Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 13-104631

Employee: Robert L. Davis
Employer: Walgreens
Insurer: American Zurich Insurance Company
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 June 12, 2018. The award and decision of Administrative Law Judge Emily S. Fowler, issued June 12, 2018, 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 7th day of August 2019.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

Robert W. Cornejo, Chairman

DISSENTING OPINION FILED
Reid K. Forrester, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary
DISSENTING OPINION

I have read the briefs of the parties and reviewed the whole record. I have considered all of the competent and substantial evidence based on record as a whole. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers’ Compensation Law, I find employee Robert L. Davis failed to prove that he sustained any physical or psychological permanent partial disability as a result of a work accident on April 6, 2013.

Failure to Prove a Compensable Accident

Section 287.020.2 provides, in pertinent part, “The word “accident” as used in the chapter shall mean 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 (emphasis added).”

Employee predicates his entire case in this appeal on proof of an acute injury on April 6, 2013. Employee alleges sudden injury to his lower back due to a specific lifting event occurring at work that day. However, records from employee’s visit to the College Park Family Care Center (College Park) on April 6, 2013, fail to reference any specific traumatic work incident. Furthermore, an entry in College Park records dated June 9, 2014, about a year after employee’s alleged accident, specifically states, “The accident or injury that started this Is [sic] not recalled by the patient.” College Park’s medical records reference employee’s job activities at Walgreens, but include no opinions regarding the causation or the etiology of any of employee’s physical complaints. College Park’s records documenting employee’s primary medical care years before the alleged work injury specifically reference chronic lower back pain. Nothing in College Park’s medical records spanning thirteen years suggest that this health care provider was overly succinct or abbreviated in its approach to record keeping. There is only one explanation for College Park’s lack of documentation of employee’s April 6, 2013, work injury—the event did not occur.

Failure to Provide Notice of Injury to Employer

Section 287.420 provides, in pertinent part:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury . . . has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

Employee had a preexisting history of on-the-job injuries with this employer. Furthermore, employee’s job responsibilities for employer specifically included reporting

1 Transcript, 1511.
and documentation of on-the job injuries involving workers he supervised. Considering these undisputed facts, employee's failure to provide proper notice to employer of the time, place and nature of his injury within thirty days after the accident, as required by § 287.420 is not reasonable or understandable. Employee's failure to provide written notice within thirty days of his alleged April 6, 2013, injury to employer further supports the conclusion that no specific work-related accident occurred that day.

Medical Causation and Disability

I. Disability attributable to lower back

The opinion of employee’s expert Dr. Brent Koprivica that employee sustained disability due to a work injury on April 6, 2013, is unsupported by contemporaneous medical records and conflicts with employee’s earlier medical records describing chronic lower back complaints beginning in 2011.

The fact that employee’s clinical examination was positive at every level for symptom magnification is undisputed. Dr. Koprivica conceded that employee’s reported complaints were an invalid indicator of his physical capabilities. Employee tested positive on Waddell’s testing, consistent with malingering or attempting to mislead an examining physician as to the extent of disability. Dr. Koprivica further found that employee’s efforts during his examination were submaximal and that, during the course of his examination, employee demonstrated an ability to perform physical movements he earlier denied.

On cross-examination, Dr. Koprivica’s admitted that employee’s chronic lower back pain prior to the alleged work injury was likely to have been disabling and that, if so, this preexisting condition would have been included in his 15% evaluation of disability related to employee’s alleged April 6, 2013, work injury. When a medical condition results from one of two causes, only one of which would be employer’s responsibility, the burden of proof has not been met. *Griggs v. AB Chance*, 503 S.W.2d 697 (Mo. App. 1973).

II. Psychological Disability

The majority bases its finding that employee sustained 5% permanent partial disability to the body as a whole due to the psychological impact of his alleged April 6, 2013, work injury exclusively on psychologist Dr. James Jackson’s expert opinion. Dr. Jackson’s objectivity is suspect because Dr. Koprivica considers Dr. Jackson to be his employee. Dr. Jackson conceded approximately 40% to 50% of his practice involves referrals from either Dr. Koprivica or attorneys who have consulted Dr. Koprivica.

In estimating employee’s work-related psychological disability, Dr. Jackson assessed 20% of the body as a whole for depression that developed following employee’s separation from employment with employer. Dr. Jackson identified a number of “stressors,” including loss of income and loss of self-esteem that related to employee’s discharge. On cross-examination, Dr. Jackson was unable to specifically identify what portion of employee’s depression was attributable to his employment separation.
When a medical condition results from one of two causes, only one of which would be employer's responsibility, the burden of proof has not been met. Griggs v. AB Chance, 503 S.W.2d 697 (Mo. App. 1973).

Furthermore, §287.120.9 provides, “A mental injury is not considered to arise out of and in the course of an employment if it resulted from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action taken in good faith by the employer (emphasis added).” There is no competent evidence that supports a finding that employee's December 12, 2013, discharge, prompted by complaints of harassment by coworkers, and decided on only after employer imposed progressive discipline, was an action taken in bad faith. Pursuant to §287.120.9, no compensation should be awarded for employee's alleged work-related psychological disability.

Subjective v. Objective Findings

Section 287.190.6(2) provides that, in determining issues of compensability and disability, where inconsistent or conflicting medical opinion exists, “objective medical findings shall prevail over subjective medical findings.”

Dr. Koprivica opined that employee's lower back complaints were out of line with his objective presentation and assessed disability based entirely on employee's subjective complaints. Employee's vocational expert Terry Cordray relied on Dr. Koprivica's work restrictions based on employee's subjective complaints in forming his conclusions regarding employee's inability to access the open labor market.

Employer's expert Dr. Alexander Bailey found no objective evidence of a neurological deficit or nerve impingement beyond employee's subjective complaints. Dr. Bailey interpreted employee's MRI results, an objective test, as consistent with degenerative disc disease, a condition that affects both working and non-working populations. Dr. Bailey found no evidence of any acute injuries traceable to employee's alleged April 6, 2013 injury, assigned zero disability relative to the alleged work event and opined that employee could return to his regular work activity level.

Given the statutory mandate requiring that objective findings must prevail over subjective medical findings, Dr. Bailey's conclusions must be considered controlling on the issue of the nature and extent of employee's disability.

