

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

Injury No. 07-124759

Employee: Eric Chambers
Dependent: Susan L. Chambers
Employer: Missouri Department of Highways and Transportation
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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

Discussion

Medical causation

The parties presented voluminous medical records and expert testimony on the issue whether the accident of December 16, 2007, was the prevailing factor causing employee to sustain any medical condition or disability. The administrative law judge thoroughly summarized all of this evidence. Then, on page 10 of his award, the administrative law judge resolved the issue of medical causation, as follows: "The substantial evidence in this case supports a finding that the work-related accident was the prevailing factor causing permanent disability to the claimant's right elbow, neck, and low back."

We agree with the ultimate result reached by the administrative law judge as to the issue of medical causation, but discern a need to supplement his findings in order to make clear what specific medical conditions we believe resulted from the accident. This is because the key source of contention on appeal involves the medical causation of employee's current low back complaints and disability in light of a congenital condition affecting employee's spinal cord.

Turning to the testimony from employee's medical expert, Dr. Thomas Musich, we note that he opined that the December 2007 accident was the prevailing factor causing employee to suffer the development of incapacitating pain and radiculopathy referable to the cervical spine, severe low back pain and right lower extremity radiating symptoms into the thigh, gluteal region, and groin, and severe pain over the lateral epicondylar region of the right elbow. These medical causation opinions from Dr. Musich are limited to identifying employee's *symptomatology* and do not include the identification of any underlying medical conditions or specific pathologies that cause or contribute to employee's symptoms. As noted by the administrative law judge, Dr. Musich additionally testified at his deposition that the accident "could have" resulted in "some type of inner trauma" to the spinal canal at the

Employee: Eric Chambers

- 2 -

L3-4 level which in turn “could have” caused employee’s persistent and ongoing low back symptoms. *Transcript*, page 159.

Employer, meanwhile, provided expert medical testimony from Dr. James Coyle, who opined that the December 2007 accident was the prevailing factor causing employee to suffer cervical spine injuries in the form of herniated discs at C6-7 and C5-6, which condition required cervical discectomy and fusion from C5 through C7 and resulted in permanent partial disability; as well as a lumbar strain resulting in permanent partial disability. Dr. Coyle did not provide any opinion whether the accident caused any injury to employee’s right elbow.

Like the administrative law judge, we find Dr. Musich’s speculation that the accident “could have” had some effect on employee’s preexisting tethered spinal cord condition to be lacking persuasive force. And, in light of Dr. Musich’s failure to identify the particular medical conditions (as opposed to symptomatology) he believes resulted from the accident, Dr. Coyle’s more specific opinions with respect to the lumbar and cervical spine injuries in this matter strike us as essentially uncontested. On the other hand, given Dr. Coyle’s failure to address the right elbow, Dr. Musich’s causation opinion with respect to the right elbow is uncontested.

Given these circumstances, we credit Dr. Coyle’s opinions as to medical causation with respect to the cervical and lumbar spines, and Dr. Musich’s causation opinion with respect to the right elbow. We find that the accident of December 16, 2007, was the prevailing factor causing employee to suffer the following medical conditions: cervical spine injuries in the form of herniated discs at C6-7 and C5-6, which condition required cervical discectomy and fusion from C5 through C7; a lumbar strain resulting in permanent partial disability; and severe pain over the lateral epicondylar region of the right elbow. We defer to and adopt the administrative law judge’s finding that employee’s permanent partial disability referable to these conditions amounts to an overall 50% permanent partial disability of the body as a whole. We additionally find that employee reached maximum medical improvement from the effects of the work injury on February 23, 2009, when Dr. Cantrell released employee from treatment.

Permanent total disability

It is well-settled in Missouri that the appropriate time to evaluate the nature and extent of an injured employee’s permanent disability is the point at which the employee reaches maximum medical improvement following treatment for the work injury. See *Cardwell v. Treasurer of Mo.*, 249 S.W.3d 902, 910 (Mo. App. 2008). As is often the case, there is some evidence in this matter that employee’s overall physical condition has deteriorated since the conclusion of treatment for the work injury. These circumstances highlight the need for evidence specifically pinpointing the date of maximum medical improvement, as well as the need for opinions from the evaluating experts relevant to employee’s condition as of that date, rather than some indeterminate later time period.

We have found that employee reached maximum medical improvement on February 23, 2009. Dr. Musich and employee’s vocational expert, Delores Gonzalez, both provided testimony suggesting employee is permanently and totally disabled. But, as noted by the administrative law judge, these experts did not specifically assess employee’s condition as of any identified date of maximum medical improvement. Rather, in both his July 2009 and September 2011 reports, Dr. Musich opined that employee is permanently

Employee: Eric Chambers

- 3 -

and totally disabled based on his “present and past disabilities.” *Transcript*, pages 184, 190. And at his deposition, Dr. Musich made clear that his opinion regarding permanent total disability took into account employee’s 2010 low back surgery and increased symptomatology, and that he was not rendering any opinion regarding employee’s ability to work as of February 2009.

Likewise, Ms. Gonzalez framed her opinions in terms of employee’s “current” inability to compete for work in the open labor market in her report of December 27, 2011. In that report, Ms. Gonzalez referenced employee’s 2010 lumbar spine complaints and surgery, prompting the question whether her opinions took into account changes in employee’s condition after reaching maximum medical improvement. At her deposition, Ms. Gonzalez did not indicate whether her opinions pertained to employee’s specific vocational prospects as of February 2009 or any other identifiable date of maximum medical improvement.

After careful consideration, we agree with the administrative law judge that employee’s experts do not provide opinions sufficient to support any finding that employee was permanently and totally disabled as of February 23, 2009, the date he reached maximum medical improvement. Absent such expert opinions, and where employee’s subsequent medical history and overall condition is complicated by worsening conditions not shown to be related to the work injury, we find insufficient evidence on this record to persuade us to make a finding that employee was permanently and totally disabled as of February 23, 2009. For this reason, we affirm the administrative law judge’s award concluding that the Second Injury Fund is liable for permanent partial rather than permanent total disability benefits.

Conclusion

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

The award and decision of Administrative Law Judge Edwin J. Kohner, issued July 24, 2014, is attached and incorporated by this reference.

