thoracic spine the primary injury of February 13, 2009, would render the claimant permanently and totally disabled. See Dr. Poetz deposition, pages 83-87.

Dr. Poetz opined that the claimant was temporarily totally disabled from the date of injury through his release by Dr. Coyle on November 30, 2010. See Dr. Poetz deposition, pages 44-45. Dr. Poetz recommended weight restrictions limiting the claimant to no overhead lifting and only occasional lifting or carrying of 5-10 pounds. He restricted him to "stand/walk" in an eight-hour day of 0-2 hours. He limited sitting to 0-2 hours. He permitted him to occasionally bend, squat, kneel, climb or reach. He gave moderate restriction as to sustained positions and movement of the head, neck and trunk and upper body. See Dr. Poetz deposition, Deposition Exhibit 2.

James J. Coyle, M.D.

Dr. Coyle, an orthopedic spine surgeon, who provided substantial surgical and medical treatment for the claimant, opined that the claimant suffered a 15% permanent partial disability of the cervical spine and 25% permanent partial disability of the lumbar spine both relative to the 2009 injury. See Dr. Coyle deposition, page 21. The claimant's last office visit to Dr. Coyle was on November 30, 2010. Dr. Coyle was asked whether or not the claimant was "totally disabled". In response, Dr. Coyle recommended a Functional Capacity Evaluation. The FCE was not

offered in evidence at the deposition. Dr. Coyle described his “restrictions” as of the last time he saw the claimant on November 30, 2010. Dr. Coyle discussed his general practice of declining to give patients specific restrictions in the absence of “a compelling reason to give somebody restrictions”. He testified that an FCE is a valid way to determine restrictions. Dr. Coyle testified, “Having said that, I put a provisional assessment that he should observe normal safety precautions. I didn’t put any permanent restrictions on him when I last saw him, subject to the FCE.” He was asked whether his opinion changed after review of the FCE and answered (over objection) “I thought his performance was fine on the FCE.” See Dr. Coyle deposition, pages 22-25. Dr. Coyle did not rate claimant on any pre-existing disabilities. Dr. Coyle testified that because he had two prior lumbar surgeries it was necessary to do a two level lumbar fusion. He testified that “The third time around, which is when I got him, you do the definitive operation, you do the fusion.” He stated that in regard to disability ratings he did not apportion any part to the prior low back condition because “...he told me, and I believed him, that he was absolutely fine despite having had two prior lumbar surgeries and I had no evidence to the contrary.” See Dr. Coyle deposition, pages 25-26. Dr. Coyle opined that at time of release on November 30, 2010, the claimant did not require further treatment. See Dr. Coyle deposition, page 27.

Gary Weimholt

Gary Weimholt, a certified vocational counselor, interviewed the claimant on September 2, 2011, and concluded based on his evaluation and review of records and information that the claimant “has a total loss of access to the open competitive labor market and then from a vocational standpoint would be totally vocationally disabled from employment. “ He testified, “There’s no reasonable expectation that an employer in the normal course of business would hire Mr. Buerk for any position or that he would be able to perform the usual duties of any job that he is or has been qualified to perform. And this is based on my in-person assessment of him, the medical opinions, and my own professional experience in the field of vocational rehabilitation disability management,” See Weimholt deposition, pages 12-13. He noted the claimant had been able to return to his full job duties after the 2007 injury and two low back surgeries which suggested to him that the 2007 injury did not constitute an obstacle or hindrance to employment. After the 2009 injury, the claimant had extensive treatment to the cervical and lumbar spine and had been unable to maintain normal sleep patterns, perform his usual activities of daily living or pastimes as he did prior to that time. Mr. Weimholt opined that the 2009 injury and residuals of such injury were responsible for his total loss of access to the labor market. He opined that the claimant would be considered permanently and totally disabled as of the date of maximum medical improvement and release by Dr. Coyle. See Weimholt deposition, pages 14-15. Mr. Weimholt described the claimant’s description of his ability at the time of interview to perform ordinary daily living activities or household chores. See Weimholt deposition, pages 19-22. He testified that based upon Dr. Poetz’ restrictions the claimant would be unable to complete a full day of work which would itself take him out of the competitive labor market. See Weimholt deposition, page 25. He opined that the claimant would have no transferable job skills beyond glass installation. His academic skills were sufficient for entry level jobs. He would be physically unable to complete a full work day and maintain employment. See Weimholt deposition, pages 26-30. Mr. Weimholt disagreed with the FCE assessment noting that if it were correct then 95% of the jobs in the Dictionary of Occupational Titles would be available to the claimant. He opined that any employer aware of his past medical problems would not be willing to hire him for any sort of job as a construction worker nor would he be considered for