Conclusion

An employee has the burden of proving all essential elements of his case. Thorsen v. Sach's Electric Company, 52 S.W.3d 611 (Mo. App. 2001). Employee in this case has failed to establish the essential element of accident. Nor did employee provide the required written notice of his injury to employee. On the issue of medical causation, employee has produced no objective evidence of permanent physical disability attributable to a work accident. To the extent that employee suffers a psychological disability, employee's own experts acknowledge it stems, at least in part, from employer's discharge. Employer's decision to discharge employee, prompted by
employee's poor judgment and inappropriate workplace conduct, was clearly in good faith. Pursuant to § 287.120.9, under these circumstances, employee's psychological disability is not compensable.

For all of these reasons, I would deny employee's claim for benefits. I respectfully dissent from the majority's decision finding otherwise.

Reid K. Forrester, Member
Issued by DIVISION OF WORKERS' COMPENSATION
Employee: Robert L. Davis

AWARD

Employee: Robert L. Davis
Dependents: N/A
Employer: Walgreens
Insurer: American Zurich Insurance Co.
c/o Sedgwick CMS
Additional Party: Missouri State Treasurer as Custodian for the Second Injury Fund
Hearing Date: March 7, 2018
Checked by: ESF/lh

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: April 6, 2013
5. State location where accident occurred or occupational disease was contracted: Lee’s Summit, Jackson County, Missouri
6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was Claim for Compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee sustained injury to his low back, right leg and psyche while awkwardly twisting and lifting heavy totes when he felt a sharp pain and pop in 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 and psyche.
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? 0
17. Value necessary medical aid not furnished by employer/insurer? $4,931.00
18. Employee's average weekly wages: $1,114.11
19. Weekly compensation rate: $742.74/$433.58
20. Method wages computation: By Evidence

COMPENSATION PAYABLE

21. Amount of compensation payable: Employer to pay to Claimant 7.5% permanent partial disability to the body as a whole related to the low back and 5% permanent partial disability to the body as a whole relating to psychiatric for a total of 12.5% body a whole. This equates to 50 weeks of disability at $433.58 per week for a total of $21,679.00.

Employer to pay to Claimant the sum of $4,931.00 as and for unpaid medical bills incurred by Claimant for treatment of injuries incurred on April 6, 2013.


23. Future requirements awarded: Employer/Insurer are ordered to provide medical treatment necessary to cure and relieve Claimant from injuries sustained to his low back, right leg and psyche on April 6, 2013.

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 William C. Spooner, Claimant’s attorney, for necessary legal services rendered.

STIPULATIONS

Prior to the Hearing, the parties stipulated to the following:

1) On April 6, 2013 ("the injury date"), Robert L. Davis was an employee of Walgreens and working subject to the Missouri Workers' Compensation Law;

2) The Employer, Walgreens, was an employer operating under and subject to the provisions of the Missouri Workers' Compensation Law on April 6, 2013, and its liability was fully insured by American Zurich Insurance Co. c/o Sedgwick CMS;

3) The Missouri Division of Workers’ Compensation has jurisdiction to hear this claim and that venue is proper in Kansas City, Missouri;

4) A Claim for Compensation was filed within the time prescribed by law;

5) Employer paid no medical care nor temporary total disability benefits;
ISSUES

The parties requested the Division to determine the following issues:

1. Whether Claimant suffered an injury by accident arising out of and in the course and scope of employment.

2. Whether Claimant provided Employer with proper notice of the injury under the Statute.

3. Whether Employer is responsible for payment of past medical benefits.

4. Whether Claimant is entitled to future medical care.

5. What is Claimant's average weekly wage and corresponding compensation rates.

6. Whether Claimant is entitled to payment of temporary total disability benefits.

7. Whether claimant sustained any disability as a result of his injury on April 6, 2013.

8. Whether the Second Injury Fund is liable to Claimant for any disability benefits.

EXHIBITS

The Employee, Robert L. Davis, testified in person and offered the following exhibits, all of which were admitted into evidence without objection:

April 6, 2013

A  Claim for Compensation  02-10-15
B  Answer to Claim for Compensation (SIF)  03-02-15
C  Amended Claim for Compensation  03-17-15
D  Answer to Claim for Compensation (Emp./Ins.)  03-30-15
E  Amended Answer to Claim for Compensation (SIF)  04-02-15
F  Amended Claim for Compensation  09-21-16
G  Amended Answer to Claim for Compensation (SIF)  10-03-16
H  Amended Answer to Claim for Compensation (Emp./Ins.)  10-12-16
December 12, 2013

I  Claim for Compensation 03-17-15
J  Answer to Claim for Compensation (Emp./Ins.) 03-30-15
K  Answer to Claim for Compensation (SIF) 04-02-15
L  Amended Claim for Compensation 09-21-16
M  Amended Answer to Claim for Compensation (SIF) 10-03-16
N  Amended Answer to Claim for Compensation 10-12-16
(Opp./Ins.)
O  Dr. P. Brent Koprivica (report) 11-17-15
P  Dr. P. Brent Koprivica (addendum) 12-01-16
Q  Dr. James O. Jackson (report) 07-06-16
  07-07-16
R  Dr. James O. Jackson (addendum report) 10-13-16
S  Terry Cordray (report) 08-21-16
T  Terry Cordray (addendum report) 02-21-17
U  College Park Family Care 11-25-05 thru 12-02-14
V  College Park Family Care 01-12-10 thru 06-24-15
W  College Park Family Care 04-02-15 thru 08-26-15
X  College Park Family Care 08-26-15 thru 11-30-15
Y  College Park Family Care 09-29-15 thru 01-18-18
Z  College Park Family Care 12-09-14
AA  Sport & Spine Physical Therapy 05-06-15 thru 07-31-15
BB  Dr. Michael Little 06-03-15 thru 01-19-16
CC  St. Luke’s East Hospital 10-05-17
DD  Medical Bill Summary
EE  College Park Family Care Center
FF  College Park Family Care Center
GG  Sport & Spine Physical Therapy
HH  Standup Mobility
II  Surgicenter of Johnson County
JJ  Diagnostic Imaging Centers
KK  Wal-Mart Pharmacy
LL  St. Luke’s East Hospital
MM  Stipulation for Compromise Settlement 06-02-10
  (Injury No. 06-136075)
    • Dr. Joyce L. Simon 11-07-06
    • Dr. Robert Pierron 08-26-09
NN  Missouri Department of Elementary & Secondary
    Education (GED transcript)
OO  United States Army (DD-214 and Honorable Discharge)
PP  Fax from Robert Davis to Margaret Scott, Sedgwick Claims Representative 03-11-15
QQ  2013 Tax Return
RR  Dr. James O. Jackson (deposition) 01-09-17
SS  Dr. P. Brent Koprivica (deposition) 02-24-17
TT  Terry L. Cordray (deposition) 05-11-17
FINDINGS OF FACT

Based on the above exhibits and the testimony of the Claimant, Robert L. Davis, this Court makes the following findings:

History

Claimant is a 54-year old man (at time of Hearing) who had worked most of his adult life in the retail industry providing managerial services. Claimant completed the eleventh grade of formal education and completed his GED in 1992. Claimant served in the Army National Guard from September 5, 1982, until relieved of his duties with an Honorable Discharge on December 13, 1988.

