

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

Injury No.: 10-006952

Employee: Michael Curbow
Employer: Hillhouse Services, Inc. (Settled)
Insurer: Missouri Employers Mutual Insurance (Settled)
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 December 5, 2013. The award and decision of Administrative Law Judge Karen Wells Fisher, issued December 5, 2013, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 3rd day of July 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Claimant:	Michael Curbow	Injury No. 10-006952
Dependents:	N/A	
Employer:	Hillhouse Services, Inc.	Before the DIVISION OF WORKERS' COMPENSATION
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	N/A	Jefferson City, Missouri
Hearing Date:	July 25, 2013	Checked by: _____

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: January 11, 2010.
5. State location where accident occurred or occupational disease was contracted: Verona, Lawrence County, Missouri.
6. Was above Claimant in the 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.
10. Describe work Claimant was doing and how accident occurred or occupational disease contracted: Claimant slipped and fell on ice at work, sustaining an injury to his low back.
12. Did accident or occupational disease cause death? NO Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Low back (lumbar spine).
14. Nature and extent of any permanent disability: 12.5% body as a whole (400-week level).
15. Compensation paid to-date for temporary disability: \$7,381.00
16. Value necessary medical aid paid to date by employer/insurer? \$7,109.95
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Claimant's average weekly wages: \$634.46

- 19. Weekly compensation rate: \$423.50 / \$422.97
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
Employer previously settled.
- 22. Second Injury Fund liability: YES.
14.5 weeks of permanent partial disability from the Second Injury Fund

TOTAL: \$6,133.07

- 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:

Larry Pitts

FINDINGS OF FACT and RULINGS OF LAW:

Claimant:	Michael Curbow	Injury No. 10-006952
Dependents:	N/A	
Employer:	Hillhouse Services, Inc.	Before the DIVISION OF WORKERS' COMPENSATION
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	N/A	Jefferson City, Missouri
Hearing Date:	July 25, 2013	Checked by: _____

AWARD

The parties presented evidence at a final hearing on July 25, 2013. Four issues were presented for determination:

- 1) Whether there was an "accident" under the Law on January 11, 2010.
- 2) Whether the claimed accident of January 11, 2010 caused Claimant to sustain an injury to his low back.
- 3) Whether Claimant sustained any permanent disability as a consequence of the claimed accident of January 11, 2010, and, if so, the nature and extent of any permanent disability.
- 4) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial or permanent total disability compensation.

Attorney Larry Pitts appeared for Claimant. Assistant Attorney General Stephen Freeland appeared for the Second Injury Fund. The employer, Hillhouse Services, Inc., previously settled with Claimant and did not participate in the hearing. The parties stipulated that the average weekly wage at the date of injury was sufficient to yield a compensation rate of \$422.97 for permanent partial disability and a compensation rate of \$423.50 for total disability benefits.

EVIDENCE PRESENTED

The evidence presented consisted of the hearing testimony of Claimant, Michael Curbow, along with the following exhibits that were received and admitted into evidence:

- A. Report of Injury by Employer.
- B. Notice of Termination of Compensation.
- C. Claim for Compensation: Injury Number 10-006952.
- D. Stipulation for Compromise Settlement with Employer/Insurer.
- E. June 14, 2011 Deposition of Michael Curbow.
- F. Certified Educational Records.
- G. Deposition of Dr. Shane Bennoch (with associated exhibits).
- H. Deposition of Phillip Aaron Eldred (with associated exhibits).

- I. Certified Medical Records (Tabs 1-10).
- J. Certified Medical Records--typed--from Dr. Watts' Office (January 11, 2010 visit).

Second Injury Fund Exhibit I: Deposition of Dr. Allen Parmet (with associated exhibits).

DISCUSSION

Claimant's Vocational Background

Claimant testified at the hearing. Claimant was born on June 21, 1961 and was 52 years old on the date of hearing. Claimant currently resides in Clever, Missouri, and is unemployed at present. Claimant's last job was for Hillhouse Services, Inc., the Employer in this case. Claimant's work duties consisted of operating a dump truck and pump truck. With the dump truck Claimant would haul dirt, gravel, and rock. With the pump truck Claimant would vacuum out cow lots, car washes, and septic tanks. This job required Claimant to routinely lift up to 80-90 pounds, particularly when removing sewer lids or dragging hoses from the pump truck. Claimant worked this job full-time, full-duty for approximately seven years prior to the claimed January 11, 2010 work injury.