employment in practical terms. He noted the claimant was motivated to work and had returned to work after two microdissectomies in 2007. See Weimholt deposition, pages 32-33.

James M. England, Jr.

On May 24, 2012, James England, a certified vocational counselor, reviewed the claimant's medical records and evaluated the claimant. Mr. England testified that the Functional Capacity Evaluation demonstrated that the claimant could occasionally lift 60 pounds from floor to waist, 40 pounds from waist to shoulder, 45 pounds from shoulder to overhead, occasionally carry 55 pounds, push with a force of 102 pounds, pull with a force of 85 pounds and demonstrated frequent standing, climbing, bending, reaching, squatting and kneeling and occasional sitting and crawling. He was asked if he had reviewed any specific restrictions or limitations in the opinions of Dr. Coyle. Mr. England testified, "Well, the last thing that I saw from Dr. Coyle was that he was the one who had arranged the FCE. So I assume from that that his findings would be in accord with the results of the FCE. That would be the reason for sending him to have an FCE". See England deposition, page 14.

Mr. England testified that the claimant could not return to his prior employment involving glass installation, because the work would require lifting in the heavy to even very heavy range of exertion. See England deposition, page 15. Mr. England opined that the claimant was employable as a tour guide, fast food worker, courier, cashier, security monitor, or assembly and packing if it allowed flexibility on sitting and standing.

Mr. England testified that if he could work in the sedentary, light and medium work demand levels, 90 percent of jobs would be "available" or within those definitions. However, he also testified that the claimant did not have the skills to perform all of these jobs. Mr. England opined that even when considering what claimant told him about what he could do "he thought he could lift about 25 pounds occasionally, maybe even a 5-gallon can of gas occasionally or briefly, that he could sit 20-30 minutes at a time, drive around 20 minutes or so, within those restrictions I still think that there would be things that he could do." See England deposition, pages 15, 16, 18, 19. Mr. England testified that considering only the restrictions from Dr. Coyle and Dr. Doll, and the Functional Capacity Evaluation, he opined that the claimant was employable. Considering Dr. Poetz' findings, Mr. England opined that the claimant was clearly not employable. See England deposition, pages 24-27.

RATE

The claimant was not paid by the year, month, or the week. Section 287.1 (4), RSMo 2000, provides:

If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage

pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision;

The claimant submitted the claimant's paycheck history for the thirteen weeks before the accident with hours worked and missed days in a summarized format. See Exhibit 29. However, "absence of five regular or scheduled work days ... shall be considered as absence for a calendar week." According to the Exhibit, the claimant only worked four weeks with five work days during the thirteen weeks before the accident:

| Paycheck Date | Gross Pay |
|---------------|------------|
| 11/05/08 | \$682.70 |
| 11/12/08 | \$682.70 |
| 11/19/08 | \$645.57 |
| 12/23/08 | \$641.45 |
| Total | \$2,652.42 |

Based on application of Section 287.250, RSMo 2000, to this case, the average weekly wage in the thirteen weeks preceding his date of accident was \$663.10.5 yielding a compensation rate of \$442.07 for temporary total or permanent total disability and \$404.66 for permanent partial disability.