Work History

Claimant’s relevant work history began in the mid-1980’s working for several retail establishments starting at Quik Trip as a manager for the night shift. After leaving Quik Trip, Claimant worked for several other retail establishments in managerial positions, including Shop ‘N Go, Blockbuster Video, Hollywood Video, 7-Eleven, Phar-Mor, Paper Warehouse, and Drug Emporium.

Claimant began his employment with Walgreens ("Employer") in April of 1999, and was employed until his termination on December 12, 2013. Claimant testified that his daily work activities included numerous repetitive daily job tasks. The majority of his day consisted of 90% standing and walking of an 8-12 hour day. He did a lot of bending and squatting while putting product on and off the shelves. He did overhead lifting of products and climbing up and down ladders. He did the stocking, organizing and cleaning of the stockroom. He received product from approximately 10-20 outside vendors a day which consisted of receiving the product and then stocking it to shelves. This included lifting and handling boxes of wine, beer, soda pop and frozen foods among other items. Claimant testified that he walked around the store daily checking and ordering product. He did the ordering from the warehouse for the whole store, including the cosmetic and pharmacy departments, and also the front-end departments, including cigarettes and tobacco. He assisted the customers. He walked the store daily and made a list of things that needed to be done and could be accomplished that day, along with other duties that had to be done daily; i.e., picking up trash on the outside, sweeping and mopping the floor, facing and straightening the product on the shelves, pulling the stockroom and stocking the floor with product. He did the resetting and revising, which included moving and deleting old discontinued product and adding
new product from a 3-feet set up to a 32-feet set up; *i.e.*, taking all product off the shelves, cleaning off the shelves and putting the product back on to the shelves. He had to maintain the Swiss program (store within a store), which was an added responsibility for the Executive Assistant Manager or Assistant Store Manager and included all edible and frozen items, grocery product, cooler items, dairy and tobacco products. This involved maintaining and achieving a constant increase of sales and profit, stocking, ordering, cleaning, straightening, pulling out-of-date product daily, constantly going in and out of the cooler and freezer, bending, stooping and lifting. He would unload warehouse trucks weekly with anywhere from 500-1,000 pieces, totes, boxes, etc. and return the empty totes to the truck. The totes weighed from 10 pounds to excess of 75 pounds depending on what was in them. He had to lift and stack the totes when full anywhere from 5-8 feet high to 10 feet due to lack of room in the warehouses, and also stacked the boxes as high as they could get them. Claimant would then have to load the stacked totes back onto the truck. He separated the totes and boxes into departments and then used the dolly to take the product out to the specific departments on the sales floor. He also did the maintaining of the seasonal aisle, including ordering, straightening, stocking and cleaning.

CLAIMANT'S CONDITION PRIOR TO APRIL 6, 2013

**Left Ankle/Achilles**

Claimant sustained a left ankle injury while playing basketball in 2004. Claimant testified that he heard a pop. Claimant received medical attention the following day consisting of an x-ray. Claimant testified that it was a little swollen, so he put a brace on it and took some time off work. Subsequently, in 2005, while working at Walgreens, Claimant was coming down off a ladder and felt a pop and sustained a torn left Achilles. Claimant sought medical treatment and was seen by Dr. Worsing on November 28, 2005 and underwent a left Achilles repair in December 2005. Claimant continued to have ongoing symptoms from the left Achilles despite the repair. Claimant relates the hinderance from work as it did not allow him the opportunity to self-direct his standing and walking activities. In addition, Claimant was limited in tolerances of climbing tasks such as work on ladders on a permanent ongoing basis.

**Left Shoulder**

Claimant sustained injury to his left shoulder in which a claim was filed on July 21, 2006. Claimant was seen by Dr. Robert Pierron on August 26, 2009, and believed this injury was the result of his physical activities of his work, including stocking and loading. Dr. Robert Pierron recommended subacromial decompression of the left shoulder for chronic impingement. Claimant underwent arthroscopic subacromial decompression of the left shoulder performed by Dr. Pierron on October 27, 2009. Claimant’s left shoulder continued to hinder his work regarding overhead tasks and had ongoing reduced strength and motion and pain that limited him at work. Claimant accommodated for his left shoulder impairment. A compromise settlement was reached with regard to Claimant’s left shoulder claim on June 2, 2010 wherein Claimant settled for 0% permanent partial disability to the shoulder and $1,000.00. Claimant was unrepresented in that case.
Prior Low Back

Claimant was involved in a car accident and contacted Dr. Joyce Simon’s office on May 20, 2011, requesting an appointment for complaints of neck and back pain. Claimant was seen by Dr. Joyce Simon on December 13, 2011, with complaints of low back and right buttock pain. Claimant was given a prescription for Tramadol, Naprosyn, Flexeril and Lisinopril. Claimant was seen by Dr. Joyce Simon on June 13, 2012, after a motor-vehicle accident with complaints of continued low back pain, but the medications did help. Claimant advised that the Trazodone was too strong, so he spread out the dosage. Claimant did not return to a doctor for the next year and a half.

HISTORY OF APRIL 6, 2013 INJURY

Low Back

Claimant describes an acute injury that occurred during his employment on April 6, 2013. Claimant testified that he was lifting a stack of totes to put them on a truck when his back popped. This was followed by immediate severe low back pain and pain that radiated from his buttocks down the back of his right leg. He told co-workers and his manager that he had injured his back while lifting a stack of totes. There was no contrary evidence presented to contradict the Claimant’s accident or reporting of the accident.

