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

Injury No.: 07-050555

Employee: Donald Davis
Employer: Ozarks Coca-Cola/Dr. Pepper Bottling Company
Insurer: Self-Insured
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 September 20, 2016. The award and decision of Chief Administrative Law Judge L. Timothy Wilson, issued September 20, 2016, 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 6th day of April 2017.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____________________________________________
John J. Larsen, Jr., Chairman

_____________________________________________
VACANT
Member

_____________________________________________
Curtis E. Chick, Jr., Member

Attest:

_____________________________________________
Secretary
AWARD

Employee: Donald Davis

Dependents: N/A

Employer: Ozarks Coca-Cola / Dr. Pepper Bottling Company

Insurer: Self-insured / Corporate Claims Management, Inc. (TPA)

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

Hearing Date: June 22, 2016

Checked by: LTW

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: June 6, 2007

5. State location where accident occurred or occupational disease was contracted: Taney County, Missouri (The parties agree to venue lying in Greene 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? N/A (Self-insured Employer)

11. Describe work employee was doing and how accident occurred or occupational disease contracted: While engaged in employment with Employer, and while Employee and a co-worker were removing a 600-pound vending machine from a motel complex with a two-wheel dolly, Employee and his co-worker maneuvered the machine and dolly over a coarse aggregate driveway. As Employee attempted to place the front wheels of the dolly on the lift gate of his truck, one of the rear wheels caught, allowing the full weight of the machine to tip back on him, causing Employee to twist and struggle to protect himself from the weight of the machine. As a consequence of this accident, Employee experienced a popping sensation and sustained 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


15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? $5,002.32

17. Value necessary medical aid not furnished by employer/insurer? $1,085.70

18. Employee's average weekly wages: $559.80

19. Weekly compensation rate: $373.20 (TTD / PTD / PPD)

20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses: ................................................................. $1,085.70

Future medical care: ................................................................. Yes

Weeks of temporary total disability (or temporary partial disability): ........................................ N/A

80 weeks of permanent partial disability from Employer / Insurer: ........................................ $29,856.00

Weeks of disfigurement from Employer / Insurer: ................................................................. N/A

22. Second Injury Fund liability: Yes

Weeks of permanent partial disability from Second Injury Fund: ........................................ N/A

Uninsured medical/death benefits: ................................................................. N/A

Permanent total disability benefits from Second Injury Fund: ................................................................. Yes

Employee is entitled to permanent total disability benefits ($373.20 per week) for his lifetime. The payment of permanent total disability compensation by the Second Injury Fund is effective as of May 26, 2009, when Employee reached MMI and his condition became permanent. Further, the payment of permanent total disability compensation shall take into consideration 80 weeks of permanent partial disability, which is attributable to Employer. There is no weekly differential between the permanent partial disability compensation paid by Employer and the permanent total disability compensation to be paid by the Second Injury Fund.

**TOTAL: $373.20 PER WEEK (LESS 80 WEEKS OF PPD PAID BY EMPLOYER) FOR EMPLOYEE'S LIFETIME, EFFECTIVE AS OF MAY 26, 2009.**

23. Future requirements awarded: Yes (See Award)

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Paul Reichert, Esq.
FINDINGS OF FACT and RULINGS OF LAW:

Employee: Donald Davis

Dependents: N/A

Employer: Ozarks Coca-Cola / Dr. Pepper Bottling Company

Insurer: Self-insured / Corporate Claims Management, Inc. (TPA)

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

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on June 22, 2016. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about August 1, 2016.

The employee appeared personally and through his attorney Paul Reichert, Esq. The employer and insurer appeared through their attorney, Jerry Harmison, Esq. The Second Injury Fund appeared through its attorney, Catherine Goodnight, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulation is as follows:

(1) On or about June 6, 2007, Ozarks Coca-Cola / Dr. Pepper Bottling Company was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully self-insured as required by Chapter 287, RSMo. (At all times relevant to this case the employer utilized Corporate Claims Management as a third-party administrator.)

(2) On the alleged injury date of June 6, 2007, Donald (“Brad”) Davis was an employee of the employer, and was working under and subject to The Missouri Workers’ Compensation Law.

(3) On or about June 6, 2007, the employee sustained an accident, which arose out of and in the course of his employment with the employer.

(4) The above-referenced employment and accident occurred in Taney County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.

(5) The employee notified the employer of his injury as required by Section 287.420, RSMo.

(6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
(7) At the time of the alleged accident of June 6, 2007, the employee's average weekly wage was $559.80, which is sufficient to allow a compensation rate of $373.20 for temporary total disability compensation, permanent total disability compensation, and permanent partial disability compensation.

(8) Temporary total disability compensation has not been provided to the employee.

(9) The employer and insurer have provided medical treatment to the employee, having paid $5,002.32 in medical expenses.

(10) In regard to the accident and injury of June 6, 2007, the employee reached maximum medical improvement on May 26, 2009.

The issues to be resolved by hearing include:

(1) Whether the employer and insurer are obligated to pay for certain past medical care and expenses?

(2) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of the injuries?

(3) Whether the employee sustained any permanent disability as a consequence of the claimed accident of June 6, 2007; and, if so, what is the nature and extent of the disability?

(4) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

**EVIDENCE PRESENTED**

The employee testified at the hearing in support of his claim. Also, the employee presented at the hearing of his case the testimony of his significant other, Amanda Dawn Seaton and his neighbor, Rachael Shaw. In addition, the employee offered for admission the following Exhibits:

- Exhibit 1 ................................................. Medical Report of Shane Bennoch, M.D. (Dated May 7, 2008)
- Exhibit 2 ................................................. Medical Reports of Shane Bennoch, M.D. (Dated October 10, 2012 & November 5, 2012)
- Exhibit 3 ................................................. Medical Report of Mitch Mullins, D.O. (Dated March 4, 2014)
- Exhibit 4 ................................................. Medical Records
- Exhibit 5 ................................................. Vocational Report of Wilbur Swearingin, CRC (Dated November 11, 2013)
The exhibits were received and admitted into evidence.

The employer did not present any witnesses at the hearing of this case. However, the employer offered for admission the following exhibits:

Exhibit A ............................................................. Deposition of Donald Brad Davis (Dated December 5, 2012)
Exhibit B ............................................................. Deposition of James M. England, CRC (Dated October 31, 2014)
Exhibit D ......................... Supplemental Medical Report of Jeffrey Woodward, M.D. (Dated May 14, 2014)
Exhibit E ......................... Addendum to Medical Report of Jeffrey Woodward, M.D. (Dated October 31, 2014)
Exhibit F..................... Video Surveillance – Three DVDs of Midwest Intelligence, Inc.

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses or offer any additional exhibits at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers’ Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Receipt for Compensation in Injury No. 88-129654
- Transcript of Compromise Settlement in Injury No. 88-129654
- Entry of Appearance of Jerry Harmison, Esq. in Injury No. 07-050555
- Answer of Second Injury Fund to Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.
DISCUSSION

Background & Employment

The employee, Donald Brad Davis, is 62 years of age; he was born on May 6, 1954. Mr. Davis resides in his family home with acreage near the northwestern edge of Springfield, Greene County, Missouri. He resides there with his significant other, Amanda Dawn Seaton. Mr. Davis and Ms. Seaton have lived together for over 13 years and have no dependents or children.