Prior to working for Hillhouse, Claimant worked at Bailey's Billiards in Marionville, Missouri. Claimant was responsible for hand-sanding and staining billiard tables. Claimant said that the work was repetitive and hand-intensive. Claimant testified that he would normally lift between 50-60 pounds while moving items such as buckets of lacquer and pool table legs. Claimant testified that he was able to do this job full-time, full-duty for one year before leaving for better pay with Hillhouse.

Prior to working for Bailey's, Claimant worked for a powerline company for almost 15 years. In this job Claimant drove trucks and operated a digger to set powerline poles. Claimant testified that this was a physically-demanding job, stating that he would often lift up to 100 pounds. Claimant's work required him to sit down for extended periods of time to operate the trucks and machinery, but it also forced him to be on his feet a lot. Claimant further testified that, because this was dangerous work, he was required to have a good understanding of how the machinery worked. He left this powerline job for better pay with Bailey's.

Before joining the powerline company, Claimant was self-employed for a period of time. Claimant operated his own tree-topping/firewood-cutting business called Mike's Tree Service. This job required Claimant to both sit and be on his feet. The work was very strenuous, requiring him to lift between 125 and 150 pounds. Claimant would have three to four Claimants working under him, and he took responsibility for finding clients. He left this job for better pay with the powerline company.

Prior to his self-employment in the tree-topping/firewood cutting business, Claimant worked for his dad as a sawmill laborer, a job that he had done since high school. Claimant cut railroad ties, carried slabs, shoveled sawdust, operated chain saws, and moved logs and planks.

Claimant testified that this was a very physically-demanding job, which required lifting of upwards to 100 pounds. Claimant would sit to operate machinery, but the job also required him to be on his feet a lot.

Prior Medical Conditions

Prior to January 11, 2010, Claimant suffered injuries and/or medical conditions that caused him to present with preexisting permanent partial disability, namely injuries to the following:

Left wrist: Claimant injured his left hand, which was his dominant upper extremity, when a horse that he was riding rolled on top of him and crushed his left hand under the saddle horn. As a result, Claimant required two surgeries to his left hand in 1988. Claimant testified that he has had left hand problems every day thereafter. Claimant testified that his left hand is sensitive to cold, that it becomes stiff and numb, and that it can ache to the point that he cannot use it for the rest of the day. Claimant testified that he avoids anything that would vibrate or jar the left hand.

Low back: Claimant testified that he had persistent low back pain prior to January 11, 2010. Although actual medical treatment started in 1989, Claimant testified that he had been experiencing low back pain for years prior to that time. In the years leading up to January 11, 2010, Claimant treated with multiple physicians for his low back. Claimant received injections into his low back, but these injections only provided minimal/temporary relief. Claimant underwent physical therapy, received shock treatment, and tried stretching and hot/cold packs. Claimant often treated with his personal chiropractor, Dr. John Watts. Claimant would stretch out on the chiropractic table and have a wheel run over his back. Claimant also tried whole body adjustments. At times, the pain in his back would cause him to miss one to two days of work at a time. Claimant said that it was difficult to lift heavy objects and that sometimes he would have to stop in the middle of lifting just to keep from falling over. Claimant testified at hearing that frequently he would have to get help at work to move heavier objects. Claimant underwent multiple MRIs prior to January 11, 2010, which repeatedly revealed bulges/herniations at L5-S1. Claimant received multiple surgical consultations, but was deemed not to be a surgical candidate due to his weight.

Accident

Claimant testified that on January 11, 2010 he sustained an injury by accident, which arose out of and in the course and scope of his employment with his employer, Hillhouse Services, Inc. Claimant testified that he arrived at work at 6:20 a.m. that morning to pick up his pump truck. From there he was supposed to drive his truck to a factory in Monett, Missouri. Claimant testified that while getting his truck he slipped on an icy concrete pad, his feet went out

from under him, and he landed on his tailbone. Claimant went ahead and took the truck out on the route but testified that, when he tried to back the truck up, he could not get his feet onto the pedals. Claimant related that his low back was hurting and that he was experiencing burning pain that radiated into both legs. Claimant testified that he let his supervisor know that he was having problems. Claimant was then told that he would be sent to Dr. Mark Costley later that day.