The defense argued in its brief that the claimant actually worked five days in many of the weeks referenced in Exhibit 29, but submitted a false and misleading Exhibit:

Claimant submitted Exhibit 29 in an effort to substantiate his burden of proof in establishing the wage rate. However, at Trial claimant admitted he had no recollection of whether he was not scheduled to work any given day in any given week during the 13-week time period. He had no recollection of whether he missed a regularly scheduled workday in that time frame. He admits that he would on occasion call in and ask to be clocked out early thus working less than an eight-hour shift on certain days. He admits that if any inclement weather existed he would not be scheduled to work on any given day.

On those days, that he was not scheduled to work, under the Statute he did not earn pay that should be considered in the wage rate calculations. He can provide no evidence of missing a regularly scheduled work day. He admits he simply chose to utilize the number of 40 hours for each and every week and subtracted the hours actually worked from the total of 40 to estimate how many regularly scheduled work days he might have missed. This is purely a mathematical exercise and has no basis in evidence. Exhibit 29 reflects nothing more than an assumption on claimant's part that he missed regularly scheduled work days when his testimony suggests he did not work regularly scheduled work days in some

weeks and in fact, did not work always complete eight-hour days, which would be needed to support weekly hour totals of not less than 40 hours per week. Claimant fails in his burden of proving his compensation rate. Therefore, his compensation rates should not reflect earnings for unworked days. See Employer's Brief.

The employer would utilize the vast majority of the thirteen weeks before the accident, claiming that the claimant actually worked five days during those weeks. However, the employer elected not to provide any records or testimony from the employer on this issue. Presumably, the employer had access to its own records and could have presented evidence to establish a different rate. By electing to not present its records or testimony from its record keeper, the only evidence is that provided by the claimant. The employer complains that the claimant lacked details on the hours and days that he worked during the thirteen weeks before the accident over five years ago. Again, the employer could have presented time records or rebuttal testimony, but elected not to do so.

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.

As stated in Sickmiller v. Timberland Forest Products, Inc., 407 S.W.3d 109, 121 (Mo. App. S.D. 2013), “[S]ection 287.140.1 ‘does not require a finding that the workplace accident was the prevailing factor in causing the need for particular medical treatment.’” (quoting Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511, 517 (Mo. App. W.D. 2011)). “Where a claimant produces documentation detailing his past medical expenses and testifies to the relationship of such expenses to the compensable workplace injury, such evidence provides a sufficient factual basis for the Commission to award compensation.” Id. (quoting Treasurer of Missouri v. Hudgins, 308 S.W.3d 789, 791 (Mo. App. W.D. 2010)).

The claimant submitted the following medical billing statements with medical records showing the services rendered and testified that they were the product of his work-related injury:

| Date | Provider | Services Provided | Exhibit No. | Amount |
|-------------|---------------------|---------------------------------|-------------|-------------|
| 10/09/12 | Dr. Tiefenbrunn | Office Visit | 22 | \$ 149.01 |
| 10/09/12 | Dr. Tiefenbrunn | X-ray of knee | 22 | \$ 48.00 |
| 12/19/12 | Dr. Haas | Office Visit | 19, 22 | \$ 329.01 |
| 12/19/12 | Dr. Haas | X-ray of eye | 19, 22 | \$ 239.00 |
| 01/08/13 | Dr. Haas | Radiological Testing | 19, 22 | \$8,304.00 |
| 02/05/13 to | Dr. Moore | Injections and Pain Management, | 22 | \$2,063.00 |
| 08/12/14 | Dr. Tiefenbrunn | Office Visits | 22 | \$ 605.00 |
| 04/16/10 to | Bourbon Drugs, Inc. | Prescription Medication | 23 | \$ 146.20 |
| 04/10/13 | | | | |
| 04/16/10 to | Wal-Mart Pharmacy | Prescription Medication | 23 | \$ 256.41 |
| Total | | | | \$12,139.63 |

On January 23, 2013, about two years after Dr. Coyle’s last evaluation of the claimant, the claimant requested additional medical treatment for chronic pain therapy noting that the claimant had sought treatment and wished to continue treatment with Dr. Tieffenbrunn for pain medication, Dr. Moore for pain therapy injections, and Dr. Haas, a neurologist. See Exhibits 25, 28. No treatment was tendered by the defense. According to the records, the claimant paid cash for the prescription medication, and Medicare Part B, an insurance program paid for by the claimant, satisfied most of the medical bills. Based on the evidence submitted, the claimant is awarded \$12,139.63 for past medical expenses.