We approve and affirm the administrative law judge’s allowance of attorney’s fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 6th day of February 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: Eric Chambers Injury No.: 07-124759
Dependents: Susan L. Chambers Before the
Employer: Missouri Department of Highways and Transportation **Division of Workers' Compensation**
Additional Party: Second Injury Fund Department of Labor and Industrial Relations of Missouri
Insurer: Self-Insured Jefferson City, Missouri
Hearing Date: May 6, 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: December 16, 2007
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 employee, a highway bridge maintenance worker, suffered a cervical spine disc injury and low back sprain when his snow plow tipped over while he was avoiding oncoming traffic.
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, right elbow, and low back
14. Nature and extent of any permanent disability: 50% permanent partial disability to the body as a whole referable to the neck, low back, and right elbow.
15. Compensation paid to-date for temporary disability: \$4,784.62
16. Value necessary medical aid paid to date by employer/insurer: \$101,880.50

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$688.16
- 19. Weekly compensation rate: \$458.77/\$389.04
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

200 weeks of permanent partial disability from Employer	\$77,808.00
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- 22. Second Injury Fund liability: Yes

80.345 weeks of permanent partial disability from Second Injury Fund	\$31,257.42
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TOTAL:	\$109,065.42
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- 23. Future requirements awarded: None

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: Christopher A. Wagner, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Eric Chambers	Injury No.: 07-124759
Dependents:	Susan L. Chambers	Before the
Employer:	Missouri Department of Highways and Transportation	Division of Workers'
Additional Party: Second Injury Fund		Compensation
Insurer:	Self-Insured	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 an alleged work-related injury in which the claimant, a highway bridge maintenance worker, suffered a cervical spine disc injury and low back sprain when his snow plow tipped over while he was avoiding oncoming traffic. The issues for determination are (1) Medical causation, (2) Permanent disability, (3) Liability of the Second Injury Fund and (4) Dependency. The evidence compels an award for the claimant for permanent partial disability benefits.

At the hearing, the claimant testified in person and offered depositions of Thomas F. Musich, M.D., and Delores E. Gonzalez, three prior workers' compensation settlements, the claimant's marriage certificate, and voluminous medical records. The defense offered a deposition of James J. Coyle, M.D., and an accident report. The Second Injury Fund offered a deposition of James M. England and medical records from Mercy Clinic East Community.

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

At close to midnight during a snow storm on December 16, 2007, this now forty-six year old claimant, a bridge maintenance worker, was operating a snow plow. A vehicle traveling in the opposite direction caused him to swerve and flip over the snow plow on the passenger side. After disconnecting his seatbelt, he fell head first down several feet to the side of his truck resulting in immediate neck pain. His supervisor came to the accident site and transported him to the emergency room at St. John's Mercy Hospital in Washington. A CT scan of his cervical spine revealed mild degenerative changes and a tiny right paracentral disc herniation at C5-6 and a small central disc protrusion at C6-7. On the following day, he went to Unity Corporate Health where Dr. Keefe diagnosed strains of the posterior neck, upper back and lower back. On December 24, 2007, Dr. Keefe noted gradual worsening of right elbow pain and diagnosed lateral epicondylitis. The claimant returned to work with restrictions. The claimant remained under the care of Dr. Keefe through mid-January, 2008. Because of a deterioration of symptoms upon working light duty, he went to Dr. Haupt.

Dr. Haupt evaluated the claimant on January 23, 2008 and recommended physical therapy for a cervical strain and right elbow epicondylitis. Physical therapy commenced at PRORehab on January 28, 2008, and continued through February 25, 2008. Dr. Haupt noted conservative treatment was not resolving the claimant's lateral epicondylitis and performed an injection into the right elbow on February 7, 2008. The claimant noted a marked improvement in his right elbow following the injection. He received no further significant treatment for his right elbow.

Dr. Haupt also noted possible radiculopathy of claimant's cervical spine. A February 11, 2008, MRI revealed a right central disc extrusion at C5-C6 and small central disc extrusion at C6-C7. Claimant was referred to Dr. James Coyle for further evaluation and treatment.

On February 14, 2008, Dr. Coyle examined the claimant and found low back pain with radiation to the right buttock and right lateral and anterior thigh that was worsened with lifting, pushing or bending in addition to cervical spine pain. Dr. Coyle recommended that the ongoing physical therapy should also involve treatment for his low back. Dr. Coyle concluded that claimant reached maximum medical improvement for his low back upon completing physical therapy as of February 27, 2008. At that time, Dr. Coyle opined that the claimant had no restrictions referable to his low back and no permanent impairment.

Dr. Coyle continued to treat the claimant for his neck and right arm pain. On March 18, 2008, Dr. Coyle recommended a repeat MRI of the cervical spine that was performed on April 2, 2008. Upon review of the additional MRI, Dr. Coyle recommended a foraminal block at C5-6 with a pain specialist. The claimant went to Dr. Smith who performed a right C5-6 transforaminal epidural steroid injection on April 16, 2008. Since the claimant did not recover with such injection, Dr. Coyle recommended an anterior cervical discectomy and arthrodesis C5-6 and C6-7. Dr. Coyle opined that the need for surgery was referable to the work injury.

On May 19, 2008, Dr. Coyle performed an anterior cervical discectomy and fusion C5 through C7. The claimant reported that the surgical procedure resolved his arm pain and numbness five weeks after the surgery. He returned to light duty work as of July 23, 2008.

On August 19, 2008, Dr. Coyle referred the claimant for a lumbar spine MRI that revealed a tethered cord at L3 and protrusion at L5-S1 on the left. Dr. Coyle noted that the claimant's back pain was localized to the L3 level. Dr. Coyle referred the claimant to Dr. Smith for further pain management referable to his lumbar spine. On August 26, 2008, Dr. Smith performed trigger point injections at L2-3 and L5-S1 based on a physical exam demonstrating marked tenderness to palpation in those intraspinal areas. On September 9, 2008, the claimant reported mild improvement and Dr. Smith repeated the same injections.

On September 15, 2008, the claimant underwent a CT scan of the cervical spine, and Dr. Coyle noted that the fusion was consolidating nicely. Dr. Coyle recommended physical therapy to deal with musculoskeletal cervical spine pain. In October 2008, the claimant commenced physical therapy.