Medical Treatment

Before seeing Dr. Costley, Claimant first went to his chiropractor, Dr. Watts. Claimant was questioned by his attorney regarding the following notation in Dr. Watt's January 11, 2010 note:

Patient states chief complaint onset this week and not getting better, patient denies trauma, activities of daily living effect moderate and has been performing work activities.

Claimant denied the history reported in Dr. Watts' record and offered the explanation that he was perhaps confused by Dr. Watts' questions in that he (Claimant) did not know what the word "trauma" meant. Dr. Watts provided hot/cold packs for Claimant's back and sent him home, saying that he needed to take a day off from work.

On the afternoon of January 11, 2010, Claimant visited Dr. Mark Costley. Claimant testified that Dr. Costley prescribed physical therapy and placed him on modified duty. Since Employer did not have modified duty, Claimant was taken off of work. Claimant related that he was sent to Dr. Woodward in Springfield, Missouri. At that time Claimant was still complaining of low back pain with numbness into his feet and toes. Dr. Woodward administered an epidural steroid injection and ordered more physical therapy, although neither provided Claimant much relief.

An MRI was taken on March 2, 2010, which revealed no evidence of acute bony or soft tissue injury. Per the MRI results, when compared with pre-January 11, 2010 MRI studies, Claimant's lumbar spondylosis was not significantly changed. There was a central-to-bilateral subarticular protrusion with marginal osteophyte at L5-S1 with mild effacement of both lateral recesses, contacting the S1 nerve root.

Thereafter Claimant continued to treat for his low back condition, receiving medications, physical therapy, and pool therapy. Claimant was released by Dr. Woodward on May 28, 2010 to perform full-time modified work duties—continuous lift/push/pull limit of 0-50 pounds—due equally to Claimant's alleged work injury and preexisting lumbar degenerative disc disease. There was no surgical recommendation due to Claimant's weight, which was 270 pounds at the time of the injury. Claimant was referred for a Functional Capacity Evaluation. Claimant testified that he did less than one hour of testing because he was unable to complete the tasks asked of him.

Medical Opinions

Dr. Shane Bennoch

Claimant offered as evidence the Independent Medical Evaluation (IME) report and testimony of Dr. Shane Bennoch. Dr. Bennoch chronicled Claimant's prior history of back pain and related treatment. Dr. Bennoch also took a history from Claimant regarding the claimed January 11, 2010 work injury and reviewed the subsequent treatment documented in the medical records.

Dr. Bennoch diagnosed Claimant with a subarticular disc protrusion at L5-S1 with bilateral S1 radiculopathy resulting from the January 11, 2010 alleged work injury, stating "that fall was a persistent irritating factor resulting in the subarticular disc protrusions and bilateral radiculopathy." In his deposition, Dr. Bennoch further stated that he believed the alleged January 11, 2010 fall was the "prevailing factor" for Claimant's subarticular disc protrusion at L5-S1 with bilateral S1 radiculopathy.

Dr. Bennoch assigned a 35% BAW disability rating for Claimant's lumbar condition, with 15% of that rating due to Claimant's preexisting lumbar condition. Dr. Bennoch limited Claimant to 20 pounds lifting/carrying with no frequent lifting or carrying. Dr. Bennoch limited Claimant to less than 2 hours of standing in an 8 hour work day, noting also that Claimant must be allowed to periodically alternate sitting and standing to relieve pain or discomfort in the back. Dr. Bennoch further noted that Claimant was limited in his lower extremities and therefore should not push/pull greater than 20 pounds and should push/pull less repetitively.

In his report, Dr. Bennoch opined that Claimant would be permanently and totally disabled as a result of the alleged January 11, 2010 fall, the preexisting lumbar condition, and his "learning disorder." In his deposition, Dr. Bennoch testified that Claimant, even without his "learning disorder," would be permanently and totally disabled as a result of the January 11, 2010 work injury, the preexisting lumbar condition, and the preexisting left wrist condition.

On cross-examination, Dr. Bennoch testified that he believed Claimant had a learning disability because that fact was indicated in a letter to Dr. Bennoch from Claimant's counsel. Dr. Bennoch conceded that he had received no psychologist or psychiatrist reports stating that Claimant had a diagnosed learning disability. Dr. Bennoch further conceded that he had not reviewed any IQ testing of Claimant nor had he reviewed any of Claimant's academic transcripts. Dr. Bennoch also testified that he assumed Claimant was functionally illiterate even though Claimant did not represent as much to him. Dr. Bennoch agreed that Claimant was still able to pass a drivers license test, be employed for several years, and operate dangerous machinery that, if not properly understand, could cause serious injury. Dr. Bennoch further agreed that Claimant's job with Employer was very physically-demanding, requiring him to drive trucks, drag hoses, and operate heavy machinery.