Claimant’s pain was such that he went to College Park Family Care to the Urgent Care Clinic on April 6, 2013, and was seen by Dr. Mitzi Groves. Documentation suggested that the low back pain was sciatic and he was prescribed pain medications, along with Flexeril. Four days later on April 10, 2013, Claimant was examined and evaluated by his family physician, Dr. Joyce Simon. Dr. Joyce Simon documented that the Claimant’s current low back episode started on April 6, 2013, and that his back hurt from doing lots of lifting. An MRI scan was ordered and his pain medication, Hydrocodone, was renewed. On April 23, 2013, an MRI study was completed which showed a focal disc protrusion and focal annual tear with disc protrusion at L4-L5. Dr. Joyce Simon renewed the Claimant’s pain medication and recommended physical therapy. Claimant testified that he repeatedly requested medical care and treatment from his supervisor. Given that he was a member of management, he could not report his own injury and his supervisor was a district manager who was in charge of several stores. Claimant testified that his pain continued to worsen every day and that he was able to do less and less of his work activities. He repeatedly complained to his district manager regarding his injury and desire for medical treatment and/or that his claim be referred to the workers’ compensation insurance carrier. Claimant continued to work. Claimant testified that on October 2, 2013, he returned to Dr. Joyce Simon with increased low back pain as he was continuing to work and lift objects while at work. Dr. Joyce Simon noted on October 2, 2013, that the Claimant “did a lot of lifting at work and unloading trucks and the symptoms caused increased pain.” Medications were reinstated. The Claimant was terminated from employment on December 12, 2013. Claimant was examined by Dr. Joyce Simon on April 29, 2014, complaining of continued back pain. Claimant was prescribed Flexeril and Naprosyn and referred to Dr. Lan Knoff for treatment of his chronic low back pain. Dr. Lan Knoff saw the Claimant for chronic pain management purposes and continued his Naprosyn, Tramadol and Flexeril. Dr. Lan Knoff also recommended Topamax, as well as epidural steroid injections for management of the lumbar pain. On October 16, 2014 Claimant was evaluated by Dr. Lan Knoff who noted ongoing chronic low back pain and an annular tear of
Claimant’s lumbar disc. Dr. Lan Knoff noted left lumbar radiculitis and recommended continued use of opioids on October 16, 2014. On October 28, 2014, Claimant saw Dr. Joyce Simon noting additional problems from mood disorder. Depression was added to the diagnosis and medication was prescribed. A Claim for Compensation was filed by Claimant on February 10, 2015, alleging a work injury to his low back that occurred on April 6, 2013. This Claim for Compensation was provided to adjuster, Margaret Scott. Thereafter, an Amended Claim for Compensation was filed on March 17, 2015, by the Claimant’s attorney who requested medical care and treatment. Dr. Joyce Simon continued to follow Claimant and noted ongoing chronic pain complaints through April and May of 2015. Dr. Joyce Simon recommended psychotherapy and continued psychotropic medications and referred the Claimant to Psychiatrist, Dr. Michael Little. Dr. Michael Little diagnosed depression, as well as somatic pain disorder and treated the Claimant for the next year. Claimant’s treatment for his low back injury, as well as depression was terminated due to the Claimant’s lack of insurance.

CLAIMANT’S CURRENT COMPLAINTS

The Claimant testified about multiple complaints regarding the physical impairments that are attributable to the primary injury on April 6, 2013. Claimant testified that he continues to have chronic back pain that can range anywhere from a 5-9 level and/or a 10 at times when he is on his feet, standing, walking, bending or squatting too much or too often. He only gets about 3-4 hours of sleep a night due to the back pain. The pain travels down to his buttocks and down his legs to his knees. The pain in his low back is sharp and stabbing and sometimes goes up the middle of his back. He tries to alleviate the pain through the day by standing 5-15 minutes, then sitting 15-30 minutes to lying down 30 minutes and then repeats the same routine. He also walks around his house a little and then back to the routine; i.e., standing, sitting and lying down. Additionally, he maintains his prescriptions and takes them as prescribed when he has them. When he has been unable to afford the medications, he takes over-the-counter medications like Aleve, Tylenol or Aspirin. Even when he has all of his medications and takes them, his pain still never completely goes away and he still has to maintain his routine of trying to keep it in check to stay mobile. He does not like to drive any longer than 10-15 minutes anymore. Each day he is finding it more difficult to maintain simple daily functions. He is getting worse and is in fear of doing more and more damage to his back and whole body. His depression is deepening. He has had thoughts of suicide. His sister and his son do the majority of his shopping. He does not eat right or get enough exercise due to his pain. He is having excessive weight gain due to being in constant pain and having to eat when he takes his medications.

Claimant testified that he continues to have ongoing left shoulder pain and it feels like needles and sharp pain stabbing at times daily and while getting dressed and undressed. He is unable to lie on his left shoulder for over an hour without it hurting. Claimant testified that he cannot lift 10 pounds over his head without pain. It is painful when raising it over his head and out to the side repetitively. He uses a TENS unit on his left shoulder approximately 3-4 times a week.

He has pain in his left Achilles when standing and walking on it. The pain radiates up from it to the calf and is a shooting pain that comes and goes from seconds to minutes multiple times daily. He uses the TENS unit on his left Achilles approximately 3-4 times a week. After about 30 minutes of standing or walking a block or up and down the stairs, he uses a heat pad and ice to help alleviate the pain.
TESTIMONY OF DR. P. BRENT KOPRIVICA


On November 17, 2015, Dr. P. Brent Koprivica performed an independent medical examination of Claimant with regard to an alleged injury to the Claimant’s back on April 6, 2013. According to Dr. P. Brent Koprivica, he recorded that the Claimant had pre-existent industrial disability of significance. First, Claimant sustained injury to his left Achilles and was seen by Dr. Robert Worsing, orthopedic surgeon, on November 28, 2005. Claimant underwent a left Achilles repair in December of 2005. As to industrial disability issues, Dr. Robert Worsing noted ongoing symptoms from the left Achilles despite the repair. Claimant related hindrance from work that did not allow him the opportunity to self-direct standing and walking activities. Claimant stated to Dr. P. Brent Koprivica that he was limited in tolerances of climbing tasks such as work on ladders on a permanent ongoing basis due to the left Achilles injury. It was Dr. P. Brent Koprivica’s opinion that Claimant did have significant pre-existent industrial disability based on the history of open left Achilles repair. Dr. P. Brent Koprivica assigned 25% permanent partial disability of the left lower extremity above the ankle (155-week level). Due to the pre-existent industrial disability, Dr. P. Brent Koprivica opined that Claimant should avoid excessive climbing activities and would represent a pre-existent restriction.