On September 30, 2008, Dr. Smith examined the claimant and found no improvement from the injections from L2-3 through L5-S1. He noted predominantly right-sided low back pain but not radicular-type symptoms. Dr. Smith noted that the claimant was recently diagnosed with

rheumatoid arthritis for which he was taking medications. Dr. Smith recommended facet joint injections and performed the same the next month.

On November 17, 2008, Dr. Cantrell examined the claimant and noted that two months earlier, based on complaints of peripheral joint symptoms, the claimant underwent laboratory testing and was diagnosed with rheumatoid arthritis for which he was placed on medications. Dr. Cantrell opined that the claimant's symptoms were most consistent with mechanical lumbar back pain. He opined that the findings of disk dessication at L4-5 and L5-S1, tethered spinal cord to the L3 level and left lateral disc protrusion at L5-S1 were radiographic abnormalities not causally related to his reported work injury. He recommended further physical therapy which occurred at PRORehab from November 19, 2008, through December 1, 2008.

Upon the claimant's completion of the physical therapy for his neck, Dr. Coyle noted on November 19, 2008 that he had about 80% of normal rotation, slightly more to the right than left. Dr. Coyle opined that the claimant reached maximum medical improvement from his cervical fusion and that he suffered from a 20% partial permanent disability to his cervical spine.

On December 3, 2008, Dr. Cantrell noted that claimant's low back pain did not improve with physical therapy and recommended a lumbar myelogram and CT scan. Dr. Smith performed additional steroid injections in the lumbar spine later that month. Dr. Cantrell reviewed a January 21, 2009, lumbar myelogram and CT scan and opined that such radiographic findings did not explain the bilateral nature of his lower extremity complaints. To determine any permanent restrictions, Dr. Cantrell recommended a functional capacity evaluation that was performed February 12, 2009. Claimant's performance on the test indicated valid effort overall. The therapist concluded that claimant could not return to regular duty for his employment with this employer and was limited to light work demand level.

Based on the results of the FCE, Dr. Cantrell placed the claimant on permanent restrictions of no lifting greater than 20 pounds occasionally from floor to waist level and 35 pounds from waist to shoulder as well as a need to sit occasionally and stand frequently. Dr. Cantrell concluded that the claimant reached maximum medical improvement as of February 23, 2009. Dr. Cantrell further concluded that the claimant sustained a 15% permanent partial disability of the person as a whole in relation to his anterior cervical discectomy and fusion from C5 through C7 which is causally related to the December 2007 work injury. Dr. Cantrell further opined that claimant sustained 8% permanent partial disability related to lumbar back pain complaints, 5% of which related to the diagnosed lumbosacral sprain/strain relative to the work injury and 3% related to preexisting degenerative and congenital abnormalities not causally related to the work injury. Dr. Cantrell also noted that the claimant's limitations per the FCE resulted from a combination of pain complaints in his lumbar spine, neck and a diagnosis of rheumatoid arthritis.

Other than the week after the accident and two months after the cervical spine fusion when the claimant was off work, he had been working light duty involving a newly created job as an assistant to the guardrail inspector involving no physical labor. Typically, the supervisor would drive to various cites to inspect guardrails and place stickers. When driving on his own, the claimant regularly pulled over for breaks. The claimant testified that he used up all of his sick and vacation time, because he regularly was unable to perform even this non-physically

demanding work. The employer terminated his employment on March 13, 2009, based on the permanent restrictions. Per the instruction of human resources, the claimant filed for and received long term disability benefits from the employer. He further applied for and was awarded Social Security Disability benefits.

The claimant has not sought any other employment. He helps maintain his home by cleaning up and performing some yard work but only for very short periods of time. He testified that he lays down every day to deal with ongoing neck and back pain. He is very limited now in terms of any leisure activities because of his diminished physical capacity.

Subsequent to his release at MMI by Dr. Coyle and Dr. Cantrell, the claimant sought additional medical treatment for his ongoing back condition in September 2009. The employer denied his request prompting the claimant to seek the same on his own. Ultimately, in April 2010, his primary care physician referred him to Dr. Dooley for a neurological consultation regarding back and leg pain. Dr. Dooley took a medical history of the onset of the claimant's symptoms after the 2007 motor vehicle accident. The claimant underwent another MRI of his lumbar spine. He was referred to a neurosurgeon, Dr. Matz, who also took a medical history that his symptoms began after the motor vehicle collision in 2007. Dr. Matz diagnosed lumbar radiculitis related to the tethered cords at L3. Dr. Matz recommended and performed surgery on September 30, 2010 involving L5-S1 laminotomy for detethering of the spinal cord. Post surgery, the claimant's burning pain in his legs improved significantly. Dr. Matz released the claimant from treatment in June 2011.

Pre-existing Conditions

The claimant sustained a prior work-related injury on April 22, 1999, involving his left hip. After an MRI revealed avascular necrosis, Dr. Gregory Galakatos performed a core decompression. After a course of physical therapy, the claimant returned to full duty without restrictions. See Exhibit F, pp. 1-11. The claimant continued to experience daily left hip pain that increased at work when walking or bending and during cold and damp weather.

On July 20, 2001, the claimant was driving a dump truck at work when he hit a bump in the road. He injured his neck when he hit the top of his head on the roof of the cab. He received treatment initially at Unity Corporate Health and underwent physical therapy for a diagnosed cervical strain. An MRI revealed a centrally bulging disc at C6-7. He underwent a course of injections with Dr. Ashok Kumar. He was initially released from treatment of this injury as of November 2001. Due to ongoing pain, further treatment occurred with Dr. Mollman, who ordered another MRI of the cervical spine that occurred in May 2002. Dr. Mollman found a small disc lesion at C6-7 as a degenerating disc and concluded that the claimant was not a surgical candidate. The claimant returned to work full duty without any permanent restrictions referable to his cervical spine. The claimant testified that he continued to experience muscle spasms in his neck. He had decreased range of motion, specifically on the left. He experienced neck pain at work when driving.