Dr. Allen Parmet

The Fund offered the report and testimony of Dr. Allen Parmet. Dr. Parmet conducted an independent records review for the Fund; he did not meet personally with Claimant. Dr. Parmet noted Claimant's long medical history of low back complaints. Dr. Parmet specifically noted the prior MRIs that revealed disc bulges and protrusions at L4/5 and L5/S1 that were causing moderate to severe canal stenosis and bilateral neuroforaminal narrowing. Dr. Parmet reported on Claimant's preexisting complaints of low back pain with right radiculopathy, noting that he received multiple injections and surgical consultations.

Based on the disparity between Dr. Watts' January 11, 2010 note and Claimant's own subjective history, Dr. Parmet reported that he could not determine for sure whether Claimant actually suffered a specific work injury on January 11, 2010. Dr. Parmet noted the long ten-year history of Claimant's progressive low back complaints and chiropractic treatment. Based on the MRI studies from 2001 thru 2010, Dr. Parmet did not identify a significant progression of anatomical findings. Dr. Parmet testified that if a disc bulged is caused by trauma, then the signal finding on the MRI study would show an annulus tear; while there was a tear present in the 2008 MRI, Dr. Parmet noted that no tear was present in the 2010 MRI. Dr. Parmet said the new L2/3 bulge was due to aging and dehydration.

Dr. Parmet noted that Claimant had had multiple surgical consultations for his low back prior to the alleged work injury and a nucleoplasty just 11 months prior to January 11, 2010. Dr. Parmet opined that Claimant's situation was a chronic progression of degenerative changes "typical of an overweight smoker." Dr. Parmet hypothesized that if there was a work-related fall on January 11, 2010, then Claimant had only sustained a mild sprain with no significant objective anatomical changes, noting that Claimant's subjective pain complaints were identical to the preexisting intermittent complaints.

Dr. Parmet noted that Claimant was not routinely taking analgesic medications but rather on an intermittent, as-needed basis, which Dr. Parmet said was "far from the chronic disabling back pain in most other patients." Dr. Parmet agreed with the assessment of Dr. Woodward and disagreed with that of Dr. Bennoch, finding Dr. Bennoch's opinion to be disproportionate to the objective findings, the treating physicians' reports, and the physical evaluation. Dr. Parmet agreed that the medium level of labor would be an appropriate restriction for physical activity.

Regarding Claimant's preexisting back condition, Dr. Parmet apportioned a 5-10% BAW disability rating. For the preexisting left wrist condition, the disability rating was 8-10% to the left wrist. Dr. Parmet observed that there were no permanent restrictions for his left wrist, that Claimant had worked for over twenty years as a general laborer, and that Claimant's left grip strength was good in the Physical Capacity Evaluation. Taking into account Claimant's low back complaints post-January 11, 2010, Dr. Parmet said that Claimant's total disability for his back was between 10 and 15% BAW.

*Vocational Opinions***Mr. Phillip Eldred**

Claimant offered the vocational report and testimony of Mr. Phillip Eldred. Mr. Eldred reported that Claimant was friendly, pleasant, and personable throughout the interview. Claimant represented to Mr. Eldred that his pain was a 5-6 throughout the interview. Mr. Eldred reported Claimant's representation that he was "functionally illiterate." Regarding his prior left hand injury in 1988, Claimant represented to Mr. Eldred that he cannot pick things up very much and that he has little strength in his left hand. Mr. Eldred noted from the medical records Claimant's longstanding history of low back pain. Mr. Eldred concluded that Claimant had a vocationally disabling impairment that was a hindrance or obstacle to employment before January 11, 2010. Mr. Eldred did note that Claimant had obtained his commercial driver's license (CDL).

Claimant represented to Mr. Eldred that the only ongoing treatment for the January 11, 2010 low back injury was Vicodin as needed. Mr. Eldred opined that Dr. Woodward's restrictions for Claimant were at the medium work level under the Department of Labor's *Dictionary of Occupational Titles (DOT)*. According to Mr. Eldred, Dr. Bennoch's restrictions for Claimant were at the "less than sedentary" work level. Mr. Eldred concluded that Claimant was permanently and totally disabled "as a result of his injury on January 11, 2010 combined with his pre-existing injuries and conditions."