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.

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App.2001). The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App.2002). Nonetheless, to be awarded future medical benefits, the claimant must show that the medical care “flow [s] from the accident.” Crowell v. Hawkins, 68 S.W.3d 432, 437 (Mo.App.2001)(quoting Landers v. Chrysler Corp. 963 S.W.2d 275, 283 (Mo.App.1997)).

While an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury. Stevens v. Citizens Mem'l Healthcare Found., 244 S.W.3d 234, 238 (Mo.App.2008); *see also* Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 270 (Mo.App.2004) (claimant must present “evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible” for future medical treatment). Conrad v. Jack Cooper Transport Co., 273 S.W.3d 49, 52 (Mo.App. W.D. 2008).

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 claimant testified concerning his ongoing condition after the 2009 work-related injury, course of treatment, and final release by Dr. Coyle. Dr. Poetz testified that both the cervical fusion and the lumbar fusion performed by Dr. Coyle resulted in the implanting of prosthetic devices in the spine. See Dr. Poetz deposition, pages 26-27, 30. Dr. Poetz testified that fusion results in greater stress on adjacent levels of the spine and may result in additional damage to the spine at adjacent levels. See Dr. Poetz deposition, page 31. Dr. Poetz testified that fusion hardware sometimes begins to deteriorate or screws begin to back up and it is not unusual for those things to be revised. See Dr. Poetz deposition, page 33. Dr. Poetz recommended that the claimant should have an evaluation by an orthopedic surgeon with imaging to review the status of his fusions at least every six months. See Dr. Poetz deposition, pages 32-33. He also recommended that a physician monitor and prescribe appropriate pain medication to relieve the claimant's current pain condition, because the claimant is consuming a toxic dose of over-the-counter-medications. See Dr. Poetz deposition, page 35.

On the other hand, Dr. Coyle testified that he “did not believe he needed any additional treatment.” See Dr. Coyle deposition, page 27. The defense argued in its brief that the evidence

fails to show a "specific causation" relationship between the accident and the claimant's current requirement for pain medication:

Furthermore, claimant's counsel argues his client should be entitled to future medical treatment. However, in reviewing the medical records of Dr. Coyle, there is no recommendation to support such contention. In fact, there is a gap between Dr. Coyle's release and claimant's return for treatment with Dr. Tiefenbrunn in October 2012, almost two years after Dr. Coyle's release. In that initial report, Dr. Tiefenbrunn is reporting mild pain to various parts of the body but appears to see claimant for a right knee injury and decides to administer pain medication. Dr. Tiefenbrunn was not deposed and the basis for the administration of that medication is not explained. Furthermore, there is no specific causation opinion in any of the subsequent medical treatment records from Drs. Tiefenbrunn, Haas or Moore. Therefore, the disputed need for medication could be due to subsequent deterioration, an additional event, a heightened activity level or some other medical condition exacerbating his complaints, any of which are wholly unrelated to the work injury. Claimant has not established his burden of proof with regard to future medical care. See Defense Brief.

Based on the testimony from the claimant and Dr. Poetz, the claimant has presented a prima facie case that future medical evaluation with appropriate imaging regarding the surgical fusions flows from the accident. Dr. Coyle's cursory statement that no further medical care was indicated as of Dr. Coyle's final examination of the claimant does not directly refute the claimant's evidence. Therefore, based on the evidence, the claimant is awarded future medical care to cure or relieve him from the effects of the 2009 work-related injury.