Dr. Robert Pierron performed a subacromial decompression on the left shoulder for chronic impingement on October 27, 2009. Claimant stated that his left shoulder continued to hinder his work with regard to overhead tasks and had ongoing reduced strength and motion. Claimant did accommodate for the left shoulder impairment. It was Dr. P. Brent Koprivica’s opinion that Claimant did have significant pre-existent industrial disability based on the history of the subacromial decompression of the left shoulder and that Claimant had subjective physical impairment. There was also evidence of a partial rotator cuff injury. Dr. P. Brent Koprivica assigned 25% permanent partial disability of the left upper extremity at the left of the shoulder (232-week level). It is noted by this Court that Claimant settled this claim in 2010 unrepresented for 0% disability and for $1,000.00. This Court finds it improbable that after arthroscopic subacromial decompression of the left shoulder there would be absolutely no disability. Further, there is no evidence to the contrary presented herein. Therefore this Court finds that Dr. Koprivica’s determination of 25% permanent partial disability of the left upper extremity at the shoulder is appropriate herein. Due to this pre-existent industrial disability, Dr. P. Brent Koprivica opined that Claimant should be restricted from work activities requiring repetitive or sustained activities above shoulder girdle level on the left and should avoid repetitive pushing or pulling activities at chest level on the left.

April 6, 2013 Injury

Dr. P. Brent Koprivica determined Claimant sustained an acute injury during his employment with Walgreens when he was lifting a stack of totes to put onto a truck and his back popped and was followed by immediate, new severe pain in the low back area. Claimant stated he had pain radiating from his buttocks down his posterior leg that was right-sided. Dr. P. Brent Koprivica opined that the Claimant’s work injury on April 6, 2013, is felt to represent the direct, proximate and prevailing factor in Claimant’s injury to the lumbar region, and that Claimant
suffered a chronic lumbosacral strain/sprain injury that included an annular injury as a component of that injury. Based upon the objective physical impairment with regard to Claimant’s lumbar injury of April 6, 2013, Dr. P. Brent Koprivica assigned 15% permanent partial disability to the body as a whole. In addition, separate from the 15% permanent partial disability to the body as a whole for the April 6, 2013 injury based on physical impairment, it is Dr. P. Brent Koprivica’s opinion that there may be additional disability to be apportioned by a mental health care expert and deferred those issues to a mental health care expert as to validation of Claimant’s presentation of disability. Dr. P. Brent Koprivica opined that any additional psychological disability apportioned by the mental health care expert as a causal consequence of the April 6, 2013 injury would be combined with the 15% permanent partial disability to the body as a whole that he assigned to the April 6, 2013 injury. It was Dr. P. Brent Koprivica’s opinion that the nature of Claimant’s April 6, 2013 injury is not one that results in total disability when considered in isolation. It is Dr. P. Brent Koprivica’s opinion that Claimant should follow the restrictions: avoid frequent or constant bending at the waist, pushing, pulling or twisting; avoid sustained or awkward postures of the lumbar spine; avoid whole body vibration exposure or jarring; avoid frequent or constant lifting or carrying tasks; avoid frequent or constant squatting, crawling, kneeling or climbing tasks; and in general, with the findings noted, Claimant should be limited to occasional lifting or carrying of 50 pounds or less as a maximum.

EXPERT SUMMARIES

Dr. James O. Jackson

On July 6, 2016, and July 7, 2016, Claimant was examined by psychologist, Dr. James O. Jackson, for a psychological evaluation for the purpose to assess the current status of his psychological functioning and to determine if and how his current psychological functioning was related to the April 6, 2013 injury and premorbid adjustment. Dr. James Jackson’s opinion was that the psychological sequela of Claimant’s injuries on April 6, 2013, and multiple occupational injuries he suffered up to and including April 6, 2013, were the direct, proximate and prevailing factors in the development of Claimant’s Somatic Symptom Disorder, moderate and major Depressive Disorder, severe.

Dr. James Jackson opined that Claimant’s overall psychological disability rating of 10% body as a whole was due to his April 6, 2013 injury. He felt the Claimant suffers from a Somatic Symptom Disorder as a consequence of the April 6, 2013 injury (same diagnosis as Dr. Michel Little). Dr. James Jackson opined that Claimant would not be permanently and totally disabled when considering only the permanent partial psychological disabilities incurred in his work-related psychological injury of April 6, 2013.

Dr. Michael Little

On June 3, 2015, Claimant was first evaluated by Dr. Michael Little, psychologist, per the recommendation of Dr. Joyce Simon, and received psychological/psychotherapy treatment through January 19, 2016, due to depression, withdrawal, low pleasure, some hopelessness, sleep disturbance and financial stress as the result of his work-related injuries of April 6, 2013, and cumulative injuries of December 12, 2013. Claimant advised Dr. Michael Little that his depression and chronic pain was in response to his on-the-job injuries and subsequent termination from Employer. Dr. Michael Little diagnosed Claimant with Major Depression and Pain Disorder.
associated with Psychological Factors and a General Medical Condition, which is the same diagnosis as Dr. James Jackson. Claimant's last visit with Dr. Michael Little was on January 19, 2016, after having to cancel appointments and delayed scheduling due to his finances. In addition, Claimant advised that his finances were so stressed that he had also been unable to get his pain medications reliably.

Dr. Alexander Bailey

On April 12, 2016, orthopedic surgeon, Dr. Alexander Bailey, performed an Independent Medical Examination of Claimant and authored a report, dated April 12, 2016. Dr. Alexander Bailey diagnosed Claimant with spondylolisthesis at L4-L5, generalized degenerative disk disease, lumbar spine L4-L5 and L5-S1, without signs of significant neurologic impingement, facet disorder and generalized degeneration and osteoarthritis of the lumbar spine and non-organic pain behaviors and positive Waddell's pain behaviors. Dr. Alexander Bailey believed that Claimant could work regular duty and if there are any limitations they are personal in nature. Dr. Alexander Bailey assigned a rating to Claimant of 0% permanent partial disability to the body as a whole as it relates to a work injury of April 6, 2013 as it relates to his employment at Walgreens.

Dr. Joseph F. Galate

Claimant was seen by Dr. Joseph F. Galate, physiatrist, on August 22, 2016, for an Independent Medical Examination. Dr. Joseph F. Galate diagnosed Claimant with a bulging disk at L4-L5 with an annular tear, and a small protruding disk at L5-S1 on the neural foramen. Dr. Joseph F. Galate had no opinion as to the prevailing factor.

RULINGS OF LAW

The first issue to be determined is whether the Claimant sustained an injury by accident arising out of and in the course and scope of his employment on April 6, 2013. I find by a preponderance of credible evidence that Claimant did, in fact, sustain an injury by accident arising out of and in the course and scope of his employment on April 6, 2013.