At his deposition, Mr. Eldred testified that Claimant represented experiencing pain with essentially every exertional movement. Although "no pain" was a potential answer in several of the questionnaires that he administered, Mr. Eldred conceded that Claimant never provided that as one of his answers. Mr. Eldred further conceded that he did not review any psychologist or psychiatrist reports concerning Claimant. Mr. Eldred testified that he did not administer an IQ test to Claimant. Although he reviewed Claimant's school records from the 8th and 9th grades, Mr. Eldred admitted that he did not review a letter from a school counselor diagnosing a learning disability for Claimant.

Present Complaints

Claimant testified that his spine feels like it is "jammed together at the tailbone." Claimant said that his low back pain is usually a 3-4/10 with pain medicines on board. Without pain medication, Claimant related that his pain is "through the roof" and beyond a 10/10. Claimant testified that he continues to experience radiating pain into one or both of his legs. Claimant testified that exertion will cause a flare-up of pain and that he "cannot function" if it becomes too bad. Although Claimant takes hydrocodone as needed, he testified that fortunately he does not experience any side-effects from the hydrocodone.

Claimant represented that he spends part of his day lying down to rest his back. Claimant conceded that he would have also laid down daily before his January 11, 2010 injury if his work would have allowed it. Per his hearing and deposition testimony, Claimant continues to mow

with his push and riding mowers as well as weed-eat. Claimant takes care of his own laundry, cooking, and housecleaning. At hearing, Claimant said that he is limited in standing/walking to twenty minutes. Claimant said that he can walk no more than one block before needing to sit down. Claimant said that his sitting is limited to less than thirty minutes, at which points he needs to stand or walk around. Claimant said that he can lift 40-50 pounds rarely, 20 pounds occasionally, and nothing frequently.

At the time of his June 14, 2011 deposition, Claimant was living alone and independently meeting his own day-to-day needs. At the time of hearing, Claimant was living with his girlfriend, but he continues to take care of his own needs and now helps his girlfriend with the household chores.

FINDINGS AND CONCLUSIONS

Claimant has the burden of proving all essential elements of his workers' compensation claim. *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793 (Mo. App. 1992). Where proof of an essential element is lacking, compensation may not be awarded. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo. App. 1993). For Claimant to be entitled to benefits under the Workers' Compensation statutes, he must prove, in part, that the condition of which he is complaining is medically caused by an accidental injury or occupational disease sustained at the work place during the course and scope of employment. *Haynes v. Emerson Elec. Co.*, 799 S.W.2d 939, 947 (Mo. App. 1990).

I. Accident

An "accident" is defined as "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift[;] An injury is not compensable because work was a triggering or precipitating factor." §287.220.2 RSMo.

The evidence is supportive of a finding, and I find and conclude that on January 11, 2010, Claimant, Michael Curbow, sustained an injury by accident that arose out of and in the scope and course of his employment with his employer, Hillhouse Services. On this point I find Claimant's testimony to be credible. I find and conclude that, on the date in question, Claimant did slip and fall on ice while he was performing his job duties for his employer and that this unexpected traumatic event did produce new and objective symptoms in Claimant's lumbar spine.

II. Medical Causation

An "injury" is defined as "an injury which has arisen out of and in the course of employment." § 287.020.3(1). "An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability." *Id.* "The prevailing factor" is defined as "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability." *Id.* Medical causation that is not a matter of common knowledge or experience must be established by scientific or medical evidence showing

the relationship between the complained-of medical condition and the asserted cause of the condition. *Bond v. Site Line Surveying*, 322 S.W.3d 165, 170 (Mo. App.2010).

On this point, I find the opinion of Dr. Bennoch more persuasive than that of Dr. Parmet. Thus, in rendering this decision, I resolve the differences in medical opinion on the issue of causation in favor of Dr. Bennoch who I find credible, reliable, and worthy of belief. I specifically note Dr. Bennoch's deposition testimony that the January 11, 2010 fall was the "prevailing factor" for Claimant's subarticular disc protrusion at L5-S1 with bilateral S1 radiculopathy.