TEMPORARY DISABILITY

Compensation must be paid to the injured employee during the continuance of temporary disability but not more than 400 weeks. Section 287.170, RSMo 1994. Temporary total disability benefits are intended to cover healing periods and are unwarranted beyond the point at which the employee is capable of returning to work. Brookman v. Henry Transp., 924 S.W.2d 286, 291 (Mo.App. E.D. 1996). Temporary awards are not intended to compensate the Employee after the condition has reached the point where further progress is not expected. Id.

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no

longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id.

The date of injury in this case was February 13, 2009. The defense paid temporary total disability benefits to the claimant from March 24, 2009 through September 20, 2010. Dr. Coyle opined that the claimant attained maximum medical improvement on November 30, 2010. The claimant alleges that he was totally disabled from the date of the accident through March 23, 2009, 5 3/7 weeks. The claimant testified his employer instructed him to consult a chiropractor which he did the afternoon of injury. See claimant deposition, pages 46-48. He went to Dr. Anderson, who provided chiropractic treatment for the condition. He testified that the chiropractor told him it was more serious than he could take care of and he should consult a back specialist. The claimant paid the chiropractor and told his employer that he needed to see a specialist. He testified that the chiropractor was retired and his records were unavailable. On March 24, 2009, the claimant's employer referred the claimant to Dr. Lamble at Mercy Clinic. See claimant deposition, page 50 and Exhibit 24. On March 24, 2009, Dr. Lamble examined the claimant, recommended an MRI, and took him off work. See Exhibit 7. There is no contention that his condition was any different during the 5 3/7 weeks that he was off work than it had been at the time of injury. Dr. Poetz opined that the claimant "was temporarily totally disabled ... from the time of his injury until the time that he was released by Dr. Coyle at MMI." See Dr. Poetz deposition, pages 44, 45.

The claimant also alleges in his brief that he was totally disabled and under treatment for his work-related injury from the date that the defense terminated temporary disability benefits, September 20, 2010 and the date that the claimant was at maximum medical improvement, November 30, 2010, 10 1/7 weeks. However, the parties stipulated that the issue relating to temporary total disability related to the prior period and the rate. See Exhibit 28.

The rules of the Department of Labor and Industrial Relations, in particular, 8 CSR 50-2.010(14), provide: "hearings before the division shall be simple, informal proceedings. The rules of evidence for civil cases in the State of Missouri shall apply. Prior to hearing, the parties shall stipulate uncontested facts and present evidence only on contested issues." Therefore, the ALJ should confine the evidence during the hearing to the stated contested issues. Lawson v. Emerson Electric Company, 809 S.W.2d 121, 125 (Mo.App. S.D.1991). Stipulations are controlling and conclusive, and the courts are bound to enforce them. Spacewalker, Inc. v. American Family, 954 S.W.2d 420, 424 (Mo.App. E.D.1997). A stipulation should be interpreted in view of the result, which the parties were attempting to accomplish. *Id.* In Lawson, our colleagues in the Southern District concluded that the Commission acted in excess of its powers in making its award on grounds not in issue. Lawson v. Emerson Electric Company, 809 S.W.2d at 126.

Here, the Order of the Commission provides that the "nature and extent of permanent disability" was an issue stipulated for trial. However, the record clearly shows it was not. Pursuant to the stipulation, *706 Boyer did not present any evidence as to his permanent partial disability. In Dr. Samson's deposition, he

rendered an opinion as to Boyer's permanent partial disability, but the issue was not discussed by the parties or the ALJ at the hearing.

In its adoption and affirmance of the ALJ's findings and conclusions, Commission's decision to award a percentage of permanent partial disability went beyond the issues stipulated for trial and was in excess of its power. Thus, the award must be reversed and the cause remanded to provide Boyer an opportunity to present evidence as to the percentage of permanent partial disability. Boyer v. Nat'l Express Co., 49 S.W.3d 700, 705-06 (Mo. Ct. App. E.D. 2001).