During evaluation of his neck injury in 2002, Dr. Yadava noted that the claimant complained of diminished grip strength and aching in his bilateral wrists and forearms. Dr. Yadava performed an electrodiagnostic study on October 11, 2002 that revealed bilateral carpal

tunnel syndrome and left ulnar nerve entrapment. The claimant was referred to Dr. Rotman who performed bilateral endoscopic carpal tunnel releases. Dr. Rotman released the claimant from treatment for the bilateral carpal tunnel syndrome in February 2003. The claimant returned to Dr. Rotman in January 2004 because of bilateral elbow complaints. Nerve studies ordered by Dr. Rotman revealed bilateral cubital tunnel syndrome. Dr. Rotman separately performed ulnar nerve transpositions on the right and left cubital tunnels in March 2004. Dr. Rotman released the claimant from treatment without any restrictions in June, 2004. The claimant testified that he continued to have significant complaints with his bilateral upper extremities aggravated by performing any hand intensive work. He had decreased grip strength and increased pain which affected his ability to work.

In 2006, the claimant sought additional treatment from Dr. Rotramel for ongoing bilateral elbow and forearm pain. Dr. Rotramel performed multiple injections to the bilateral epicondyles. Dr. Rotramel further noted left shoulder problems. An MRI showed some mild tendonitis and possibly some partial thickness rotator cuff tearing. The claimant also developed right shoulder pain. As of November 20, 2006, Dr. Rotramel diagnosed bilateral shoulder pain with mild to moderate AC joint degenerative disease and left rotator cuff tendonitis as well as bilateral upper extremity dysaesthesias likely secondary to the cervical nerve root. On November 29, 2006, an MRI of the cervical spine revealed right foramina narrowing at C5-6 and a small central disc protrusion at C6-7.

The claimant testified that he was able to maintain the performance of his job with this employer without any work restrictions prior to the primary work injury. However, this was only because of his position as crew leader which enabled him to arrange job duties within the crew and limit his own physical demands. He regularly took prescription medication to cope with his pain.

Thomas F. Musich, M.D.

Dr. Musich testified that he evaluated the claimant three times for work-related injuries. The initial evaluation occurred December 7, 2004 regarding the prior injuries involving the cervical spine and bilateral upper extremities. Dr. Musich rated the resulting permanent partial disability at 20% of the body as a whole and 35% of the right elbow, 25% of the right wrist, 25% of the left elbow and 25% of the left wrist. Dr. Musich also noted permanent partial disability of 25% of the left hip referable to the avascular necrosis.

Dr. Musich evaluated the claimant on July 21, 2009 regarding the primary claim. He rated the claimant's permanent partial disabilities at 50% of the cervical spine, 30% of the lumbar spine, and 20% of the epicondylar region of his right elbow all caused by the work-related injury on December 16, 2007. Dr. Musich noted no change in the claimant's disabilities referable to his left hip and bilateral upper extremities as previously evaluated. Dr. Musich opined that the combination of these preexisting and primary disabilities was significantly greater than their simple sum and produced a chronic hindrance to his routine activities of daily living. Dr. Musich opined that the claimant should refrain from activities that require prolonged sitting, standing, climbing, squatting, kneeling, or repetitively lifting any weight greater than 10 pounds, nor operate any commercial or industrial equipment or motorized vehicles. Dr. Musich

concluded that the claimant is likely permanently and totally disabled due to medical reasons from his present and past disabilities and his ongoing need for the recommended restrictions.

Dr. Musich reevaluated the claimant on September 13, 2011 after the lumbar spine surgery performed by Dr. Matz. Dr. Musich concluded that the need for such surgery was due to the work injury. Although there was no distinction on the physical examination at this time, Dr. Musich rated additional permanent partial disability at 45% of the body referable to the lumbar spine. Dr. Musich confirmed all the other prior conclusions regarding disability and restrictions.

James J. Coyle, M.D.

Dr. Coyle, the treating orthopedic surgeon, reevaluated claimant on April 2, 2013. Dr. Coyle testified that the claimant's work injury on December 17, 2007, was the prevailing factor in the necessity for the C5 through C7 cervical discectomy and fusion. Dr. Coyle confirmed the prior rating of permanent partial disability at 20% of the cervical spine due to this work-related injury. Dr. Coyle also opined that the claimant suffered a 5% permanent partial disability to the lumbar spine due to this same work injury. Dr. Coyle testified that the claimant's tethered spinal cord for which he underwent surgery was a congenital problem that pre-existed the work injury. Dr. Coyle also found diffused joint pain and swelling which he attributed to the claimant's diagnosed rheumatoid arthritis. Dr. Coyle testified that the work injury was not the prevailing factor causing the claimant's diagnosed rheumatoid arthritis. Dr. Coyle concluded that the claimant's disability had increased by 2013 attributable to rheumatoid arthritis.

Delores Gonzalez

Delores Gonzalez, a vocational rehabilitation counselor, evaluated the claimant on December 2, 2011. Ms. Gonzalez concluded that the claimant had impoverished educational skills and permanent physical disabilities that prevent him from performing his past jobs or any job on the open labor market as a result of his severely reduced physical residual functional capacities. Ms. Gonzalez noted that the claimant could not comply with an employer's expectations that an employee be able to maintain the ability to sit, stand or walk for prolonged periods of time to be able to work competitively.

James M. England, Jr.

James England, a licensed rehabilitation counselor, issued a report regarding the claimant on September 16, 2013. Mr. England testified that the claimant would not be able to return to work doing the same job but would be able to do light work activity. See England deposition, page 25. Even considering the restrictions noted by Dr. Musich, Mr. England testified that the claimant was capable of employment in some sedentary jobs. Mr. England acknowledged that such sedentary employment would be negated if the claimant needed to lie down or take naps regularly. See England deposition, page 30. Mr. England testified that the claimant's work capacity certainly has worsened as noted by Dr. Coyle per his final evaluation in 2013 but such worsening seemed attributable to the claimant's arthritis and spinal cord problems.

MEDICAL CAUSATION

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

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

The substantial evidence in this case supports a finding that the work-related accident was the prevailing factor causing permanent disability to the claimant’s right elbow, neck, and low back. For instance, Dr. Haupt opined that the claimant “has developed epicondylitis, right shoulder that probably is the result of compensating for his right shoulder especially with the pre-existing history of epicondylitis. ... Lacking information to the contrary, I would have to consider “the work injury on 12/16/2007 as the prevailing factor for the recommended care and treatment.” See Exhibit F, pages 106-107.

Dr. Coyle testified that the work accident of December 16, 2007, “was the prevailing factor in the necessity for the C5 through C7 cervical discectomy and fusion.” See Dr. Coyle deposition, page 27. In addition, Dr. Coyle opined that the claimant suffered a lumbar strain and a “five percent permanent partial disability of the lumbar spine ... referable to the injury.” See Dr. Coyle deposition, page 29. Similarly, Dr. Cantrell had opined that the claimant “has an 8% permanent partial disability ... relating to his lumbar back pain complaints , 5% of which I would relate to a diagnosis of a lumbosacral sprain and strain relative to his work injury and 3% of which I would relate to pre-existing degenerative and congenital abnormalities not causally related to the accident.” See Exhibit F, page 212.

Dr. Musich opined that the December 2007 accident was the prevailing factor in causing permanent partial disabilities of 20% of the right elbow, 50% of the cervical spine, and initially 30% of the lumbar spine. Dr. Musich increased his rating to 45% of the man as a whole referable to the lumbar spine after claimant underwent surgery although his physical examination was unchanged.

The substantial evidence in this case supports a finding that the work-related accident was the prevailing factor causing permanent disability to the claimant's right elbow, neck, and low back. This issue must be ruled in favor of the claimant.

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. Joulzhouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997). Generally, where two events, one compensable and the other non-compensable, contribute to the claimant's alleged disabilities, the claimant has the burden to prove the nature and extent of disability attributed to the job related injury. Strate v. Al Baker's Restaurant, 864 S.W.2d 417, 420 (Mo.App. E.D. 1993); Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. E.D. 1991).

"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 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.

At the time of the hearing, the claimant testified that he has ongoing severe pain and loss of strength and some muscle spasms with his neck. With respect to his back, he testified that he has a lot of pain and has difficulty bending, walking and sitting. With respect to his elbow, he testified that he has some pain which he believes is distinct from his cubital tunnel condition, because it is up on the top of his elbow.

Various physicians provided forensic medical opinions regarding the claimant's disabilities from the last injury alone and preexisting disabilities. Dr. Musich opined that the December 2007 accident was the prevailing factor in causing permanent partial disabilities of 20% of the right elbow, 50% of the cervical spine, and initially 30% of the lumbar spine. Dr. Musich increased his rating to 45% of the lumbar spine after claimant underwent surgery although his physical examination was unchanged. Dr. Coyle opined that the December 2007 work injury caused a 20% permanent partial disability of the cervical spine and 5% of the lumbar spine. Dr. Cantrell opined that the December 2007 work injury caused a 15% permanent partial disability of the cervical spine and a 5% permanent partial disability of the lumbar spine. Dr. Cantrell further concluded that the claimant suffered from a preexisting 3% permanent partial disability of the lumbar spine.

Based on the evidence as a whole, the claimant suffered a 50% permanent partial disability to the body as a whole from the 2007 accident to include the claimant's neck, low back, and right elbow.

The evidence does not support a finding that the claimant suffered permanent total disability solely from the 2007 work-related accident. Not only does the claimant have established permanent and ongoing disability from his three prior workers' compensation cases, which are deemed to continue for the remainder of his life, he also significantly testified to the many restrictions he had at work as a result of these injuries. Because of the position he was in (crew leader), he could work around those restrictions and maintain his job. However, he testified that they significantly hindered his ability to do his job, and he was able to modify his job into a lighter duty type job with less physical demands, due to his pre-existing limitations. He testified that he had significant pain and loss of strength in his left hip, neck, and both shoulders before the accident causing limitations in his ability to do many aspects of the bridge maintenance job, including lifting, walking, and utilizing tools such as a jackhammer. He took frequent breaks and also directed his crew members to do some of the physically demanding tasks that he normally would have done himself.

Additionally, there is insufficient forensic evidence to support a finding of permanent total disability solely from the December 16, 2007 injury. The expert testimony of Dr. Coyle does not reach this point. The expert testimony of Dr. Musich supports the finding of permanent and total disability, due to a combination of his pre-existing and primary injuries, calling into question liability of the Second Injury Fund only with respect to permanent and total disability.

The other forensic experts in this case, Mr. England and Ms. Gonzalez, also do not support a finding of permanent and total disability against the employer. Ms. Gonzalez, the vocational expert retained by the claimant, concluded that the claimant was unable to return to past relevant jobs or "really any job" on a sustained basis. Additionally, she concluded that he was "not a candidate for vocational rehabilitation as he was not clearly capable of any competitive work for which there was a reasonably stable job market." Finally, she concluded that this was all due to "his primary injury in combination with his pre-existing disabilities/conditions." At no time in her testimony did she opine that the claimant is unable to compete in the open labor market due to his primary injury alone.

Mr. England concluded that the claimant could do light work activity or sedentary tasks at best. Mr. England listed a number of jobs that the claimant could do, under either Dr. Cantrell's findings or Dr. Musich's findings. He also testified that if he was truly limited as set out in a 2013 re-examination of him by Dr. Coyle, he "may very well be totally disabled at this time." He testified, however, "This would appear to be, however, due to conditions that have occurred since the primary injury and have in particular included worsening of his rheumatoid arthritis and the tethered spinal cord problems."

Consistent with the testimony of the claimant, Mr. England testified that the claimant had not made any attempts to seek employment, rehabilitation services, or retraining. Mr. England did not know the vocation of the claimant's pain complaints. The claimant had testified at his deposition that he had "8 out of 10" pain. However, Mr. England had no knowledge of the source of the pain. He did not know if the severe pain was a product of the claimant's rheumatoid arthritis, low back issues, his neck, his arms or his hip. He was also questioned specifically about prior settlement amounts the claimant had received for his three prior workers' compensation claims. He testified that the information regarding the prior injuries and disabilities had not been provided to him. He did not, in fact, have "any information" regarding

his pre-existing permanent partial disability. Mr. England was asked “and with regard to your summary and conclusions, your ultimate conclusions, you do not have a single specific ultimate conclusion in this case, do you?” His answer was “No. I think the trier of fact will have to determine which is more credible as far as what his true functional ability is.” See England deposition, page 35.