III. Nature & Extent of Disability

The evidence presented in this case is supportive of a finding that Claimant sustained an injury to his lumbar spine as a consequence of the January 11, 2010 accident. This injury to the lumbar spine has been identified and outlined in the foregoing sections and subsections. Furthermore, this injury has caused Claimant to sustain permanent disability and to be governed by additional limitations and restrictions. The parties offer differing medical and vocational opinions regarding the nature and extent of Claimant's disability and employability.

In considering the nature and extent of the permanent disability attributable to the January 11, 2010 work injury, I find and conclude that Claimant is governed by the restrictions imposed by Dr. Woodward and affirmed by Dr. Parmet: continuous lift/push/pull limit of 0-50 pounds. I further find credible Claimant's testimony that he has increased pain and a decreased level of functioning in his back, which I find attributable to the January 11, 2010 work injury.

In light of the foregoing, and after consideration and review of the evidence, I find and conclude that the accident of January 11, 2010 caused Claimant, Michael Curbow, to sustain permanent partial disability of 12.5 percent to the body as a whole (50 weeks).

However, the issue of Claimant's employability remains unanswered. Regarding whether Claimant is "permanently and totally disabled," the following standard applies:

The test for permanent total disability is whether the worker is able to compete in the open labor market. A worker is totally disabled if they are unable to return to any normal or reasonable employment; the worker is not required to be inert or completely inactive. The key question is whether any employer in the ordinary course of business would reasonably be expected to hire the worker in his or her current physical condition.

Schussler v. Treasurer of State-Custodian of Second Injury Fund, 393 S.W.3d 90, 96 (Mo. App. 2012) (citing *Carkeek v. Treasurer of State-Custodian of Second Injury Fund*, 352 S.W.3d 604, 610 n.3 (Mo. App. 2011)). I find and conclude that the work injury of January 11, 2010 in isolation does not render Mr. Williams unemployable in the open and competitive labor market. I further find and conclude that Mr. Williams is able to conduct physical activity that falls within the "medium" level of labor as defined by the *DOT*. Mr. Eldred reported and testified that Dr.

Woodward's restrictions--which I have found to govern Claimant's current condition--would place Claimant at the medium level. Claimant can stand, sit, and walk as tolerated. I thus find and conclude that certain employers in the ordinary course of business would reasonably be expected to hire Claimant in his current physical condition to perform work at or below the medium level of labor.

Claimant argues that he is permanently and totally disabled due to the alleged January 11, 2010 accident, his preexisting lumbar condition, and his "learning disability." Alternatively, Claimant asserts that he is permanently and totally disabled from his physical disabilities alone. I find and conclude that Claimant has not met his burden of proving permanent total disability under either theory.

The law is well established that a claimant's poor reading and writing skills are not enough to trigger Fund liability as a preexisting disability. "A 'permanent partial disability' is one that is permanent in nature and partial in degree. *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo. App. 1985); *Section 287.190.6*; *Loven v. Greene County*, 63 S.W.3d 278, 286 (Mo. App. 2001).

A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." *State Div. of Family Services v. Hill*, 816 S.W.2d 702, 703 (Mo. App. 1991). *See also Alaska International Constructors v. Kinter*, 755 P.2d 1103, 1105 (Alaska 1988) and *Robinson v. Newberg*, 849 S.W.2d 532, 534 (Ky. 1993) (in worker's compensation context, "permanent" means lasting rest of claimants life or will not improve during lifetime).

Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo. App. 1997).

In *Tiller*, the Missouri Court of Appeals, Southern District, affirmed the Commission's award denying the claimant's illiteracy as a preexisting permanent disability because:

The Commission's award included the ALJ finding that Appellant was capable of learning to read and write, but lacked sufficient motivation to do so. Thus, the disability, if it be such, is not permanent. Where illiteracy is not due to inability to learn, but lack of education, it is not a permanent partial disability for Second Injury Fund purposes.

941 S.W.2d at 866.

In *Roby v. Tarlton Corp.*, the Court was faced with similar facts. 728 S.W.2d 586 (Mo. App. 1987). In that case, the claimant had a limited third-grade education or intellectual aptitude. The evidence showed Mr. Roby could not read or write, and had an I.Q. of between 59 and 67. *Id* at 587. The Employer attempted to put liability upon the Second Injury Fund by claiming Mr. Roby had a preexisting industrial disability (low intelligence) that was manifested by a lack of earning capacity or earning power at the time of the injury to his leg. *Id* at 588. However, the

Court rejected this argument, stating, "The record suggests that Mr. Roby's mental deficiency was not so severe as to be clearly manifested, and that he had successfully adapted to his social and physical environment, had a steady employment history, and economically supported his family." *Id* at 589. The Court went on to further state, "There is no evidence upon the record to suggest that Mr. Roby's employers considered him mentally retarded in the sense of being industrially disabled." *Id* at 589.