Based on the Claimant's testimony and the records submitted into the record, it is evident that the Claimant was injured while lifting a stack of totes and attempting to put them back in the delivery truck on April 6, 2013. Claimant felt immediate pain and heard a pop. This event was an unexpected, traumatic event identifiable by time and place of occurrence during a single work shift. Further, at the time of the accident, Claimant felt severe pain in his low back and right leg. The contemporaneous medical records document the April 6, 2013 injury. After the accident, an MRI revealed an annular disc tear of the Claimant's L4-L5 disc. Dr. P. Brent Koprivica, Dr. Lan Knoff, and Dr. Joseph Galate have all identified the same annular tear, which I find is objective evidence of the Claimant's injury on April 6, 2013. In addition, I find the Claimant's treatment for depression and pain disorder, which was provided by Dr. Joyce Simon and Dr. Michael Little, to naturally flow from the April 6, 2013 injury. I find Dr. P. Brent Koprivica's opinions credible and persuasive when he testified and stated that the Claimant's work injury of April 6, 2013, was the direct, proximate and prevailing factor in the Claimant's injury in the lumbar region. I find the opinions of Dr. James Jackson and Dr. Michael Little to be persuasive and supportive that the Claimant suffers from severe depression and a somatic pain disorder flowing from the injury of April 6, 2013, and was a medical condition and disability which arose from that event.
Supported by the foregoing, I find the event which occurred on April 6, 2013, meets the definition of an accident set out in RSMo 287.020.2. Accordingly, the Court must now evaluate whether the accident caused an injury arising out of and in the course and scope of his employment. I find that it did. The first step in determining whether an injury arises out of and in the course of employment is to determine whether it is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury. In the present case, the evidence establishes that the April 6, 2013 work accident is the prevailing factor in causing the Claimant's low back injury and subsequent depression and somatic symptom disorder.

Both Dr. P. Koprivica and Dr. James Jackson have stated that after review of the contemporaneous medical records, as well as their clinical examinations, that the Claimant did sustain injury on April 6, 2013.

Accordingly, on the basis of the Claimant's credible testimony and the credible and persuasive testimony of Dr. P. Brent Koprivica, I find the Claimant met his burden of proving he sustained an injury to his low back on April 6, 2013 that arose out of and in the course of employment for Employer, and which was medically causally connected to it. I find that the Claimant's work for the Employer was the primary factor, in relation to any other factor, in causing both the medical condition and the disability in the Claimant's low back.

I find that the Claimant met his burden of proof in this regard. The Claimant, in addition to testimony needed to offer competent, credible and persuasive medical and psychological testimony to support his contention that he injured his low back on April 6, 2013, and in addition, his somatic pain disorder and major depressive disorder. Claimant also offered the sole opinion and sole psychological testimony of Dr. James Jackson who persuasively opined that the Claimant had developed the psychological sequelae after his April 6, 2013 low back injury which produced pain and that were a direct, proximate and prevailing factor in the development of a major severe depressive disorder, as well as a moderate somatic symptom disorder.

In regards to the psychological disorder, I find that Dr. James Jackson, the only psychological expert, testifying in this case supported the diagnosis of major severe depressive disorder and a somatic symptom disorder, which Dr. James Jackson relates to the pain resulting from the injuries of April 6, 2013.

In regards to the April 6, 2013 injury to Claimant’s low back, Dr. James Jackson, the only independent psychological evaluator in the claim, also pointed to other physicians over the course of the treatment of Claimant who similarly diagnosed the same condition. Dr. James Jackson's opinion is the same as Dr. Joyce Simon who diagnosed and began treating the Claimant with antidepressant medications on October 28, 2014. Dr. Joyce Simon noted that Claimant's depression was ongoing as of May 13, 2013, and by June 3, 2015, she referred the Claimant to Dr. Michael Little, a psychiatrist, who diagnosed him with major depressive disorder and a pain disorder with both psychological factors and a general medical condition. Dr. Michael Little treated the Claimant over 16 sessions until January 19, 2016, when they stepped because the Claimant did not have any additional financial resources that he could contribute for his treatment. Additionally, Dr. Lan Knoff, his pain management specialist, also noted the Claimant was suffering from depression in October of 2014. It is clear that the Claimant had not only physical injuries, but psychological impact from his work injuries of April 6, 2013. Multiple physicians have diagnosed...
and treated Claimant. Therefore, I also find the Claimant’s psychological conditions of somatic pain disorder and severe major depressive disorder to be proximately and casually related to the April 6, 2013 low back injury. Employer and the Second Injury Fund offered no contrary psychological or psychiatric opinions.

I find Dr. P. Brent Koprivica and Dr. James Jackson’s opinions credible and persuasive. Accordingly, I find that the April 6, 2013 work accident was, in fact, the prevailing factor in causing injuries to the Claimant’s back and psyche. Claimant must show that his injury did not come from a hazard or risk unrelated to employment to which he would have been equally exposed to outside of and unrelated to his non-employment life. In the present case, the record clearly establishes that the Claimant’s injuries were the result of a hazard directly related to employment. Specifically, the Claimant testified on April 6, 2013, he was lifting a stack of very heavy totes and while placing them onto a delivery truck injured his low back after hearing a pop which resulted in immediate pain. Furthermore, Claimant testified that this accident was the result of an activity that he only performed at work and that he would not have been equally exposed to the hazard that caused his accident outside of his work with the Employer. I find the Claimant’s testimony on this issue credible and persuasive. As discussed earlier, medical evidence establishes that this accident was the prevailing factor in causing Claimant’s low back injury and subsequent depression and somatic pain disorder. Therefore, I find the evidence clearly establishes that the Claimant’s low back injury and depression and somatic pain disorder to be the result of a risk directly related to Claimant’s work to which he was not equally exposed in his non-employment life.

The next issue to be determined is whether Claimant provided Employer with proper notice of the injury under the Statute. There were several forms of notice which the Claimant did complete and provide Employer. The Claimant testified that he told co-workers and his store manager about the injury immediately after the event. There was no evidence presented by the Employer to refute that. In addition, the Claimant testified that he repeatedly told his area supervisor about the injury and need for medical treatment, as well as other store managers and no one assisted him with filing a Report of Injury or notifying the workers’ compensation carrier. Again, no evidence to the contrary was presented at trial by the Employer.