Based on the record, the claimant is awarded temporary total disability benefits from February 24, 2009 through September 20, 2010, 82 weeks, with credit for the \$27,528.79 previously paid by the defense.

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. Joultzouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997).

"Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how

it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for a pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

Two physicians opined that the claimant suffered substantial permanent disability from the 2009 work-related accident. There is no contrary evidence of record. However, the two physicians differ markedly with respect to the claimant's residual capabilities.

On November 30, 2010, Dr. Coyle, an orthopedic spine surgeon, who provided substantial surgical and medical treatment for the claimant, examined the claimant for the last time and opined that the claimant could flex about 70 degrees but complained of intermittent posterior thigh pain and low back stiffness. Dr. Coyle reported a negative SLR test bilaterally and intact motor strength and sensation in the lower extremities. Prior x-rays had shown a solid fusion. Dr. Coyle ordered an FCE and opined that the claimant was at maximum medical improvement from both his cervical and lumbar injuries. See Exhibit 8. The claimant performed the FCE on December 7, 2009, but it was not offered into evidence. Dr. Coyle opined that the claimant suffered a 15% permanent partial disability of the cervical spine and 25% permanent partial disability of the lumbar spine both relative to the 2009 injury. See Dr. Coyle deposition, page 21.

On March 8, 2011, a little over three months later, Dr. Poetz examined the claimant, took a medical history, and reviewed the claimant's medical records. Dr. Poetz described the claimant's chief complaints as follows:

Since I fell, I have pain along my mid back which wraps around both sides of my ribs. The pain is along each side of the spine, and then it turns into tightness as it

wraps around my sides. The muscles in my neck tighten up more so on the right and I get excruciating headaches. There's usually two days a week that my head throbs where I have to be in the dark and keep the curtains closed. I had headaches before surgery, and then they gradually returned after surgery. The headaches form by getting a huge knot at the base of my head and around my right ear. I usually wake up with a headache in the middle of the night and they can last 24 to 36 hours. My lower back also still hurts and I have pain down my legs. Ninety percent of the time the pain occurs on my right side. It will travel to the back of my thigh, skip my calf, and then go into my foot. I have numbness and tingling in the bottom of the foot since the day I had an epidural. I have no feeling to light touch at the bottom of my foot. I don't pick up much weight. I have lots of pain in my right shoulder and biceps. My right hand locks up out of nowhere and is painful. Sometimes I drop things when the locking occurs. Sleeping is miserable. I toss and turn all night. I'm irritable and tired of hurting and sitting at home. I can't travel or take many vacations. My pain increases with standing, walking, sitting, and dreary weather. See Dr. Poetz deposition, pages 18-19.

Dr. Poetz opined that the claimant suffered from the following disabilities from the 2009 work-related accident: (1) 35% permanent partial disability of the cervical spine for the disc herniation, bilateral upper extremity radiculopathy and resulting discectomy and fusion at C5-6, (2) 20% permanent partial disability at the thoracic spine, and (3) 30% permanent partial disability at the lumbar spine, reference the 2009 work-related injury and revision decompression at L4-5 and L5-S1 and fusion L4 through S1.