In this case, Claimant Michael Curbow is not completely illiterate and his current problems with reading and writing are not permanent in nature. Claimant testified that he "never took to school." Claimant voluntarily dropped out in the 9th grade. Claimant never attempted to obtain a GED after leaving high school. In the 8th grade, he was absent for 33 days out of the year, a fact that undoubtedly had a negative effect on his grades that year, despite Claimant's beliefs to the contrary. I find and conclude that Claimant has not show any initiative towards bettering his education. While Claimant may have tested poorly on the vocational tests administered by Mr. Eldred, I find that this is merely consistent with the poor motivation that Claimant has consistently demonstrated towards education.

In *Tilley* and *Roby*, the claimants could not read or write at all. Those claimants were completely illiterate, and yet their illiteracy was not deemed to be permanent in nature because they were not diagnosed with a specific learning disability. In this case, Claimant Michael Curbow has never been diagnosed with an actual learning disability. The claim of "functional illiteracy" was manufactured through the legal proceedings in this case. Dr. Bennoch conceded in his deposition that the only place he found a "learning disability" mentioned was in the letter addressed to him from Claimant's counsel. Claimant can read and write. While he may not be as strong in reading and writing as other individuals, Claimant certainly has developed sufficient skills to function as a productive member of society since leaving high school. I would specifically note the following facts:

- Claimant has obtained personal and commercial driver's licenses, both of which require a written test.
- Claimant has been able to perform satisfactory work for various employers while operating heavy and dangerous machinery.
- Claimant has been able to operate as an independent small business owner while securing jobs in the community and paying his employees.

During cross-examination at hearing, the Fund's counsel asked Claimant to follow along as Dr. Watt's January 11, 2010 note was read to Claimant. Claimant followed along and verbally confirmed that the Fund's counsel had read the note correctly. Had Claimant not been able to read, I expect that he certainly would have raised that fact. Again, while he may be weaker in these areas than others, Claimant has not made any attempts since high school to improve his reading or writing abilities. I find that Claimant is not barred from bettering his ability to read and write because of a learning disability as none has ever been diagnosed. Claimant is barred because he has chosen not to put the effort and time in to bettering his ability.

Just as the claimant in *Roby*, Claimant Michael Curbow is claiming his lack of education has limited the jobs he has applied for over the years, which has limited his earning capacity. The law is very clear this does not give rise to a hindrance or obstacle to employment. Claimant has successfully held many jobs over his lifetime. He has supported himself, and his family, through his employment. Further, there is no evidence any of Claimant's employers having treated him as an individual who is not fit to function like any other worker. His employers did not limit him to simple, menial tasks, nor did they require close supervision of his work. Claimant has not been treated by his employers as an individual with a diminished mental capacity, such as an individual who has been diagnosed with mental retardation.

Just because Claimant did not apply for jobs for which he did not feel he was qualified, does not mean his lack of qualification was a hindrance or obstacle to employment. If Claimant's logic is accepted, then every single person could claim their lack of education in any given field caused them to have a hindrance or obstacle to employment. The Court in *Loven v. Green County* specifically addressed this issue:

No authority is cited to us, and we have found none, indicating that a person is necessarily disabled if there is any conceivable occupation that he would not be able to perform because of his condition. Likewise, we are not cited to any authority holding that if a preexisting condition would hinder or be an obstacle in acquiring any conceivable type of occupations, it would qualify as a hindrance or obstacle under §287.220.1. The "hindrance or obstacle" provision of §287.220.1 obviously refers to a hindrance or obstacle to obtaining employment or reemployment for which the Claimant would otherwise be qualified. Otherwise, a preexisting condition that would be a hindrance or obstacle to obtaining *any* employment regardless if the applicant was otherwise qualified for the position would result in a false and inappropriate test for applicability of the statute.

63 S.W.3d 278, 291 (Mo. App. 2001). In light of the foregoing facts and law, I find and conclude that Claimant is not permanently and totally disabled from a combination of his physical disabilities and the asserted, but unproved, "learning disability."