Based on the foregoing, the claimant has suffered permanent partial disability with respect to the primary injury, and is awarded with a 50% permanent partial disability to the body as a whole from the 2007 accident to include the claimant’s neck, low back, and right elbow.

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).

The test for permanent, total disability is the worker's ability to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. Id. at 48.

The prior section concluded that the claimant suffered a 50% permanent partial disability to the body as a whole from the 2007 accident to include the claimant’s neck, low back, and right elbow but did not become unemployable in the open labor market solely from the 2007 accident at work. The record substantiates several pre-existing permanent partial disabilities:

1. 17.5% of the left hip (4-22-1999 injury) See Exhibit E.
2. 12.5% of the body as a whole referable to the neck (7-20-2001 injury)
3. 15% of the right wrist, 15% of the left wrist, 15% of the right elbow and 15% of the left elbow, including a 10% loading factor (8-23-2002 injury) See Exhibit E.

In addition, Dr. Musich examined the claimant after the occurrence and rated the claimant's pre-existing permanent partial disabilities at 25% of the left hip, 20% of the cervical spine, 35% of the right elbow, 25% of the right wrist, 25% of the left elbow, and 25% of the left wrist. The claimant clearly had substantial pre-existing permanent partial disabilities that constituted hindrances in his routine activities of daily living and combined with the claimant's 2007 work-related injury resulting in an overall disability that is significantly greater than their simple sum. See Dr. Musich deposition, pages 12, 16. Subsequent to his release from treatment referable to these prior work-related injuries, the claimant continued to have problems necessitating further treatment up to the occurrence of the primary injury. See Exhibit F, pages 77-86. Although the claimant was not placed on any permanent restrictions prior to the primary work injury, the performance of his job was significantly altered because of his pre-existing permanent partial disabilities to his right elbow, neck, and back as well as his left hip, right wrist, left elbow and left wrist. As a crew leader, the claimant self limited the physical demand of his employment. The claimant testified that he would not have been able to perform such a physically demanding job without such an option. The extent of disability listed in the original settlement agreements appear to be consistent with the rest of the evidence.

The controversial issue is whether the claimant is employable in the open labor market as a result of the combination of the limitations and restrictions from the permanent partial disabilities from the 2007 work-related accident and his pre-existing permanent disabilities together with his age, education, and his past relevant employment history. The defense alleged in its well written brief (1) that the claimant has failed to prove that he is unemployable in the open labor market, (2) that the claimant is employable in the open labor market, or (3) if the claimant is unemployable in the open labor market, it would be due to the subsequent deterioration of his asymptomatic preexisting back condition and development of new conditions following the 2007 work-related injury.

The claimant's testimony combined with the forensic evidence from Dr. Musich and Ms. Gonzalez supports a prima facie case that the claimant is unemployable in the open labor market. Dr. Musich opined in his first report following the primary claim that the claimant is permanently and totally disabled. Ms. Gonzalez confirmed such conclusion. Mr. England opined that the claimant was employable in a light duty capacity based solely on the restrictions noted by Dr. Musich but conceded that the claimant is not employable in any capacity if he needs to lay down on a daily basis. This evidence supports a prima facie case that the claimant is unemployable in the open labor market.

The Second Injury Fund argues in its brief that the claimant remains employable in the open labor market:

The treating doctors and the functional capacity evaluation gave restrictions for the Claimant that would not preclude employment. Dr. Coyle treated Claimant for the primary injury performing an anterior cervical discectomy and fusion on 5/18/08. Dr. Coyle released Claimant and gave him no restrictions for his neck. (depo p.39) On 2/23/09 Dr. Cantrell found Claimant to be at MMI from the 12/16/07 injury. Dr. Cantrell's review of the FCE documented Claimant's ability to lift 20 pounds occasionally from floor to waist level and 35 pounds from waist to shoulder. Dr. Matz who performed the most recent surgery

for spinal cord tethering on 9/30/10 did not give the Claimant restrictions. At his last post op follow up visit on 6/17/11, Dr. Matz encouraged Claimant to stay active, avoid bed rest and use heat and anti-inflammatories.

Vocational expert Jim England opined that Claimant remains employable in the open labor market, light duty based on the treating doctors' findings, and sedentary based on Dr. Musich's findings. Claimant is a younger individual with supervisory experience and good test results.

Claimant's current level of activity further corroborates Mr. England's opinion that he remains employable. Claimant testified at hearing that he does dishes, and vacuums at home.

He still takes his 4 wheeler out deer hunting, shooting a 5 point buck last archery season, and an 8 point buck during regular deer hunting season; field dressing the animals. He mows 3 of his 10 acres and does some gardening; He drives his tractor using the blade on the tractor to plow his driveway which is 9/10 of a mile long. He is able to drive his pickup truck and operate a 4 wheeler. He knows how to use a computer. He agreed that Dr. Matz released him without restrictions and that his treating doctors did not tell him he could not work. Claimant told Mrs. Gonzalez he could sit [for] 60 minutes. See SIF Brief.

This case involves a temporal view of three different evaluations of the claimant with very different results. In February 2011, Dr. Cantrell ordered a functional capacity evaluation and placed the claimant on permanent restrictions of no lifting greater than 20 pounds occasionally from floor to waist level and 35 pounds from waist to shoulder as well as a need to sit occasionally and stand frequently. In September 2011, Dr. Musich examined the claimant and opined that the claimant should refrain from activities that require prolonged sitting, standing, climbing, squatting, kneeling, or repetitively lifting any weight greater than 10 pounds, nor operate any commercial or industrial equipment or motorized vehicles. In April 2013, Dr. Coyle examined the claimant and opined that the claimant's condition had deteriorated due to a low back condition (intradural lipoma at L3-4 and a tethered spinal cord at L3) that became symptomatic during or after the 2007 work-related accident and progression of the claimant's degenerative rheumatoid arthritis. Mr. England discussed this progression of events:

I thought looking at the medical records and particularly Dr. Cantrell's findings and the FCE, he would not be able to go back to doing his past work activity. I thought Dr. Musich's restrictions would limit him to more sedentary types of activity. Dr. Coyle ultimately indicated he thought the man was severely debilitated by rheumatoid arthritis and tethered spinal cord problems. ... [A]ssuming Dr. Cantrell's findings at the time of the FCE ... I thought he would still be able to do some alternative entry-level kinds of things. It could be anything from security work to cashiering to retail sales, courier positions, light assembly, packing, all kinds of things that would be entry-level within the light level of exertion.