He also opined that the claimant suffered pre-existing disabilities: (1) 5% permanent partial disability at the thoracic spine, and (2) 20% permanent partial disability at the lumbar spine for prior L5-S1 disc herniation and recurrent disc herniation and two micro-discectomies in 2007. He opined that the pre-existing disabilities and those resulting from the February 13, 2009 injury combined to give a greater overall disability than their simple sum by a factor of 20%. See Dr. Poetz deposition, pages 36-40. Dr. Poetz opined that the claimant is permanently and totally disabled due to the injuries of February 13, 2009, combined with his pre-existing conditions and disabilities. See Dr. Poetz deposition, Deposition Exhibit 2. In his deposition, Dr. Poetz opined "that regardless of any pre-existing disabilities, that the primary injury of February 13, 2009, alone would render him permanently and totally disabled." See Dr. Poetz deposition, page 86. He testified that the work restrictions prescribed by Dr. Poetz would be the same if only considering disability and injury of February 13, 2009. See Dr. Poetz deposition, pages 82, 83, 84. Dr. Poetz testified that the claimant was performing his full duties at work and had no apparent limitations on his ability after the 2007 injury and before the 2009 injury. See Dr. Poetz deposition, page 85. He opined that the claimant's chief complaints all arose after the February 13, 2009, injury. See Dr. Poetz deposition, page 85. Dr. Poetz testified that the claimant's complaints prior to the February 13, 2009, injury in regard to his low back were occasional soreness after a strenuous day at work and resolved with a hot shower. Dr. Poetz testified that the claimant had no history prior to February 13, 2009, of headaches, sleep disturbance, or pain at levels of 6 out of 10. Dr. Poetz testified that regardless of the pre-existing disabilities rated to the low back or thoracic spine the primary injury of February 13, 2009, would render the claimant permanently and totally disabled. See Dr. Poetz deposition, pages 83-87.

Dr. Poetz recommended weight restrictions limiting the claimant to no overhead lifting and only occasional lifting or carrying of 5-10 pounds. He restricted him to "stand/walk" in an eight hour day of 0-2 hours. He limited sitting to 0-2 hours. He permitted him to occasionally bend, squat, kneel, climb or reach. He gave moderate restriction as to sustained positions and movement of the head, neck and trunk and upper body. See Dr. Poetz deposition, Deposition Exhibit 2.

On May 24, 2012, James England, a certified vocational counselor, reviewed the claimant's medical records and evaluated the claimant. Mr. England testified that the claimant could not return to his prior employment involving glass installation, because the work would require lifting in the heavy to even very heavy range of exertion. See England deposition, page 15. Mr. England opined that the claimant was employable as a tour guide, fast food worker, courier, cashier, security monitor, or assembly and packing if it allowed flexibility on sitting and standing.

He testified that if he could work in the sedentary, light and medium work demand levels, 90 percent of jobs would be "available" or within those definitions. He stated he did not suggest that he had the skills to perform all of these jobs. Mr. England stated that even when considering what the claimant told him about what he could do "he thought he could lift about 25 pounds occasionally, maybe even a 5-gallon can of gas occasionally or briefly, that he could sit 20-30 minutes at a time, drive around 20 minutes or so, within those restrictions I still think that there would be things that he could do." See England deposition, pages 15, 16, 18, 19. Mr. England testified that considering only the restrictions from Dr. Coyle and Dr. Doll, and the Functional Capacity Evaluation, he opined that the claimant was employable. Considering Dr. Poetz' findings, Mr. England opined that the claimant was clearly not employable. See England deposition, pages 24-27.

Mr. England's observation is very astute and indicative of the critical question in this case. The two medical experts rendered contrasting reports relative to the claimant's restrictions. Dr. Coyle was the claimant's treating surgeon and observed the claimant over a long period of time. Dr. Poetz examined the claimant a little over three months after Dr. Coyle's evaluation and found marked differences in the claimant's medical condition and vitality. In November 30, 2010, the claimant had spine flexion at 70 degrees with pain, but three months later, the flexion was only 45 degrees with mid-thoracic muscle guarding and thoracic myospasm.

One possible explanation for the claimant's deterioration is that under Dr. Coyle's medical management the claimant had been consuming a variety of prescription strength medications throughout his treatment from Dr. Coyle, with the last prescription three days before the last office visit for 60 doses of 800 mg. ibuprofen. The medical records reflect that Dr. Coyle prescribed and systematically adjusted a variety of prescription medications to relieve the claimant's pain from the accident. The inference is that after the claimant was no longer followed by a physician who managed medication to control the claimant's pain from the occurrence, he began consuming over the counter Tylenol and Ibuprofen in a haphazard manner that ceased meeting his medical needs.