Mr. Davis attended High School in Willard, Missouri but only completed the 11th grade. Mr. Davis’s principle and last employment for 27 years, between 1980 and 2007, was as a vending machine delivery driver with Ozarks Coca-Cola / Dr. Pepper Bottling Company. The work involved picking up and delivering soft drink vending machines weighing anywhere from 200-1200 pounds. Mr. Davis performed this work with a helper and the work was accomplished using a large capacity box truck. As lead man and driver, he was required to maintain a Commercial Drivers License. They would use a heavy-duty two-wheel dolly and the truck’s lift gate to pickup and deliver the machines. The work was hard and required a lot of heavy lifting, pushing and pulling; but he found the physical labor gratifying and he misses it.

Accident

On June 6, 2007, while engaged in employment and performing his work duties with the employer, Ozarks Coca-Cola / Dr. Pepper Bottling Company, Mr. Davis and a co-worker were removing a 600-pound vending machine from a motel complex. The vending machine was strapped to their two-wheel dolly and they were maneuvering the machine and dolly over a coarse aggregate driveway. As Mr. Davis attempted to place the front wheels of the dolly on the lift gate of his truck, one of the rear wheels caught, allowing the full weight of the machine to tip back on him. As he twisted and struggled to protect himself from the weight of the machine, he experienced a popping sensation in his low back. Further, he experienced an immediate onset of severe pain from his neck through his shoulders, spine and into his knees.

With the assistance of his co-worker, they were finally able to maneuver the vending machine onto the lift gate and secure it inside the truck. By the time the two men returned to the employer’s warehouse, all of the office and supervisory staff had left for the day. The employer’s Report of Injury filed on June 8, 2007 reflects that the employee sustained a sprain or tear to his lumbar and lumbosacral area on June 6, 2007, which was reported to the employer on June 7, 2007.

Medical Treatment

The next day following the injury, when Mr. Davis reported the injury to his employer, he was sent to St. John’s Occupational Medicine. On that date, he was seen and examined by a physician’s assistant, Dean Carlson. Mr. Carlson noted the employee to be in moderate distress and his impression was low back pain. Mr. Carlson’s recommendation was rest, ice, heat and massage. Mr. Davis was excused from work until his reappointment on June 11, 2007.
On June 11, 2007, Mr. Davis was again examined by Mr. Carlson, who noted no change in the patient’s symptoms from the previous visit. Mr. Carlson prescribed Flexeril and Norflex, a course of physical therapy and return to work with restrictions.

Physician Assistant Carlson again saw Mr. Davis at occupational medicine on June 18, 2007 with similar complaints of severe low back pain and experiencing difficulty with activity such as dressing himself. At this appointment he was diagnosed with degenerative disc disease and physical therapy and medications were again recommended. When he saw Physician Assistant Carlson again on June 25, 2007, Mr. Davis, because of the chronic nature of his pain, requested a referral to an orthopedic specialist. Physician Assistant Carlson agreed and due to the chronic nature of his symptoms, made a referral to a spine specialist. At the July 23, 2007 follow up with Physician Assistant Carlson, there had still been no referral to a neurosurgeon or orthopedist. At that appointment, Physician Assistant Carlson noted that he had recommended a referral to a spine specialist that had not been completed and recommended that Mr. Davis continue his medications and restrictions and scheduled a return visit for August 14, 2007. Physician Assistant Carlson again diagnosed severe degenerative disc disease in Mr. Davis’s low back and recommended physical therapy and again, a referral to a spine specialist. The continued physical therapy was declined by the employer’s workers’ compensation administrator.

On September 27, 2007, Mr. Davis returned for a follow up appointment with St. John’s occupational medicine and was evaluated by William Campbell, M.D. After a physical examination, Dr. Campbell diagnosed the following:

1. Diffuse L1-S1 tenderness.
2. Sensation decreased in the right foot
3. Lumbosacral myofascial strain
4. Degenerative joint disease with some scoliosis
5. Right side radiculopathy vs stenosis

Dr. Campbell prescribed Lortab and made a referral for an MRI and continued Mr. Davis’s work restrictions.

A MRI was finally completed on October 6, 2007 that revealed the following:

1. There are bone marrow signal changes with replaced red marrow and endplate degenerative changes.
2. There is multilevel spondylosis. At L4-5 there is a broad-based disc protrusion and annular tear, which results in moderate vertebral canal and lateral recess stenosis, right greater than left. There is mild biforaminal stenosis at this level as well.
3. There is a mild lateral recess stenosis bilaterally at L2-3 and on the right at L3-4.

Mr. Davis again followed up with Dr. Campbell on October 11, 2007 and was noted to have no change in his chronic symptoms although he opined and noted “any injury should have had time to heal”. It was his opinion that Mr. Davis may need surgery and he recommended that he follow up with his primary care physician and an evaluation by a neurosurgeon. As directed, Mr. Davis followed up with his PCP Stephen Reeder, M.D. on November 19, 2007. Dr. Reeder
reviewed the MRI results with Mr. Davis and recommended a referral to a specific neurosurgeon, Dr. Rahman. He also prescribed the medication Vicodin.

Mr. Davis continued to follow up with Dr. Reeder for conservative care and a continued prescription for Vicodin. During this period Mr. Davis continued to draw a normal paycheck from the employer and reported to work with modified duties that were under special circumstances and not a normal position with the employer.

On August 18, 2008, Mr. Davis was returned to St. John’s Occupational Medicine (now Mercy Occupational Medicine) where Thomas Corsolini, M.D, evaluated him.

Dr. Corsolini’s treatment notes from the August 18, 2008, exam reflect the following:

HISTORY OF PRESENT ILLNESS: … MRI of the lumbar spine was obtained 10-6-07. I have been able to review the x-rays, the MRI report, and the actual images. The primary finding is moderate to severe disc height loss with broad based disc protrusion at the L4-5 level, resulting in moderate vertebral canal and lateral recess stenosis, right side worse than left. There was also mild foraminal stenosis bilaterally. The interpretation also included annular tear at the L4-5 level. Lesser levels of degenerative changes were seen at the L1-2, L2-3 and L3-4 levels. Mr. Davis has been on light duty since June of 2007 and essentially has not had any additional treatment since October 2007.

PHYSICAL EXAMINATION: Mr. Davis is 70 inches tall, about 175 pounds. He is cooperative during the interview and examination. Muscle stretch reflexes are intact at patella and Achilles locations bilaterally. The straight leg raising test does not seem to be particularly painful on either side. Hip joint range of motion normal bilaterally without significant increase in pain. He is able to walk smoothly with normal posture, and is able to squat independently. He is able to bend backwards 20 degrees at the waist, complaining of low back pain, and limits his forward bending to about 60 degrees. Visual inspection of the low back unremarkable, and palpation in the low back generally nonpainful. Simulated lumbar rotation also nonpainful.

* * *

DISCUSSION: Diagnostic impression is severe lumbar degenerative changes, most notable at the L4-5 level resulting in moderate vertebral canal and lateral recess stenosis. The finding at the L4-5 level is highly likely to be Mr. Davis’ primary pain generator. I think that he will require a consultation with a spinal surgical specialist in order to get relief from this problem.

My opinion regarding the potential connection to his work activity is that the work activity over at least the last 15 years should be considered to represent the prevailing factor causing most of the degenerative changes in his lumbar spine. Regarding the effects of June 6, 2007, it does represent a “last straw” phenomenon, but the work done on this particular day probably contributed to the annular tear component of the disc abnormality seen at the L4-5 level. While I usually recognize the significance of preexisting degenerative changes as separate
from a potential specific work injury, in the case of Mr. Davis his particular type of work, the movement and transport of beverage vending machines, in my opinion constitutes an occupational exposure which I believe represents the prevailing factor causing his need for further treatment.