I think under Dr. Musich's restrictions he would be limited to more sedentary types of activity. Things there would be like a security officer in an office building, parking lot cashier, some sedentary assembly and packing, but there would still be some options, and then I thought if he was indeed functioning as poorly as he appeared to be at the time Dr. Coyle re-examined him and considered his description of his typical day-to-day functioning, which indicated eight level pain on a pretty consistent day-to-day basis, he might very well be disabled, but it appears that something happened since.

He had actually gone back to work and worked light duty for quite some time, and then they just didn't have permanent light duty, but then since then, he appears to be, based on what Dr. Coyle indicated and from what he described, functioning way worse, and this may very well be due to the arthritis and the spinal cord. See England deposition, pages 26, 27.

The import of that analysis is the claimant's experts, Dr. Musich and Ms. Gonzalez, opined that the claimant is not employable in the open labor market and the defense's vocational expert, Mr. England tends to agree that the claimant is now unemployable in the open labor market. The conclusion is that the claimant is now unemployable in the open labor market. However, Mr. England's comments require an analysis of the Second Injury Fund's third argument that if the claimant is unemployable in the open labor market, it would be due to the subsequent deterioration of his asymptomatic preexisting back condition and development of new conditions following the 2007 work-related injury in combination with his pre-existing permanent partial disabilities and his permanent partial disabilities from the 2007 work-related accident. The claimant argued in his brief:

The most significant defense regarding the claimant's entitlement to permanent total disability benefits is the assertion that the claimant's disability is in part due to rheumatoid arthritis that developed after the 2007 work-related accident. The claimant testified that he would not be able to work in any capacity when his rheumatoid arthritis flares up a few times a month. However, it is unnecessary to consider the combination of claimant's disability due to rheumatoid arthritis. In determination of the employment capacity, the last injury is first considered in isolation. If it is determined that claimant is totally disabled based on the last injury alone, no further disability need be considered. In the same manner, if claimant is determined unemployable based on the last injury alone or in combination with pre-existing disability, consideration of the worsening of his overall condition due to deterioration is irrelevant. This claimant is permanently and totally disabled regardless of his rheumatoid arthritis which is generally controlled by medication. If claimant did not have the conditions of Rheumatoid Arthritis, he would still be permanently and totally disabled. It is not the Rheumatoid Arthritis that causes claimant to lie down and/or nap every day. The same stems from his spinal problems. See claimant's brief.

The claimant's position regarding the claimant's rheumatoid arthritis is well taken based on the only forensic evaluation of the condition. Dr. Musich opined that the rheumatoid arthritis is not disabling. See Dr. Musich deposition, page 40. However, the tethered spinal cord seems

to be different based on medical records from Dr. Dooley, Dr. Matz, and Dr. Rickmeyer. See Exhibit F. The medical records reveal the progressive deterioration of the claimant relative to his low back condition:

The work-related accident occurred on December 16, 2007. The claimant received medical care for his cervical disk condition after the accident. Dr. Keefe assessed the claimant with a low back strain on December 17, 2008, and diagnosed that condition later that month. See Exhibit F, pages 96-105. On February 14, 2008, Dr. Coyle took a medical history of low back pain radiating into his right buttock and right lateral and anterior thigh. See Exhibit F, page 124. The claimant reported that he developed low back pain two days after the accident. See Exhibit F, page 124. On May 19, 2008, Dr. Coyle performed a cervical fusion. See Exhibit F, pages 137, 138. Dr. Coyle ordered x-rays and an MRI revealing a tethered cord at the L3 level with a desiccated disc with foraminal and extraforaminal protrusion L5-S1 on the left with lipoma. See Exhibit F, pages 144, 147. On August 19, 2008, Dr. Coyle opined, "I don't see the L5-S1 as causing his current symptoms." See Exhibit F, page 144. From August through December 2008, Dr. Smith performed injections for low back pain relief. See Exhibit F, pages 173-190. On November 17, 2008, Dr. Cantrell examined the claimant for his low back pain and opined that the condition was mechanical back pain not related to the accident. See Exhibit F, pages 199-203. In February 2009, Dr. Cantrell found the claimant to be at maximum medical improvement from the accident and returned him to work. See Exhibit F, pages 210-212.

On April 14, 2010, Dr. Rickmeyer examined the claimant and noted that the claimant could not stand for an hour, could not sit for over an hour, and could only lift 5-10 pounds without back pain. See Exhibit F, page 327. On April 29, 2010, Dr. Dooley examined the claimant and found a severely disabled patient according to his medical report. See Exhibit F, pages 259-260. In May 2010, Dr. Matz opined that treatment for the tethered cord was indicated after treatment of the claimant's colitis. See Exhibit F, pages 263-264. Dr. Matz recommended and performed surgery on September 30, 2010 involving L5-S1 laminotomy for detethering of the spinal cord. Post surgery, the claimant's burning pain in his legs improved significantly. On January 24, 2011, Dr. Rickmeyer found chronic low back pain and rheumatoid arthritis. See Exhibit F, pages 340-342. Dr. Matz released the claimant from treatment in June 2011. On July 15, 2011, Dr. Rickmeyer found severe aching pain radiating to the back aggravated by lifting, movement, sitting, walking, and standing with no relieving factors. Associated symptoms included spasms and weakness. Pertinent negatives included numbness or tingling in the arms and legs. See Exhibit F, pages 345-348. On November 8, 2013, medical records show the claimant had chronic pain syndrome, onset January 24, 2011, and rheumatoid arthritis, onset November 2, 2009. See Exhibit F, page 359.

Certainly, if the low back condition was caused by or flowed from the accident, then the progressive deterioration of the claimant is a work-related result and the Second Injury Fund

bears liability for the claimant's total disability. On the other hand, if the claimant's severe low back condition is progressive degeneration of a pre-existing congenital condition, then the Second Injury Fund does not bear liability for the claimant's permanent total disability. Dr. Cantrell opined that the condition was not related to the work-related accident. See Exhibit F. Legal counsel inquired with both Dr. Musich and Dr. Coyle whether the claimant's condition resulting from his tethered spinal cord was related to the 2007 accident. Both physicians responded that the question was very difficult.

Dr. Musich testified that it "could" have resulted from the accident, but, "as far as causation, I don't believe that there's enough information that he (Dr. Coyle) would be able to shed any light on this subject." See Dr. Musich deposition, page 43. Dr. Coyle testified:

Boy, that's a hard question to answer. It's pretty hypothetical. The thing I do know is that he was pretty good after I sent him for some brief therapy, and I didn't see problems with his low back until the following summer when apparently he was symptomatic enough that I recommended an MRI. I would think that if the snowplow incident caused his back pain, it would have been continuous between the time of his accident and time that we ordered the MRI. See Dr. Coyle deposition, page 44.

In order to prove that the progressive deterioration from the tethered spinal cord is related to the accident, the claimant must prove his case. The fact that it is a hard question or could have been a result of the accident does not prove that the claimant's progressive degenerative condition was a result of the accident.

The difficulty with the claimant's case against the Second Injury Fund is that the total disability must be a product of the claimant's preexisting permanent partial disabilities and the claimant's permanent partial disability from the work-related occurrence. Generally, the deterioration of other conditions after the occurrence will not support an award of permanent total disability from the Second Injury Fund.

By her argument the claimant would have us expand § 287.220.1 to impose liability for any worsening of a claimant's pre-existing disability occurring after the last injury was sustained without regard to whether the last injury contributed to or aggravated the pre-existing condition. This we decline to do. Such interpretation would not promote the purpose of the Second Injury Fund. The Second Injury Fund provides compensation for previously existing disabilities, not increased disabilities caused by post-accident worsening of pre-existing diseases when that worsening was not caused by or aggravated by the last injury. The view urged by the claimant would convert the Second Injury Fund to a form of health insurance, which it is not. "The purpose of the Second Injury Fund is twofold: to encourage the employment of individuals who are already disabled; and to relieve an employer or his insurer of liability for the previously disabled employee's total and permanent disability where that disability is not specifically attributable to an injury suffered during the period of employment with that employer. Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789, 793 (Mo.

App. S.D. 1992)

The question becomes whether the evidence supports a finding that the claimant's unemployability resulted from a combination of the claimant's preexisting permanent partial disabilities and the claimant's permanent partial disability from the work-related occurrence. Were the claimant's subsequent disabilities merely added to the claimant's existing disabilities that already qualify him for total disability, the additional disabilities would be irrelevant. However, none of the experts isolated the claimant's preexisting disabilities and disabilities from this occurrence to voice a forensic opinion. Based on the claimant's latest conditions including his post injury progressive degeneration of a pre-existing congenital condition, most of the experts testified that the claimant was unemployable in the labor market. The conclusion is that the evidence does not support an award of permanent total disability against the Second Injury Fund.

However, the evidence supports an award of permanent partial disability benefits against the Second Injury Fund. Based on the weight of the evidence, the claimant's pre-existing permanent partial disabilities combined with the claimant's permanent partial disability from the last accident to create a greater overall disability. Based on the entire record, the claimant suffered a compensable work-related injury in 2007 resulting in a 50% permanent partial disability to the body as a whole (200 weeks). At the time the last injury was sustained, the claimant had a 17 ½% pre-existing permanent partial disability to the left hip (36.225 weeks), a 12 ½% pre-existing permanent partial disability to the neck (50 weeks), a 15% pre-existing permanent partial disability to each wrist and elbow (115.5 weeks). The permanent partial disability from the last injury combines with the pre-existing permanent partial disability to create an overall disability that exceeds the simple sum of the permanent partial disabilities by 20%.

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. The claimant testified credibly about significant ongoing complaints associated with these injuries. The claimant changed how he performs many activities both at home and at work due to the combination of the problems. The claimant testified that as a result of the combination of the problems, he had limited the way he lifts objects at work and at home.

Therefore, the Second Injury Fund bears liability for 80.345 weeks of permanent partial disability benefits.

DEPENDENCY

The claimant raised the dependency of his spouse as an issue in this matter. In support of this issue, he evokes the ruling in Schoemehl v. Treasurer of the State of Missouri, 217 S.W.3d 900 (Mo. 2007). Schoemehl dealt with the issue of whether a dependent spouse may step into the shoes of a deceased claimant as the putative employee, and receive previously awarded permanent total disability benefits for the rest of the dependent spouse's life. The ruling in Schoemehl was that a dependent spouse could stand in the shoes of the deceased claimant and receive those benefits. Later case law, as well as a statutory amendment to Section 287.230.3, limited the scope of the Schoemehl decision to the period of time of January 9, 2007, through

June 26, 2008, when the statute was amended and abrogated the ruling in Schoemehl. Subsequent decisions also decided that, if a claimant had a pending claim for that time period, the Schoemehl ruling applied.

In this case, the claimant and his spouse, Susan Chambers, have been continuously married since February 11, 1989. They were married at the time of the accident and at the time of the hearing. The claimant's spouse qualifies as a dependent as that term is defined in Section 287.240, RSMo 2000.

Whether the dependent has a valid claim for workers' compensation benefits under the Schoemehl doctrine is unclear and cannot be determined at this time. In White v. University of Missouri, Kansas City, 375 S.W.3d 908 (Mo.App. 2012), the Court dealt with a situation similar to the one in the instant case. In White, the claimant sought a ruling that his wife was his dependent, and would recover his lifetime permanent total disability benefits upon his death. The problem, however, was that Mr. White was still alive at the time of the ruling and may still be alive to this day. The court in White ruled that the dependent spouse had "no currently enforceable claim for benefits" against the Second Injury Fund. The court concluded that the claim for benefits "remains contingent." The two important contingencies, according to the court, were that:

1. The dependent spouse and the claimant remain married, and
2. That the employee passes away before the dependent spouse.

Until those contingencies are satisfied, the dependent spouse does not yet have a claim for benefits. White, at 913. Thus, no ruling on the rights of the dependent spouse is authorized by Missouri law, and any such ruling would be premature, so none is made.

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