At the time of Dr. Poetz' examination, the claimant consumed over-the-counter Tylenol and Ibuprofen in haphazard, toxic doses. See Dr. Poetz deposition, page 35. If the claimant

ceased taking the prescription medication under the supervision of a spine specialist, the claimant would have greater pain and less range of motion during a physical examination. The claimant's need to consult pain management physicians in 2013 suggests that the lapse of the prescription pain medication was a substantial impact on the claimant's condition. Likewise, conducting the Functional Capacity Evaluation while the claimant is consuming potent prescription pain medication can also reveal a different set of results than after the claimant loses the benefit of the medication. It would be curious indeed to have the benefit of Dr. Coyle's observations after the claimant ceased taking the prescription pain medications that he prescribed and managed during his course of treatment. It would also be interesting to have the benefits of Dr. Poetz' observations of the claimant while on a course of prescription pain medication. Unfortunately, such considerations are hypothetical and the only evidence is that found in the record.

Based on the record as a whole, Dr. Poetz' evaluation is a more accurate observation of the claimant's physical condition than that of Dr. Coyle. Accordingly, the claimant is unemployable in the open labor market.

Although the claimant had pre-existing permanent partial disabilities, the evidence in the record compels a finding that the degree of disability from the last injury alone and of itself resulted in the employee's permanent, total disability. Dr. Coyle testified that none of his ratings were referable to the claimant's prior low back injury, "[h]e probably wouldn't have had a fusion if this was his first injury, I could have looked at that and said I apportioned half of this to the last injury. I didn't do that because he told me, and I believed him, that he was absolutely fine despite having had two prior lumbar surgeries and I had no evidence to the contrary." See Dr. Coyle deposition, page 26. Dr. Poetz testified that the claimant was permanently and totally disabled as a result of the 2009 work-related injury. See Dr. Poetz deposition, page 41. Dr. Poetz agreed that all of the claimant's restrictions listed in his work evaluation form related to the 2009 work-related injury alone. See Dr. Poetz deposition, page 83. Mr. Weimholt, a vocational rehabilitation counselor, opined that 2009 work-related injury alone rendered Claimant unable to compete in the open labor market. Mr. Weimholt reported that, "As a result his pre-existing back problems do not appear to have been any real hindrance in his ability to perform his job or similar jobs prior to the injury of 2009...[a]s a result it appears he has total loss of labor market access as a result of the 2/13/09 injury." See Weimholt deposition, Deposition Exhibit 2, page 14.

The claimant reported to Dr. Coyle that the second surgery with Dr. Heim relieved his symptoms, and he had not had them for the year and half leading up to the primary injury. See Dr. Coyle deposition, page 13. The claimant also had no history of injury, symptoms or treatment related to his cervical spine. The claimant testified that before the last injury he used to walk five miles with ease, and could sit indefinitely. He was also able to work without restriction, on his feet most of the day doing repetitive bending, twisting and stooping, with only occasional muscle tightness after a strenuous day.

Based on the evidence in the record, the claimant is awarded permanent total disability against the employer and insurer. In addition, the claimant demonstrated a scar on his neck due to the cervical fusion surgery 2 inches in length and is awarded two weeks for disfigurement.

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).

In deciding if the Second Injury Fund is liable in a permanent and total disability case it is first necessary to determine the degree of disability from the last injury considered in and of itself. Prior partial disabilities are irrelevant until employer's liability for the last injury is determined. If the last injury in and of itself causes permanent and total disability, then the Employer is responsible for the entire liability and the Fund has no liability. 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). Having determined that the claimant is permanently and totally disabled as a result of the last accident alone the Second Injury Fund in this case has no liability.

In this case, the claimant's disability from the last injury alone and of itself is so disabling, that the employer and insurer bear sole liability for the claimant's permanent total disability benefits, and the Second Injury Fund has no liability.

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