Claimant also provided proper notice to the Employer on several occasions including, but not limited to the actual injury date of April 6, 2013, while working at the Lee’s Summit location. Claimant had been lifting and unloading heavy totes and injured his low back. After his injury, Claimant immediately told Robin Brook, a clerk in the store, and also, his supervisor, Tom Murphy, about his work injury. Claimant testified that basically Mr. Murphy did not say much other than something like, “Oh, okay. Let me know if there’s anything else.” He felt like it was brushed under the rug. He asked Mr. Murphy to fill out a Report of Injury and was under the impression when he reported his injury, that the paperwork for his claim would be initiated. He never received a claim number for his injury, so he asked Mr. Murphy for treatment on at least a couple of occasions. In fact, Claimant testified that he brought a doctor’s note from Dr. Mitzi Groves with emergent care at College Park Family Care the following day after the April 6, 2013 work accident and gave it to Mr. Murphy as he was taken off of work. Mr. Murphy asked Claimant how long he would be off work and was not happy about it. Claimant advised Mr. Murphy that he was to be off work for a week or two. He thought Mr. Murphy was going to fill the claim out then that day. Claimant testified that Mr. Murphy also spoke to his wife about the injury. Claimant testified that Mr. Murphy absolutely knew his injury was work related. Claimant testified he lost time from work and was off probably a week or two which he documented and
turned in paperwork. Claimant testified that he should have been off longer; however, due to the workload and being a dedicated employee, he came back early. Claimant returned to work and took his pain medication and tried to deal with the pain because he had work to do. Claimant testified and also believed that Mr. Murphy wanted him back as soon as possible.

Claimant continued to report his injury and request treatment with at least three other store managers at other locations. Claimant worked at a total of four different store locations from April 6, 2013 through December 12, 2013, and testified that he reported his injury with each and every one of them. Claimant reported his work injury to store managers, Luis Alvardo, Adam Arnold and Willow Cope. Claimant testified that he did not believe these store managers reported his work injury as it was Employer’s policy for any injury to be reported by the store manager at the location of the injury. Claimant told Mr. Alvardo, Mr. Arnold and Ms. Cope about his April 6, 2013 low back injury; however, it was Mr. Murphy’s responsibility to initiate the claim. Therefore, none of the other three store managers reported the claim as Claimant was not injured at their store locations and the responsibility would therefore fall on Mr. Murphy.

Claimant was later moved to two different store locations due to the Employer’s restructure program. Claimant testified while working at the Raymore store, Mr. Murphy was still Claimant’s community leader, and when Mr. Murphy came out to the store, Claimant again mentioned his low back work injury to him.

Finally, Claimant testified that in addition to reporting his work injury of April 6, 2013, to four different store managers employed with Employer, Claimant also notified loss prevention and believes that he mentioned his work injury to Joy Jaramillo. No evidence or testimony by the Employer was provided at trial to refute any of the Claimant’s testimony regarding notice to any of the above-named supervisors.

This Court finds the Claimant did provide timely notice.

The next issue to be determined is whether Employer is responsible for payment of past medical benefits. Under Mo. Rev. Stat. § 287.140.1 (2005), "The employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment . . . as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

An employee has the right to employ his own physician at his own expense, but when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails and neglects to provide the needed treatment, the employer is held liable for the medical treatment procured by the employee. Hendricks v. Motor Freight Corp., 570 S.W.2d 702, 709-10 (Mo. App. St. L. 1978).

I find that the Claimant’s testimony that he requested and demanded medical treatment for this injury from the Employer persuasive. The Claimant told numerous store managers and supervisors including, but not limited to Adam, Luis, Willow and Tom. The Employer did not provide any testimony to the contrary. I find that the Employer was given the opportunity to control the medical care and select the treating physicians as is their statutory right which they failed to provide. Since the Employer failed to provide adequate medical treatment to the Claimant he sought treated on his own with doctors using his own health insurance which evidently ceased,
causing a discontinuation of his medical treatment. When reviewing the billing, it is clear that
Claimant’s medical treatment at College Park Family Care included treatment for his injury of
April 6, 2013. Dr. P. Brent Koprivica testified that the medical bills were reasonable and
necessary. Claimant’s request for payment of the past medical expenses is awarded. Therefore,
I find that the Employer is responsible for the medical bills referable to the treatment as contained
in Claimant’s Exhibit DD-LL for the April 6, 2013 injury and listed as follows:

- Sport & Spine Physical Therapy $1,256.00
- Standup Mobility $595.00
- Diagnostic Imaging $3,080.00

These total $4,931.00

The next issue to be determined is whether Claimant is entitled to future medical
care. Dr. P. Brent Koprivica and Dr. James Jackson each addressed Claimant’s future need
for medical treatment in both their reports and depositions. Dr. P. Koprivica wrote in his
report that there was medical probability that the Claimant would have ongoing treatment
needs. Dr. P. Koprivica suggested behavioral chronic pain management, as well as the
need for chronic narcotic use and chronic pain management. In addition, Claimant as of a
month prior to this hearing was receiving continued medical treatment from College Park
Family Care Center. Claimant went back College Park Family Care Center and saw
Dr. Lan Knoff January 18, 2018, who suggested the need for continued management of the
Claimant’s chronic pain syndrome which included physical therapy, as well as
medications. Dr. James Jackson also wrote in his reports that the Claimant would need an
ongoing protocol indefinitely of anti-depressant medication, as well as an evaluation by a
psychiatrist and skilled focus counseling.

Therefore, I find that the medical treatment recommended by Dr. P. Brent Koprivica,
Dr. James Jackson and Dr. Lan Knoff to be persuasive. Accordingly, I find that Claimant is
entitled to future medical care that will cure or relieve the effect of his April 6, 2013 injury to his
low back. In addition, I find the Claimant is entitled to future psychological care as outlined by
Dr. James Jackson to include, but not be limited to, psychological treatment including anti­
depressant medications and psychological/psychiatric counseling processes. Pursuant to the
statute, Employer retains the right to direct care and choose the treating physicians for these
purposes.

The next issue to be determined is what is Claimant’s average weekly wage and
corresponding compensation rates. When reviewing Claimant’s 2013 tax return, I find the
Claimant’s total wages and income received from the Employer, Walgreens, is evidenced by the
attached W-2 to equal $57,454.88. Further, given that the Claimant was terminated on December
12, 2013, I find that the Claimant worked 51 and 4/7 weeks in the year 2013. When dividing the
compensation of $57,454.88, as evidenced by the tax return, by 51 and 4/7 weeks, I find it yields
an average gross weekly wage of $1,114.11 and a corresponding compensation rate of $742.74.
Therefore, based on these calculations, the compensation rate for temporary total disability
benefits, as well as permanent total disability benefits is $742.74 and his compensation for
permanent partial disability benefits would be $433.58.
The next issue to be determined is whether Claimant is entitled to payment of temporary total disability benefits. Employer is responsible in the statute for payment of temporary total disability benefits pursuant to Mo. Rev. Stat. § 287.170 (2005) during the continuance of such disability at the appropriate week of compensation. The statute also defines “total disability” under Mo. Rev. Stat. § 287.020.6 (2005) has the “inability to return to any employment and not merely . . . (the) inability to return to employment in which the employee was engaged at the time of the accident.” Claimant bears the burden of proof on this element of his claim just as on any other element.