The employer provided Mr. Davis a neurosurgical evaluation with Charles Mace, M.D. on December 3, 2008. Dr. Mace found decreased sensation in his right lateral leg, low back pain and tenderness over lumbar spine and limited lumbar spine flexion. Based on his examination and evaluation of Mr. Davis, Dr. Mace diagnosed Mr. Davis with lumbar back pain, with radiculopathy. Further, in examining the cause of the medical condition Dr. Mace described the medical condition as an aggravation of his degenerative lumbar spine disease, and causally related this medical condition the work injury of June 6, 2007.

Thereafter, Mr. Davis underwent a course of physical therapy at Johnson Physical Therapy, which occurred between December 11, 2008 and January 16, 2009. The therapist reported slow progress and patient continued to have significant limitations. He was only able to meet one of his goals but Mr. Davis wished to exhaust all options before having to have any surgery. Mr. Davis reported to the therapist that he felt the therapy was somewhat beneficial but still did not feel he could return to his normal duties with the employer Ozarks Coca-Cola / Dr. Pepper Bottling Company.

The employer last provided medical care when they sent Mr. Davis to Jeffrey Woodward, M.D. for an independent medical examination on May 26, 2009. Dr. Woodward is a physician practicing in the specialty of physical medicine, and is associated with Springfield Neurological & Spine Institute. At the time of this examination, Dr. Woodward determined that relative to the work injury of June 6, 2007, Mr. Davis was at maximum medical improvement and did not require any additional medical care.

Present Complaints

Mr. Davis was only absent from work a few weeks after the June 6, 2007 injury. He was then returned to work on very light duty and his employer created a special position for him and paid Mr. Davis his normal wage in lieu of temporary total disability. Mr. Davis reported back to work as instructed but it was with the understanding that he was not to engage in any activities that aggravated his symptoms. He essentially worked as a helper for the parts man. He would also do some occasional light clean up. He also had the opportunity to rest or not do anything if his symptoms spiked. This special work duty continued until he was rated and released by the company physician, Dr. Woodward on May 26, 2009. Shortly thereafter the employer terminated Mr. Davis, indicating that they did not have work for him within the permanent physical restrictions he had been assigned. Mr. Davis testified that he terminated his employment with Ozark’s Coca-Cola and the position he had been filling for almost 2 years was eliminated and the parts man continued his duties without a helper. Mr. Davis has not been employed since leaving Ozark’s Coca-Cola and does not feel he has the physical stamina to perform either a full time or part time position with any employer.

Since the injury, Mr. Davis reports ongoing low back symptoms that are exacerbated with weather changes. He will have a bad day or exacerbation of his symptoms at least once per week that will require him to use a cane in order to walk. He describes his pain as a stabbing sensation
often feeling like a “catch”. He describes shooting pain into his legs with discomfort in his right thigh more than his left. He will also experience bouts of numbness in his right leg that will on occasion last a full day. Any twisting, lifting, sitting, standing, pushing or pulling is difficult and painful for him. He indicates being able to take care of his daily personal hygiene but at a very slow pace. When he feels up to it, he will walk around his acreage but for no more than a quarter mile. He reports difficulty walking up or down stairs and he constantly changes his position from sitting to walking to standing and his back pain interferes with his sleep.

He reports during periods when his back pain is less, he attempts to stay active performing small chores at home. He also attempts to use his riding lawn mower to keep his yard mowed but only for 20-30 minutes and then stops for a similar period. He indicated that the majority of the time during the summer a relative does the mowing for him.

Mr. Davis testified that his work for 27 years at Ozark’s Coca-Cola involved much heavy strenuous lifting, however he enjoyed the work and found it gratifying. He regrets not being able to perform this level of physical activity.

Medical Opinions

Shane Bennoch, M.D.

Shane L. Bennoch, M.D., a physician practicing in the area of Independent Medical Examinations testified by Complete Medical Report on behalf of Mr. Davis. Dr. Bennoch performed an Independent Medical Examination of Mr. Davis on May 7, 2008. At the time of his examination, Dr. Bennoch took a history from Mr. Davis, reviewed various medical records and performed a physical examination. In his May 9, 2008 report, Dr. Bennoch opined that the lifting incident that occurred on June 6, 2007 at Ozark’s Coca-Cola was the prevailing factor in causing Mr. Davis’s low back injury and his chronic symptoms and impairments. It was also his opinion that Mr. Davis had not reached MMI and was in need of a neurosurgical evaluation. He opined that the mechanism of the injury, as well as the MRI (completed 4 months following the injury), supports the patient’s history and complaints. In his opinion, the MRI confirms a broad based disc protrusion with an annular tear at L4-L5, which in his opinion was the cause of Mr. Davis’s chronic low back symptoms.

On October 10, 2012, Dr. Bennoch, after reviewing additional medical treatment records from Dr. Parsons, Dr. Corsolini, Dean Carlson, Charles Mace, M.D. and Jeffrey Woodward, M.D. opined that:

1. Mr. Davis had reached MMI as indicated by Dr. Woodward.
2. That Mr. Davis had sustained a 25% permanent partial impairment to the body as a whole rated at the lumbar spine due to the acute injury that occurred on June 6, 2007.
3. Recommended further ongoing medical care.
4. Lifting restrictions of 20 pounds occasionally with no frequent lifting, no repetitive push/pull with his lower extremities greater than 25 pounds and then only on an occasional basis and not repetitively.
5. It was his opinion that Mr. Davis no longer possessed the ability to compete in the open labor market because of the combined effect of Mr. Davis’s pre-existing
degenerative disc and the disc and annular tear injury at L4-5 that occurred on June 6, 2007.

6. He also noted that both the injury at L4-5 and the degenerative disc disease itself were directly related to the patient’s daily work at Ozark’s Coca-Cola.

7. It was last of all his opinion that in the interim, the patient would need ongoing therapy and should have more consistent pain management to help with the patient’s present complaints. It was also his opinion that if Mr. Davis’s condition worsened; he would be a neurosurgical candidate.

On November 5, 2012, Dr. Bennoch issued an Addendum Report clarifying certain of his opinions offered on October 10, 2012. Dr. Bennoch opined that Mr. Davis’s pre-existing right shoulder injury was certainly a component of his disability. However, in his opinion, Mr. Davis was totally disabled and unemployable from the effects of the June 6, 2007 injury standing alone. He also opined, due to Mr. Davis’s chronic low back symptoms, that no employer would be able to depend upon Mr. Davis to maintain a normal work schedule for either full-time or part-time employment.

Jeffrey Woodward, M.D.

Dr. Woodward provided limited care to Mr. Davis during the time that he was receiving treatment. On May 27, 2009, Dr. Woodward performed an independent medical examination of Mr. Davis. At the time of this exam, Dr. Woodward took a history from Mr. Davis, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Davis, Dr. Woodward opined the occupational related lifting incident of June 6, 2007, is the prevailing factor in causing Mr. Davis to sustain an injury to his lumbar spine in the nature of a bulging disc with associated lumbar pain and lower extremity discomfort. Also, in rendering his medical opinions Dr. Woodward further opined that at the time Mr. Davis sustained this work injury, he presented with preexisting lumbar spine degenerative disk disease, causally related to genetic factors of age and smoking history. In regards to the work injury, Dr. Woodward opined that Mr. Davis had reached maximum medical improvement.

In assessing the nature and extent of the permanent disability referable to the low back, Dr. Woodward opined that Mr. Davis is governed by permanent work restrictions, and presents with permanent disability. In this context, Dr. Woodward propounded the following comments:

Work Status:
I agree with Dr. Bennoch that the patient (Mr. Davis) needs ongoing work duty restrictions, I recommend continuous lift / push / pull 0-30 lbs. maximum; this physical restriction is due equally to work injury and pre-existing degenerative spine condition.

IMPAIRMENT: I recommend a permanent partial impairment and disability rating as follows: 13% at the 400-week level for the work-related condition and 12% at the 400-week level for the multiple level lumbar spine degenerative condition.
Dr. Woodward next saw Mr. Davis on January 18, 2010 at the request of the Social Security Administration in connection with Mr. Davis’s application for SSDI. After an examination and review of records, Dr. Woodward opined that Mr. Davis experienced pain at the L5 region, shoulder pain with moderate crepitus and impingement. He also noted diffused elbow tenderness, lateral shoulder pain, minimal impingement and hyperesthesia of the right calf. His impression was cervalgia without radiculopathy, chronic lumbar pain with radiculopathy, chronic shoulder joint pain with impingement.

On July 1, 2014, the employer requested Dr. Woodward to review and give an opinion of surveillance the employer had conducted of Mr. Davis. Dr. Woodward indicates that he reviewed three DVD discs that were dated May 21, 2014. After reviewing the discs, Dr. Woodward stated the following:

“The man on the video appeared to be my patient, Mr. Davis. He was apparently working in and around his driveway/yard spreading gravel over his drive. He lifted white trash bag into the back of the pickup smoothly and quickly. He was standing and walking during the video; also appeared to be using a rake or hoe with bending/twisting and pulling activities.

The following medical opinions are provided within a reasonable degree of medical certainty. I currently have no changes to recommend to my previous work duty restrictions or my previous work injury disability rating orders.”

Mitchell C. Mullins, D.O.

Mitchell C. Mullins, D.O., a physician practicing in the area of Independent Medical Evaluations and board certified in emergency medicine testified by Complete Medical Report on behalf of the employee. Dr. Mullins performed an Independent Medical Examination of Mr. Davis on March 4, 2014. At the time of his examination, Dr. Mullins took a history from Mr. Davis, reviewed various medical records and performed a physical examination. In light of his examination and evaluation of Mr. Davis, Dr. Mullins opined that the repetitive nature of Mr. Davis’s job, lifting heavy objects, as well as the injury occurring on June 6, 2007, are the prevailing factors causing Mr. Davis’s degenerative disease in the lumbar spine as well as the annular tear and disc protrusion at L4-5. He further opined that Mr. Davis had sustained a 25% permanent partial disability rated at the 400-week level of the lumbar spine due to the June 2007 injury. He also opined that Mr. Davis suffered from the following pre-existing industrial disabilities:

1. There is a 15% permanent partial disability rated at the 400-week level at the lumbar spine due to the degenerative changes caused by lifting over the last 15 years.
2. There is a 15% permanent partial disability to the right shoulder due to a prior injury.

It was his ultimate opinion that:

The patient is incapable of competing in the open labor market and should be considered permanently and totally disabled as a result of his most recent injury
of June 2007 as well as the repetitive injury suffered over the past 27 years of employment with Coca-Cola.

In addition, Dr. Mullins recommended that Mr. Davis be provided additional or future medical care in order to cure and relieve him from the effects of the work injury of June 6, 2007. In this context, Dr. Mullins propounded the following comments:

It is my opinion the patient’s lumbar spine symptoms will likely progress with time. This may require surgical intervention at some point. It is my opinion that prior to employing surgical intervention a series of facet or epidural injections would be tried in a more conservative manner.

A regular home exercise program with occasional physical therapy evaluation and treatment will likely be employed over the years. It is my opinion this is a permanent condition and will vary in its intensity over the years.

It is also my opinion that further care for his back will be the direct result of the June 2007 injury as well as the repetitive injuries suffered over the last 27 years while at Coca-Cola.

In considering the residual effects of Mr. Davis’s June 6, 2007 work injury, Dr. Mullins opined that the work injury caused Mr. Davis to be governed by restrictions and limitations sufficient to constitute a hindrance or obstacle to employment. In this context and in contrast to the opinions of Dr. Woodward, Dr. Mullins imposes permanent restrictions upon Mr. Davis. These permanent work restrictions include:

Exertional Limitations:

1. Mr. Davis is restricted to lifting/carrying 20 pounds occasionally and less than 10 pounds frequently.

2. Mr. Davis is restricted to standing and/or walking less than 2 hours in an 8-hour day.

3. Mr. Davis is restricted to a work environment that allows him to periodically allow him to alternate sitting and standing to relieve pain and discomfort.

4. Mr. Davis is limited in his capacity to push or pull with his lower extremities.

Postural Limitations:

1. Climbing-ramps, poles, ladder, rope scaffold
   Never

2. Climbing-stairs
   Occasionally

3. Balancing-narrow, slippery, moving surfaces
   Occasionally

4. Kneeling-bending legs to rest on knees
   Occasionally

5. Crouching-bending downward, forward with legs & spine
   Occasionally

6. Crawling-moving on hands and knees
   Occasionally

7. Stooping-bending at waist
   Occasionally
Environmental Limitations:

1. Mr. Davis is restricted to work environment that avoids cold weather conditions that will exacerbate his symptoms and make him less functional.

(Dr. Mullins notes that the phrase “lifting/carrying” includes upward pulling. Also, Dr. Mullins notes that the term “frequently” is defined to include one-third to two-thirds of an 8-hour workday; and the term “occasionally” means occurring from very little up to one-third of an 8-hour workday. Further, Dr. Mullins defines an 8-hour workday to mean cumulatively, not continuously).

Vocational Opinions

Wilbur T. Swearingin, CRC

Wilbur T. Swearingin testified at the hearing on behalf of the employee. Mr. Swearingin evaluated Mr. Davis on August 21, 2013 and issued his evaluation report on November 11, 2013. His report was admitted into evidence as Exhibit 5. Mr. Swearingin testified that he found Mr. Davis to be a 27-year employee of the same employer, Ozark’s Coca-Cola, with the last 15 years being his most relevant employment. He testified that Mr. Davis’s relevant employment for the last 15 years consisted of delivering and installing vending machines. His job duties required that he load these machines onto his truck, deliver them to the point of installation, often requiring him to pull machines up steps or stairs via a dolly, and setting up and installing the machine. He described Mr. Davis’s relevant work for the past 15 years as heavy to very heavy. He further recognized that Mr. Davis was required to maintain a commercial drivers license in order to operate the large truck utilized for pickup and delivery.

From the history taken from Mr. Davis and his review of past medical records, Mr. Swearingin concluded that Mr. Davis has a long history of back pain beginning in the mid 1990’s. Mr. Davis would go to the chiropractor 2-3 times a year when his back felt “messed up”. He would feel much improved after the treatment. In approximately June of 2000, Mr. Davis injured his back while moving a cooler through a doorway. The employer sent Mr. Davis to St. John’s Occupational Health where he was prescribed a course of physical therapy and returned to work. Mr. Davis gave him a history of returning to work with some back pain but because he had good strength, the condition did not interfere with his ability to perform his normal duties. Mr. Davis worked continuously until he injured his back on June 6, 2007.

Mr. Davis provided Mr. Swearingin with a history of his present problems, which he attributes to the work injury of June 6, 2007. Mr. Swearingin records this history as follows:

Mr. Davis comes with complaint of low back and right leg pain, bilateral knee and shoulder pain. Mr. Davis’ primary complaint is pain in the center of his lower back at belt line and above for about six inches. Brad’s pain is mostly in midline and is described as feeling really stiff, with muscle spasms with sharp, stabbing pain. Brad says it feels like, “I’ve been hit by a 2x4 in the back.” Mr. Davis has pain to a lesser extent in his upper back to his shoulders. Mr. Davis rated his low back pain today at five on a scale of zero to ten, zero being no pain and ten pain
for which he would go to the emergency room. Mr. Davis’ pain is much worse during cold, damp weather. Brad becomes so stiff it becomes hard for him to move.

Mr. Davis has pain radiating from his lower back down his right leg in the medial and lateral aspects of his thigh to just above knee level. Mr. Davis describes a shooting type pain. Brad’s leg pain is not constant, occurs when he has stood or sat for a time or if he has been working.

Mr. Davis has pain in both shoulders, the right being worse than the left. Brad’s left shoulder pain began after he fell from a motorcycle and landed on his shoulder. Mr. Davis says he was sore for a few weeks or a month. Brad’s right shoulder pain began about fifteen years ago when bottles or cans of soda fell on him. Mr. Davis had some cortisone injections and has always had pain in this shoulder. Mr. Davis stated he just had to work through his pain. Brad also has pain in his knees, right more than left. While Brad has some pain in his left knee, it really did not bother him at work. Brad’s right knee pops, cracks and over the years the pain has gradually increased. Mr. Davis attributes this to years of taking soda machines up and down stairs, climbing and moving heavy pieces of equipment.

Mr. Swearingin performed vocational testing that revealed Mr. Davis had completed the 11th grade and his reading was at 11th grade level. He also found that his spelling and math computation skills were at the 5th and 6th grade levels. It is Mr. Swearingin’s opinion that based upon Mr. Davis’s age, he was not a candidate for vocational rehabilitation.

Mr. Swearingin testified that subsequent to his November 11, 2013 report, he had reviewed additional information that included the IME report of Mitch Mullins, D.O., 3 CDs containing video surveillance of Mr. Davis completed on May 21, 2014 and the report and deposition of James England, CRC.

With reference to the video surveillance, Mr. Swearingin testified that it was difficult to draw any meaningful conclusions from the surveillance since it was difficult, if not impossible, to determine what activities Mr. Davis was engaging in and the duration was so short that it would be vocationally impossible to draw a conclusion that Mr. Davis could perform any specific activity on a sustained basis in a work environment. He also testified that the IME report of Dr. Mullins and the report and deposition of Mr. England did not change any of the opinions he had rendered in his November 11, 2013 report.

It was Mr. Swearingin’s ultimate vocational opinion that considering Mr. Davis’s chronic back pain, his medical restrictions, marginal education, advanced age and over 27 year history of manual labor work, he did not believe an employer in the normal course of business would hire and employ Mr. Davis.

On both direct examination and cross-examination, Mr. Swearingin was probed as to the basis of his opinion. Was his opinion of Mr. Davis’ lack of employability based upon the June 6, 2007 injury standing alone or the last injury in combination with any pre-existing industrial
disabilities? The sum and substance of his opinion testimony at the hearing did not vary from his ultimate opinion set forth on page 15 & 16 of his vocational report. That opinion states:

**SUMMARY**
Brad Davis is a fifty-nine year old vending machine deliverer/installer, with a long history of low back pain leading up to June 6, 2007, when he suffered an acute exacerbation of his back pain. Assuming the findings of Thomas Corsolini, M.D. that Mr. Davis’s degenerative changes in his lumbar spine were attributable to his work activity over the preceding fifteen years, and that the incident of June 6, 2007 represented a “last straw phenomenon,” Mr. Davis would not be considered to have pre-existing industrial disability, hindrance or obstacle to employment.

If on the contrary, the Trier of Fact was to determine Mr. Davis had sustained pre-existing injuries which were not due to cumulative trauma and that the incident of June 6, 2007 was a separate and independent industrial injury, I would then believe Mr. Davis had pre-existing industrial disability sufficient to constitute a hindrance or obstacle to employment leading up to June 6, 2007.

Considering Mr. Davis’s presentation and the medical reports of Shane Bennoch, M.D., I am of the opinion Mr. Davis is unable to compete in the open labor market. By that I mean Mr. Davis could not be depended upon to work a regular schedule as set by an employer on either a full or part time basis. It is my opinion Mr. Davis is permanently and totally disabled and unable to compete in the open labor market. Given the history provided by Mr. Davis and in consideration of his medical diagnosis and work restriction, I am of the opinion Mr. Davis’ permanent and total disability is the result of his work activity over the past fifteen years as described by Dr. Corsolini and is therefore permanently and totally disabled the result of the cumulative effect of his work over the last five years leading up to June 6, 2007.

James M. England, Jr., CRC

James M. England, Jr., a vocational rehabilitation counselor, performed a vocational assessment of Mr. Davis at the request of the employer on May 2, 2014. Mr. England issued his vocational assessment report on May 21, 2014. It was his opinion, assuming the findings of Dr. Bennoch and Dr. Woodward, that Mr. Davis could perform a variety of entry level work including such things as retail sales, cashiering, some security work, perhaps working as an office cleaner, a small parts assembler or a packer, etc.

Assuming Dr. Mullins’ restrictions, he would be limited to some security post work, doing some small parts assembly and packing, and cashiering positions that would allow him to sit the majority of the day such as ticket sales, etc.

Mr. England issued an Addendum Report on July 25, 2014 after having an opportunity to review the employer’s surveillance completed on May 21, 2014. It was Mr. England’s opinion that nothing in the surveillance changed any of the opinions he rendered in his earlier report.
On October 31, 2014, the employer took the sworn deposition testimony of James England for use in evidence. All parties were represented at the deposition. On direct examination, it was Mr. England’s opinion that based upon the physical restrictions assigned by Dr. Bennoch and Dr. Woodward, Mr. Davis would be employable in the light range category. He did not mention any specific part time for full time positions that Mr. Davis could perform. On page 24 of his deposition he seemed to opine that under the restrictions assigned by Dr. Mullins, Mr. Davis would be unemployable.

With reference to the surveillance that was conducted by the employer on May 21, 2014 of Mr. Davis between 1:27 p.m. and 3:25 p.m., Mr. England responded to the following question by the employer on page 25:

Q. In your observation, the video footage validated that conclusion?
A. Well, I think he was doing at least light-level activity in that, if not more.

On cross-examination, inquiry was made as to the significance of Mr. Davis’s activities as shown on the surveillance video versus his ability to compete in the open labor market for gainful employment. In this regard, Mr. England responded on page 29:

Q. And so can you say within a reasonable degree of vocational certainty, based upon what you saw in that surveillance, he could perform those activities on a sustained based?
A. No.

Q. Okay. So you’re saying he couldn’t do a job where he rakes or uses a wheelbarrow day in and day out?
A. I don’t know whether he could or not. I’m just saying this would be just a brief amount of time compared—it’s certainly not an all-day activity.

On further cross-examination Mr. England was asked his opinion on the issue of Mr. Davis’s transferable skills. He responded with the following comments on page 30:

A. I think the only thing he had would have been the driving, and I think the use of that would be negated by—by the physical restrictions. So he doesn’t have any usable transferable skills.

Mr. England had earlier opined that Mr. Davis’s return to work following the injury was evidence of his continuing ability to compete in the open labor market. On further cross-examination on this issue, Mr. England propounded the following comments on page 30-31:

Q. Now, let’s talk about his return to work after the June 6, 2007 injury. Did you understand that that job was accommodated?
A. Right.
Q. And how was it accommodated?

A. Well, he told me that—that he was allowed to change positions, sitting, standing, moving around. Was able to lift within the lifting limits that the doctors had recommended. I mean, that—that’s what he told me.

Q. So the job that he was doing at Coca-Cola when he returned on light duty, is that a job that appears in the national economy?

A. I don’t know. Because—

Q. That he could compete for?

A. --I don’t know whether they had somebody normally doing that or not. Apparently not, because eventually they told him they didn’t have any permanent light duty, that type, at least there at Coca-Cola, that –that they could continue that indefinitely.

Q. So they just – they essentially just made a job so that he could return to work for a period of time. Is that what it seems like to you?

A. That –that may very well be.

On further cross-examination Mr. England was questioned concerning the opinions of Dr. Bennoch and Dr. Mullins that Mr. Davis would not be able to maintain a regular work schedule because of the unpredictability of his chronic back pain, Mr. England responded as follows:

Q. So let’s say Mr. Davis is interviewing for a prospective position, and he says, you know, I want to return to work; I like to work. But, gosh, I just have days when my back flares up and I can’t do anything. Even sometimes I have as much as a week then things flare – when my back flares up and I can’t do anything. Is an employer going to hire him under those circumstances?

A. Probably not.

Q. Okay. And aren’t those restrictions that you found both Dr. Bennoch and Dr. Mullins found that he would exhibit?

A. Well, they weren’t specific restrictions, but, I mean, assuming that, if that were the case, then I don’t see how he would be – if—if that were an ongoing thing with any regularity, I – I would agree that that would probably keep him from working.

(Page 34)

*   *   *
Q. Would any employer accommodate that type of a physical problem?

A. Well, I mean, if – if I assume where –where if the doctor says an employer could not depend on him to be able to work eight—eight hours a day, 40 hours a week; he may also require additional treatment, blah, blah, blah – assuming that he couldn’t be a reliable worker, no.

Q. Okay. So if he has exacerbation of his low-back pain, his low-back condition, that prevents him from showing up when he’s supposed to, that makes him unemployable?

A. I’d say that’s fair.

(Page 37 & 38)

On later cross-examination, Mr. England offered the following additional opinion:

Q. Mr. England, we talked earlier about Dr. Bennoch’s opinion that Mr. Davis could not maintain a work schedule because he doesn’t have any warning when he’s going to have back pain that takes him out of the picture for the day. And that was in terms of a full-time position. Wouldn’t those same flare-ups interfere with the ability to maintain any kind of a work schedule, whether it be part time or full time?

A. If they flare up to the point where he just can’t show up, sure.

With reference to Mr. Davis’s use of Hydrocodone, Mr. England opined as follows:

Q. With reference to his use of hydrocodone, would his use of hydrocodone restrict him from using his CDL license?

A. Yes.

FINDINGS AND CONCLUSIONS

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

I. Accident & Injury

The parties readily acknowledge that the evidence is supportive of a finding that on June 6, 2007 the employee sustained an injury by accident, which arose out of and in the course of his employment with the employer. This injury occurred as Mr. Davis and a co-worker were
removing a 600-pound vending machine from a motel complex. The vending machine was strapped to their two-wheel dolly and they were maneuvering the machine and dolly over a coarse aggregate driveway. As Mr. Davis attempted to place the front wheels of the dolly on the lift gate of his truck, one of the rear wheels caught, allowing the full weight of the machine to tip back on him. As he twisted and struggled to protect himself from the weight of the machine, he experienced a popping sensation in his low back. Further, he experienced an immediate onset of severe pain from his neck through his shoulders, spine and into his knees.

As a consequence of this lifting incident, Mr. Davis sustained an acute injury to his low back. A question remains, however: What is the nature and extent of the injury? Further, does the presenting occupational injury include an incident of occupational disease in the nature of repetitive trauma?

In considering the question as to whether the presenting injury is the result of a single lifting incident or the result of repetitive trauma, Dr. Woodward provided a special report on April 6, 2014, verifying that the injury sustained by Mr. Davis is an acute heavy lifting, single lifting event that occurred on June 6, 2007. According to Dr. Woodward, the presenting low back condition represents a single event, involving a serious traumatic work injury condition, and the 2007 injury does not represent a cumulative occupational condition that is characterized by the lack of any single or specific injury events, but are merely gradual worsening of symptoms. He verified that Mr. Davis reported a specific work injury traumatic event in 2006 when moving a cooler and sustaining back pain. Further, Dr. Woodward indicated that the June 2007 injury is not a “last straw” injury event, as a last straw event would be a relatively minor strain event with relatively light forces. A lifting injury while handling a 600 pound machine is not a last straw event any more than a serious MVA injury would be considered a last straw event.

After consideration and review of the evidence, I find and conclude that the injury to the low back was in the nature of a broad based disc protrusion with an annular tear at L4-L5, as well as an aggravation of his degenerative lumbar spine disease, and it was caused by the single traumatic injury-producing event on June 6, 2007. This particular accident involved heavy lifting and moving of a 600-pound vending machine with a two-wheel dolly over a coarse aggregate driveway. Further, when one of the rear wheels got caught and stopped rolling, the full weight of the machine tipped back on Mr. Davis, causing him to twist and strain his body in order to protect himself from the weight of the machine. This single event caused Mr. Davis to experience immediate onset of low back and radicular pain. Further, the nature and effect of this injury caused Mr. Davis to experience a change in pathology, and continues to cause him to experience chronic low back pain with associated pain and numbness radiating into the lower extremities.

II. Medical Care

Past Medical Expenses

The employee seeks payment of medical expenses incurred for medications prescribed principally by his primary care provider (Dr. Reeder and Dr. Reeder’s successor), which occurred subsequent to his release from medical care by Dr. Woodward, and the employer and insurer’s subsequent denial of his request for additional medical care. Notably, the employer and
insurer denied Mr. Davis’ request for additional medical care following an independent medical examination performed by Dr. Woodward on May 26, 2009. At the time of this examination, Dr. Woodward determined that relative to the work injury of June 6, 2007, Mr. Davis was at maximum medical improvement and did not require any additional medical care.

In support of his request for additional medical care, Mr. Davis testified that the medications identified in Exhibit 6 were prescribed and used for treatment of his low back pain; and the nature of these prescriptions are essentially a hydrocodone product. Mr. Davis testified further that in securing these prescriptions he incurred medical expenses in the amount of $1,085.70. Both Mr. Davis and Amanda Seaton testified that Mr. Davis takes these medications on a daily basis for control of low back pain.

It is noted that subsequent to his independent medical examination of Mr. Davis on May 26, 2009, Dr. Woodward happened to examine Mr. Davis on January 18, 2010 at the request of the Social Security Administration in connection with Mr. Davis’s application for SSDI. After an examination and review of records, Dr. Woodward opined that Mr. Davis was continuing to experience, among other things, chronic lumbar pain with radiculopathy. Although Dr. Woodward appears to differentiate the cause of this chronic low back pain as being attributable to preexisting degenerative disc disease, the evidence is supportive of a finding that this chronic low back is causally related to the low back injury of June 6, 2007, which involves an aggravation of preexisting degenerative lumbar disc disease. As further noted, Dr. Mace described the medical condition as an aggravation of his degenerative lumbar spine disease, and causally related this medical condition to the work injury of June 6, 2007.

Finally, the adjudication of this issue requires consideration of what medical treatment is reasonably required in order to cure and relieve the effects of the June 6, 2007, work-related injury. This medical / legal inquiry is not changed by the 2005 statutes, and does not involve a “prevailing factor” analysis. Rather, the inquiry requires consideration of whether the treatment and medication flow from the work injury. See, Section 287.140.1, RSMo; Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511 (Mo. App. W.D. 2011). In context of this case, the work injury involved an injury to the low back, and the prescriptions in question relate to treatment of the lumbar spine, insofar as it is directed toward providing Mr. Davis with pain relief, secondary to his chronic low back and radicular pain. As such, the resulting medical expenses flow from the work injury of June 6, 2007.

Accordingly, after consideration and review of the evidence, I find and conclude that the prescription medication expenses as identified in Exhibit 6 are reasonable and necessary medical care, causally related to the work injury of June 6, 2007. I further find and conclude that the medical expenses incurred in the amount of $1,085.70 are fair, reasonable and customary charges. Therefore, the employer and insurer are ordered to pay the aforementioned medical expenses to the employee, Donald Davis.

**Future Medical Care**

In order to receive an award for additional or future medical care under Chapter 287, RSMo, an employee need not show “conclusive evidence” of a need for future medical treatment. Rather, the employee need only show a “reasonable probability” that because of his or her work-related injury, future medical treatment will be necessary. Stevens v. City of Citizens
Memorial Healthcare Foundation, 244 S.W. 3d 43 (Mo. App. 2008). In this context it must be shown that the need for additional or future medical care “flows(s) from the accident.” Landers v. Chrysler Corp., 963 S.W. 2d 275 (Mo. App. 1997) at 283. Further, the phrase “to cure and relieve” has been construed to mean treatments that “give comfort even though restoration to soundness is beyond avail.” Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996) (parenthesis omitted).

In considering the question of future medical care, Dr. Woodward, the physician selected by the employer, released Mr. Davis from medical care and issued a final rating report determining that Mr. Davis’s medical condition did not warrant any additional future medical care or medications. In contrast, the physicians selected by the employee to perform Independent Medical Examinations, Dr. Bennoch and Dr. Mullins, opined that Mr. Davis will have an ongoing need for physical therapy, injections, medications and possibly surgery as his condition deteriorates. These opinions are consistent with the surgical opinion provided by Dr. Mace.

In evaluating the opinions set forth, I find Dr. Bennoch and Dr. Mullins to be credible and persuasive. Similarly, I find Mr. Davis credible and accept as true his testimony and histories given to both Dr. Bennoch and Dr. Mullins, on the issue of his ongoing chronic low back pain. Notably, as to this issue, Mr. Davis testified he is receiving ongoing healthcare services from his family practice physician in Springfield. His treatment is limited care in the form of opioid medications and muscle relaxers.

After consideration and review of the evidence, I find and conclude that as a consequence of the work injury of June 6, 2007, Mr. Davis continues to suffer with chronic low back pain, as well as chronic right leg numbness and leg pain. These conditions warrant continuing receipt of pain management in order to cure and relieve him from the effects of the work injury. This medical care is necessitated by and flows from the work injury. Therefore, for the foregoing reasons, the employer is ordered to provide the employee with such additional or future medical care as recommended by Dr. Mullins and which is reasonable, necessary and causally related to the work injury of June 6, 2007.

III.
Nature & Extent of Permanent Disability

The evidence is supportive of a finding, and I find and conclude that the work injury of June 6, 2007, caused the employee, Donald Davis, to sustain an injury in the nature of a broad based disc protrusion with an annular tear at L4-L5, as well as an aggravation of his degenerative lumbar spine disease. The nature and effect of this injury causes Mr. Davis to experience chronic low back pain with associated pain and numbness radiating into the lower extremities, particularly the right lower extremity.

The nature and extent of the permanent disability attributable to this injury includes assessment of permanent disability referable to the low back. As to this assessment, the employee has sustained a permanent partial disability of 20 percent to the body as a whole, referable to the lumbar spine. Further, this injury causes Mr. Davis to be governed by certain permanent restrictions and limitations, and constitute a hindrance or obstacle to employment.
Yet, does this injury, considered alone and in isolation, render Mr. Davis permanently and totally disabled – unemployable in the open and competitive labor market?

The adjudication of this issue requires consideration of Section 287.020.6, RSMo, and applicable case law. Section 287.020.6, RSMo states:

The term ‘total disability’ as used in this chapter [Chapter 287] shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

In giving meaning to this provision the courts have provided instruction and guidance. “The test for permanent total disability is whether, given the claimant’s situation and condition, he or she is a competent to compete in the open labor market. [citation omitted] 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.” Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992).

Also, where permanent total disability is alleged, the Administrative Law Judge must first consider the liability of the employer in isolation by determining the degree of disability due to the last injury. APAC Kansas, Inc. v. Smith, 227 S.W.3d 1,4 (Mo. App.W.D. 2007). If the claimant (employee) is not permanently and totally disabled from the last accident, then the degree of disability attributable to all injuries is determined. 227 S.W.3d at 4. Further, in considering employer liability several additional principles bear reprise.

The inability to return to any employment means the inability to perform the usual duties of the employment in a manner that such duties are customarily performed by the average person engaged in such employment. Gordon v. Tri-State Motor Transit Co., 908 S.W.2d 849 (Mo. App. S.D. 1995). In determining whether the claimant can return to employment, Missouri law allows the consideration of the claimant’s age and education, along with physical abilities. BAXI v. United Technologies Automotive, 956 S.W.2d 340 (Mo. App. E.D. 1997). While “total disability” does not require that the claimant be completely inactive or inert, Sifferman v. Sears Roebuck and Co., 906 S.W.2d 823, 826 (Mo. App. S.D. 1996), overruled on other grounds, Hampton v. Big Boy Steel Erection, 121 S.W.2d 220 (Mo. Banc 2003), it does require a finding that the employee is unable to work in the open labor market, and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Sullivan v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 (Mo. App. S.D. 2001), overruled on other grounds, Hampton v. Big Boy Steel Erection, 121 S.W.2d 220 (Mo. banc 2003). The central question is: In the ordinary course of business, would any employer reasonably be expected to hire Claimant in his [or her] physical condition? Ransburg v. Great Plains Drilling, 22 S.W.3d 726, 732 (Mo. App. W.D.2000) overruled on other grounds, Hampton v. Big Boy Steel Erection, 121 S.W.2d 220 (Mo. banc 2003).

In examining this issue, the parties offer competing and differing medical and vocational opinions. The employee relies principally upon the medical opinions of Dr. Bennoch and Dr. Mullins, the vocational opinion of Mr. Swearingin, and the supporting testimony of himself and his significant other, Amanda Dawn Seaton. The employer relies primarily upon the medical opinion of Dr. Woodward, and the vocational opinion of Mr. England.
After consideration and review of the evidence, I resolve the differences in medical opinion relative to this issue in favor of Dr. Bennoch. In rendering opinions relative to this concern, Dr. Bennoch provided a disability rating of 25 percent to the body as a whole applicable to the acute injury that occurred on June 6, 2007. He further provided a disability rating of 15 percent to the body as a whole applicable to Mr. Davis’ pre-existing lumbar condition, and 15 percent to the right shoulder due to Mr. Davis’ prior work injury. Viewing his reports together, Dr. Bennoch opines that Mr. Davis is unlikely to be able to compete in the open labor market for gainful employment due to a “combination of his pre-existing degenerative disc disease, the disc and annular tear injury at L4-5 that occurred on June 6, 2007, and Employee’s pre-existing right shoulder injury.”

In addition, I resolve the differences in vocational opinion in favor of Mr. Swearingin, who I find credible, reliable and worthy of belief. In rendering his vocational opinions, Mr. Swearingen leaves the determination of permanent total disability up to the “trier of fact”. He admits the trier of fact is the Administrative Law Judge. In this context, Mr. Swearingin acknowledges that if the trier of fact should determine that Mr. Davis’ work activity over the last 15 years is the prevailing factor causing most of his degenerative changes and that the June 6, 2007, incident merely represents a last straw phenomenon, as suggested by Dr. Corsolini, then Mr. Davis would not have a pre-existing vocational disability sufficient to constitute a hindrance or obstacle to employment. However, should the trier of fact determine Mr. Davis had specific pre-existing injuries/impairments existing prior to June 6, 2007, and considering Mr. Davis’ history of working in pain, then he concludes that Mr. Davis would have a vocational disability that would be a hindrance or obstacle to employment. In the latter event, any conclusion of permanent total disability would be a combination of the June, 2007 injury and Mr. Davis’ pre-existing conditions.

Moreover, in considering the issue of permanent disability attributable to the low back, Mr. Davis admitted in his deposition and informed all healthcare providers of prior injuries to his back. Specifically, he sustained an injury in 2001 resulting in sciatic pain. He sustained an injury in June 2006 to his low back, which required medical treatment, and his symptoms did not resolve. He admitted he continued working in pain for the next year, leading up to the injury of June 6, 2007. Even Employee’s IME physicians, Dr. Bennoch and Dr. Mullins, verified Employee had a pre-existing disability of 15 percent to the body as a whole for his back condition pre-dating June 2007 and had a pre-existing disability of 15 percent to the right shoulder due to the work injury, which was settled for 14 percent disability.

Also, Mr. Davis admitted that his right shoulder continued to give him trouble as it popped, and he would occasionally have to change arms when performing lifting activities while he continued working. Dr. Bennoch concluded that Mr. Davis is permanently totally disabled due to a combination of his pre-existing back and right shoulder problems, combined with the June 6, 2007, traumatic injury. Even Dr. Mullins indicated Mr. Davis is incapable of competing in the open labor market and should be considered permanently and totally disabled as a result of the “most recent injury of June, 2007, as well as the repetitive injury suffered over the past 27 years of employment with Coca-Cola.”

In his deposition, Mr. Davis admitted his back was continuing to bother him due to a couple of injuries prior to June 2007. He referenced the back incident in approximately 2001, which affected the sciatic nerve. He referenced the June 2006 injury while moving a vending
machine at K-Mart. When he was sent to a vocational counselor by his attorney, he stated he continued to work with pain for the next year after the 2006 injury until he sustained another injury in June 2007. He admitted his right shoulder continued to pop and give him pain with regard to performing ongoing job duties, and on bad days he would have to change arms and change position due to the discomfort. He sustained a prior left shoulder injury as a result of a motor vehicle accident. The right shoulder is worse than the left, and has a limited range of motion.

Accordingly, after consideration and review of the evidence, I find and conclude that as a consequence of the June 6, 2007, accident, the employee, Donald Davis, sustained an acute traumatic injury to his low back, resulting in him sustaining a permanent partial disability of 20 percent to the body as a whole (80 weeks). Also, while this work injury presents a hindrance or obstacle to employment or reemployment, I find and conclude that the work injury of June 6, 2007, considered alone and in isolation, does not render Mr. Davis permanently and totally disabled. Therefore, the employer is ordered to pay to the employee, Donald Davis, the sum of $29,856.00. This sum represents 80 weeks of permanent partial disability compensation payable at the applicable compensation rate of $373.20 per week.

IV. Liability of Second Injury Fund

The accident of June 6, 2007, considered alone, does not render the employee permanently and totally disabled. Yet, Mr. Davis suffers multiple medical conditions and disabilities, which cause him to be governed by significant restrictions and limitations that render him unemployable in the open and competitive labor market. These restrictions and limitations are related to the work injury of June 6, 2007, in combination with his preexisting medical conditions and disabilities.

The liability of the Second Injury Fund for permanent disability compensation is governed by the provisions of Section 287.220.1, RSMo. In light of this statute and the facts presented, the evidence is supportive of a finding that the Second Injury Fund is liable for payment of permanent total disability compensation.

In this case, prior to June 6, 2007, Mr. Albright suffered from preexisting disabilities referable to his low back and right upper extremity, which were sufficiently disabling to impact physically his ability to perform certain activities, and to be governed by limitations and restrictions. Notably, he sustained an injury to his low back in 2001 resulting in sciatic pain. He sustained additional injury to his low back in June 2006, which required medical treatment and caused him to sustain permanent disability without complete resolution of symptoms. Although he continued to work until suffering the accident of June 6, 2007, he worked in pain for the next year, leading up to the injury of June 6, 2007. Also, his right shoulder continued to pop and give him pain with regard to performing ongoing job duties, and on bad days he would have to change arms and change position due to the discomfort. He sustained a prior left shoulder injury as a result of a motor vehicle accident. The right shoulder is worse than the left, and at the time of the work injury of June 6, 2007, he presented with a limited range of motion in his right shoulder.
Further, Dr. Bennoch and Dr. Mullins opined that at the time of the June 6, 2007 work injury, Mr. Davis presented with a pre-existing disability of 15 percent to the body as a whole for his back condition; and he had a pre-existing disability of 15 percent to the right shoulder. The right shoulder involved a prior workers’ compensation injury, and resulted in a compromise settlement based upon approximate disability of 14 percent.

In light of the foregoing, I find and conclude that at the time of the June 6, 2007 injury, Mr. Davis presented with a permanent partial disability of 15 percent to the body as a whole referable to the lumbar spine condition; and he presented with a permanent partial disability of 15 percent to the right shoulder. I further find and conclude that these preexisting disabilities presented a hindrance and obstacle to employment or potential employment.

Accordingly, after consideration and review of the evidence, I find and conclude that as a consequence of the accident of June 6, 2007, in combination with the preexisting industrial disabilities, Mr. Davis is permanently and totally disabled. Therefore, the Second Injury Fund is liable to the employee for payment of permanent total disability compensation and is ordered to pay to the employee, Donald Davis, the sum of $373.20 per week for the employee’s lifetime. The payment of permanent total disability compensation by the Second Injury Fund is effective as of May 26, 2009, when he reached maximum medical improvement and his condition was rendered permanent. Further, the payment of permanent total disability compensation shall take into consideration 80 weeks of permanent partial disability, which is attributable to the employer and insurer.

The award is subject to modifications as provided by law.

An attorney’s fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Made by: /s/ L. Timothy Wilson
L. Timothy Wilson
Chief Administrative Law Judge
Division of Workers’ Compensation