Furthermore, I find and conclude that Claimant is not permanently and totally disabled from his physical disabilities alone. While Claimant certainly has a significant disability in his low back, he is not totally disabled from that low back condition either in isolation or in combination with his preexisting left wrist condition.

An important fact, as noted by Dr. Parmet, is that Claimant does not routinely take analgesic medication, but rather only on an intermittent, as-needed basis. As Dr. Parmet observed, this is far from the chronic disabling back pain found in most other patients that are complaining of debilitating back pain. It is also important to note that Claimant lives

independently and takes care of his own personal needs (cooking, cleaning, shopping, and mowing).

Another tellingly fact is Claimant's marked weight loss. At hearing, Claimant weighed 230 pounds, which is 40 pounds less than what he weighed on June 14, 2011 when the Fund took his deposition. Claimant said he had worked off the weight by "being more active." Claimant said nothing about diet or lifestyle changes. As Claimant is active enough to enjoy this kind of weight loss, I find that he is not nearly as limited physically as he wants to portray. Accordingly I do not find credible Claimant's representation that he can only walk one block or 50 yards at a time before needing to sit down.

Based upon my review of the evidence, I find and conclude that the medical records and Claimant's subjective complaints establish Claimant's preexisting low back condition as a hindrance or obstacle to employment/ reemployment. However, as indicated by the records, Claimant has worked with pain (up to a 10/10) and range of motion limitations in his back for much of his adult working life in very heavy, manual labor jobs. According to Claimant's testimony, these jobs were performed full-time and at full-duty.

I further find and conclude that the medical records and Claimant's subjective complaints establish Claimant's preexisting left wrist condition as a hindrance or obstacle to employment/reemployment. However, I do not find that the level of disability in the left wrist is as great as Claimant wants to portray. Claimant injured the left wrist in 1988 and then proceeded to work a variety of heavy, manual labor jobs in the years that followed. Claimant was full-time, full-duty in working these jobs before January 11, 2010. Most significant was Claimant's work for Bailey's Billiards. Claimant testified that this was hand-intensive, repetitive work. Claimant was using his dominant left hand to sand and finish billiard tables. He testified that he performed this job full-time, full-duty for one year without difficulty. According to Claimant, the only reason he left that job was because of a better paying job with Hillhouse Services. While Claimant described significant preexisting limitations in his left hand and wrist, I do not find Claimant's testimony credible as to the extent of disability present in his dominant upper extremity.

In summation, I find and conclude that Claimant Michael Curbow is not permanently and totally disabled from any combination of his physical disabilities.

IV. Liability of Second Injury Fund

After consideration and review of the evidence, and for the reasons previously stated herein, I find and conclude that Claimant Michael Curbow is not permanently and totally disabled. However, the disability attributable to the January 11, 2010 work injury in combination with the prior low back and left wrist conditions caused Claimant to sustain additional permanent disability greater than the simple sum sufficient to establish Second Injury Fund liability.

Having carefully considered the entire record and the applicable law of the State of Missouri, I find the following:

1. Claimant sustained a compensable last injury on January 11, 2010 that resulted in disability of 12.5% to the body as a whole (400-week level).
2. As of the time the last injury was sustained, Claimant had the following pre-existing permanent partial disabilities that meet the statutory thresholds and were of such seriousness as to constitute hindrances or obstacles to employment or reemployment:
 - a. 15% to the body as a whole with respect to the lower back (60 weeks).
 - b. 20% at the level of the left wrist (35 weeks).

I find that the last injury combined with the pre-existing permanent partial disability results in a 10% greater overall disability than the independent sum of the disabilities. I find the Second Injury Fund liability is calculated as follows: 50 weeks (12.5% x 400 = 50 weeks) for the last injury plus 95 weeks for the preexisting injuries (15% x 400 = 60 weeks and 20% x 175 = 35 weeks) = 145 weeks x 10% = 14.5 weeks of overall greater disability.

I order the Second Injury Fund to pay Claimant \$6,133.07 (14.5 weeks x \$422.97) in permanent partial disability benefits. I find Claimant's attorney, Larry Pitts, is entitled to an attorneys' fee of 25% of all amounts awarded herein, which shall constitute a lien upon this award.

Made by: _____

Karen Wells Fisher
Administrative Law Judge
Division of Workers' Compensation
signed 11/22/13