Employee continued to work from the date of his accident until he left his employment on December 12, 2013. Although Claimant testified he was off for one or two weeks after his April 6, 2013 injury, there is no doctor’s note in the records stating he was to be off work. Further there is no testimony from any of the Claimant’s experts stating he was unable to work after this accident. Therefore this Court finds Claimant has failed to carry his burden of proof that he was temporarily totally disabled for any time period after his injury of April 6, 2013 and his termination on December 12, 2013. This Court awards no temporary total disability benefits herein.

The next issue to be determined herein is whether Claimant suffered any permanent disability due to his injury sustained on April 6, 2013. Dr. P. Brent Koprivica opined that the Claimant’s work injury on April 6, 2013, is felt to represent the direct, proximate and prevailing factor in Claimant’s injury to the lumbar region, and that Claimant suffered a chronic lumbosacral strain/sprain injury that included an annular injury as a component of that injury. Based upon the objective physical impairment with regard to Claimant’s lumbar injury of April 6, 2013, Dr. P. Brent Koprivica assigned 15% permanent partial disability to the body as a whole. Dr. James Jackson opined that Claimant’s overall psychological disability rating of 10% body as a whole due to his April 6, 2013 injury. Dr. Alexander Bailey assigned a rating to Claimant of 0% permanent partial disability to the body as a whole as it relates to his employment at Walgreens. After reviewing the medical reports and Claimant’s testimony, this Court finds that the medical care to Claimant’s back was minimal. No surgery was recommended or performed. It is clear his depression and other psychological injuries partially flow from his back injury. However he was able to work full time until he was dismissed on December 12, 2013 for non-injury related reasons. Therefore, this Court finds that Claimant suffered a 7.5% permanent partial disability to the body as a whole due to the injuries to his lower back. In addition, this Court finds that Claimant suffers a 5% permanent partial disability to the body as a whole due to the psychological impact of this back injury all due to his April 6, 2013 injury. This equates to a 12.5% permanent partial disability to the body as a whole.

The final issue to be determined in this matter is whether the Second Injury Fund is liable to the Employee for any disability compensation. In order to establish Second Injury Fund liability for permanent partial disability benefits, the Employee must prove:

(1) That he has sustained a permanent disability resulting from a compensable work-related injury. See Section 287.210.1 RSMo (1964). This Court notes and determines that Employee has a compensable work-related injury resulting in a 12.5% permanent partial disability to the body as a whole referable to the low back and psyche.

(2) That the Employee has permanent disability predating the compensable work-related injury which is of such seriousness as to constitute a hindrance or obstacle to employment
or to obtain reemployment if the Employee becomes unemployed. § 287.220.1 RSMo (1994); Messex v. Sachs Electric Co., 989 S.W.2d (Mo. App. 1997); Gariby v. Treasurer, 964 S.W.2d 474 (Mo. App., 1998); Rose v. Treasurer, 899 S.W.2d 563 (Mo. App.1995); Leutzinger v. Treasurer, 837 S.W.2d 615 (Mo. App. 1995).

(3) That the combined effects of the disability resulting from the work-related injury and the disability that is attributable to any condition existing at the time that the last injury was sustained results in an enhanced permanent partial disability greater than the sum of the individual parts. Boring v. Treasurer, 947 S.W.2d 483 (Mo. App. 1997); Reiner v. Treasurer, 837 S.W.2d 363 (Mo. App. 1992); Frazier v. Treasurer, 879 S.W.2d 152 (Mo. App. 1994).

As discussed above, prior to April 6, 2013, Claimant had an extensive history of injuries and disabilities.

In addition to Claimant’s testimony regarding these various disabilities and the medical records which corroborate Claimant’s testimony, Claimant presented the expert medical opinions of Dr. P. Brent Koprivica and Dr. James Jackson. Based on the testimony of Dr. P. Brent Koprivica and Dr. James Jackson, as well as the medical records offered at the hearing, I find that Claimant had permanent physical disabilities to his left ankle/Achilles and left shoulder prior to the compensable work-related injuries that he sustained on April 6, 2013. First, with regards to pre-existing permanent partial disability that existed prior to April 6, 2013, I accept Dr. P. Brent Koprivica’s assignment of permanent partial disability. Accordingly, I find that the Claimant suffered 25% permanent partial disability of the left lower extremity at the 155-week level prior to April 6, 2013. I also find that Claimant suffered 25% permanent partial disability of the left upper extremity at the level of the shoulder at the 232-week level prior to April 6, 2013. I further find that Claimant’s pre-existing physical disabilities were of such seriousness as to constitute an obstacle or hindrance to his employment or reemployment as required by Missouri law. In making these findings, I specifically find the testimony of Dr. P. Brent Koprivica and Dr. James Jackson credible and persuasive.

Finally, I find that Employee has clearly established that the combined effects of the disability resulting from the work-related injury and the disability that is attributable to any condition existing at the time that the last injury was sustained results in an enhanced permanent partial disability greater than the sum of the individual parts. To support this finding, I rely on the credible competent testimony of Dr. P. Brent Koprivica who opined, “[t]he synergistic effect of combining the previous disabilities with the current disabilities creates a disability greater than the simple arithmetic sum of these disabilities and I would render a 10% enhancement factor.”

Wherefore, this Court finds that the Second Injury Fund owes permanent partial disability to the Claimant for a combination of his primary injury and his pre-existing disabilities. Claimant’s primary injury resulted in a disability of 12.5% to the body as a whole or 50 weeks of disability. Claimant’s prior disabilities resulted in 25% permanent partial disability of the left upper extremity at the level of the shoulder (232-week level) equating to 58 weeks; and 25% permanent partial disability of the left lower extremity above the ankle (155-week level) equating to 38.75 weeks. The total combined weeks of compensation for these disabilities equates to 146.75 weeks. Using a 10% load factor, the Second Injury Fund is liable to Claimant for 14.675 weeks of compensation at a compensation rate of $433.58 per week, totaling $6,362.79.
Compensation is awarded and subject to a lien in the amount of 25% of all payments in favor of William C. Spooner, Spooner & Perkins, P.C. for necessary legal services.

I certify that on June 12, 2018, I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

Made by: 

Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation