

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

Injury No.: 07-109992

Employee: David Davy
Employer: Welded Construction (Settled)
Insurer: Hartford Fire Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence and considered the whole record. We find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge.

The administrative law judge heard this claim with the claim in Injury No. 07-132271. Employee filed an Application for Review identifying Injury Nos. 07-109992 and No. 07-132271. Although employee included this injury number on his Application for Review, we find no allegations of error related to this claim (Injury No. 07-109992). We have read the briefs, reviewed the evidence, and considered the whole record. We find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge.

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

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

The August 17, 2012, award and decision of Chief Administrative Law Judge Robert J. Dierkes, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17th day of April 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

¹ Statutory references are to the Revised Statutes of Missouri 2007, unless otherwise indicated.

AWARD

Employee: David Davy

Injury No. 07-109992

Dependents:

Employer: Welded Construction (settled)

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Hartford Fire Insurance Company (settled)

Hearing Date: May 29, 2012

Checked by: RJD/ga

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: October 29, 2007
5. State location where accident occurred or occupational disease was contracted: Audrain 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 was driving a truck in the course of his employment and ran off the road into a ditch.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back, lumbar spine.
14. Nature and extent of any permanent disability: 12.5% permanent partial disability of the body as a whole.
15. Compensation paid to-date for temporary disability: Unknown.
16. Value necessary medical aid paid to date by employer/insurer? Unknown.
17. Value necessary medical aid not furnished by employer/insurer? Unknown.

Employee: David Davy

Injury No. 07-109992

18. Employee's average weekly wages: sufficient for maximum compensation rates
19. Weekly compensation rate: \$742.72 for temporary total disability and permanent total disability; \$389.04 for permanent partial disability.
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Second Injury Fund liability:

29 weeks of permanent partial disability benefits	\$11,282.16
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Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Jonathan McQuilkin

Employee: David Davy

Injury No. 07-109992

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Davy

Injury No: 07-109992

Employer: Welded Construction (settled)

Insurer: Hartford Fire Insurance Company (settled)

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Add'l Party: Second Injury Fund

Checked by: RJD/ga

ISSUES DECIDED

These cases (Injury No. 07-109992 and Injury No. 07-132271) were consolidated for hearing. The evidentiary hearing was held on May 29, 2012 in Columbia. The hearing was held to determine the liability of the Second Injury Fund, if any, for permanent partial disability benefits or permanent total disability benefits in each case. The employee is seeking permanent total disability benefits from the Second Injury Fund. The claim against Welded Construction ("Employer") in each case was settled by stipulation on February 15, 2012.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over each case;
2. That venue for the evidentiary hearing in each case is proper in Audrain County and adjoining counties, including Boone County;
3. That the claim for compensation in each was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Claimant's average weekly wage was sufficient for the maximum compensation rates, and thus the compensation rate for temporary total disability benefits and permanent total disability benefits in each case is \$742.72, and the compensation rate for permanent partial disability benefits in each case is \$389.04;

Employee: David Davy

Injury No. 07-109992

6. That Claimant, David Davy, sustained an accident arising out of and in the course of his employment with Welded Construction on October 29, 2007; and
7. That Claimant, David Davy, sustained an accident arising out of and in the course of his employment with Welded Construction on November 3, 2007.

EVIDENCE

The evidence consisted of the testimony of Claimant, David Davy; medical records; the deposition testimony and medical report of Dr. P. Brent Koprivica; the deposition testimony and medical report of Dr. A. E. Daniel; and the deposition testimony and narrative report of James M. England, Jr., a vocational rehabilitation counselor.

DISCUSSION

Claimant, David Davy, was born on August 17, 1963. Claimant dropped out of school in the ninth grade. According to Claimant's testimony, he did receive a GED while in the military. Claimant testified that he entered the military at age 17, and received a less than honorable discharge in July 1982.

Claimant has apparently had psychiatric problems throughout his life, starting in childhood. Claimant was apparently physically and emotionally abused by his parents, and was apparently sexually abused by an older female cousin. Claimant has a history of multiple suicide attempts. Claimant has a long history of drug and alcohol abuse starting in his early teens. Claimant reports having auditory hallucinations since age 14, which have continued off and on throughout his life. Claimant has been treated for Major Depression with Psychotic Features throughout his life, including inpatient hospital stays.

Claimant began working for Welded Construction ("Employer") on May 29, 2007 and sustained the two work injuries with Employer on 10-29-07 and 11-3-07. There is no question that Claimant's psychiatric condition affected Claimant vocationally prior to May 2007, and thus I believe it is important to have an accurate vocational picture of Claimant prior to May 2007. In this regard, Claimant testified at the hearing as follows:

Q: Has it (psychological condition) ever prevented you from working in the past?

A: Yes, sir.

Q: Have you ever sought Social Security Disability as a result of your psychological issues before this?

A: Yes, sir I have.

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Q: And you were actually approved and were on Social Security Disability?

A: Yes, sir.

Q: And you have been kind of off and on Social Security Disability throughout your adult life?

A: Yes, sir.

Q: Alright. About how many times?

A: Uh, every time I started to work, like four times, four different times. And then I'd go back on Social Security.

Q: Can you tell me when you first went on disability?

A: I think when I was 30 years old.

Q: And how old are you now, I should be able to do the math; how old are you?

A: Forty-eight.

Q: OK. And so then most recently before your employment with Welded, had you been on Social Security before that?

A: Yeah, yes sir.

Q: OK. And you actually had to go off of disability to do this work for Welded Construction?

A: Yes, sir.

Q: And what was it, your situation, or what was it that led you to do this return to work?

A: Encouragement from my brother, and trying to get me into the union, trying to make a better life for myself and for my family.

Q: Uh, and so it seems then kind of throughout your adult life you had kind of the experience where you would go and work with the truck driving, and work with the union, and then have an increase in your symptoms and you'd go on Social Security Disability?

A: Yes, sir.

Q: OK, and then you might then have, your symptoms would improve, and you would get out and attempt to work again?

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A: Yes, sir.

Q: And are we talking, in regards to the prior work, before Welded, is that something where you'd be off for several months you'd be off disability or several years you'd be out working?

A: It'd be about a year or so, usually. And then I'd be back on disability, several years before I'd get back to work again.

Claimant was born in August 1963; if he first went on Social Security Disability at age 30, that would have been in 1993 or 1994. On September 25, 2003, Claimant's psychiatrist in Michigan, Dr. Gary Ralph, noted: "(h)e has now been approved for disabilities benefits apparently." Claimant told Dr. Koprivica that he was on Social Security Disability following a 1994 work-related injury to the right shoulder injury. Therefore, the way I understand Claimant's quoted testimony, from 1993 (or 1994) through 2007, Claimant would have been "on and off" Social Security Disability three or four times; he would be on disability for a few years, work for about a year, go back on disability for a few years, work for about a year, etc.

At the request of his attorney, Claimant saw Dr. P. Brent Koprivica for a medical evaluation on September 24, 2009. Dr. Koprivica authored a report of the same date, which is in evidence. That report contains an "Educational and Vocational History" which reads as follows:

Mr. Davy completed the ninth grade of formal education. He has a GED.

He told me that he attended Central Michigan Community College from the fall semester of 1998 through the fall semester of 1999. Overall, he believes he has twelve hours of college study. He does not have a degree.

Mr. Davy was trained as a mechanic in the United States Army. He served from September 3, 1980, through July 3, 1983. He denies having any military disabilities.

He worked at Kraft's Construction as a parts runner from August 1, 1979, to August 31, 1980, prior to going into the Army.

After his military service, he began working as a construction laborer out of Laborer's Union Local #1098 in Saginaw, Michigan. He did this work from August of 1983 through May 30, 1988. He denies having any permanent injuries, while working as a construction laborer.

He then worked at a Cummins International Dealership as a diesel mechanic. He worked there from September 1, 1988, through June 30, 1989, without permanent injuries.

Mr. Davy next worked at S&D Tree Farm. He was actually self-employed owning the tree farm. He produced Christmas trees.

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He did that from July 1, 1989, through April 1, 1993, without permanent work-related injuries.

He then worked at Packaging Resources. He was employed there from May 1, 1993, to August 15, 1995. He was a grinder. This was a plastic manufacturer.

He had a work injury in 1994.

My understanding is that he had an 800-pound dust bag fall and injured his right shoulder.

He was treated with subacromial steroid injections. This treatment was by Dr. Montez.

He did not have any surgery.

He received a \$27,000.00 settlement.

He then went to work at Tony's Heating and Cooling, which was owned by his brother. He worked there from September 1, 1995, through October 1, 2002. He was an installer during this employment. He had no permanent work injuries during this employment.

Mr. Davy then worked at MCT Trucking from December 2002 to 2005 without any permanent work-related injuries.

He had a motor vehicle accident in 2002 when he was driving a half-ton pickup. An ongoing vehicle struck a deer that resulted in contact with Mr. Davy's vehicle on the driver's side.

He began at Welded Construction in May of 2007.

Associated with the initial work injury accident of October 29, 2007, Mr. Davy had no lost time.

He was temporarily totally disabled from November 3, 2007, through November 7, 2007.

I would point out that Mr. Davy was previously on Social Security disability. This followed the 1994 work injury.

He has worked subsequent to the primary work injury claims. My understanding is that he worked at Precision Pipeline Motor Company in New York as a mechanic. He worked there from April of 2008 to August 16, 2008.

He was having to take Vicodin during this time period in order to sustain employment.

He was then laid off.

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Subsequent to being laid off, he went back on Social Security disability, which he received previously.

In addition to his 1994 shoulder injury, Claimant also had neck and back problems prior to 2007. On November 4, 2002, Claimant was seen at Michigan Spine and Pain Clinic for "pain in lower back into left leg". Claimant attributed the onset to a work injury in California on September 27, 2002. Claimant also stated on the intake form: "Had similar injury about 5-6 years ago." On November 25, 2002, Claimant was complaining of neck and back pain, with tingling and numbness in his left leg with pain of "8/10". On December 6, 2002, Claimant complained of increased neck and back pain with tingling and numbness of left lower extremity. His pain was "9/10". Claimant was seen by Michigan Spine and Pain Clinic on 1/21/03, 2/19/03, 2/27/03, 3/10/03, 4/7/03, 5/5/03, 5/12/03, 5/27/03, and 8/4/03, all with complaints of neck, back and left lower extremity pain. On July 3, 2006, Claimant was again seen by Michigan Spine and Pain Clinic. Claimant stated he had moved to Arizona and was being treated for his neck, back and left lower extremity pain in Arizona. Claimant reported he had received a series of three epidural steroid injections in both his neck and back within the previous six months.

On August 9, 2006, Claimant was seen at Community Mental Health for Central Michigan. It was noted that Claimant had recently moved back to Michigan from Arizona and was on Social Security Disability. On that date, he denied any illegal drug use. On November 8, 2006, Claimant tested positive for cocaine. On a December 13, 2006 visit to Community Mental Health for Central Michigan, it was noted that Claimant had recently tested positive for cocaine, Opioids and marijuana.

In May 2007, Claimant moved to central Missouri to work for Welded Construction. As stipulated, Claimant sustained two work injuries while working with Welded Construction, both occurring in Audrain County, Missouri, and both being motor vehicle accidents. Claimant complained of neck and back pain after these accidents. He was diagnosed with a L5-S1 disk herniation and received an epidural steroid injection. On April 18, 2008, Claimant was seen by Dr. Joel T. Jeffries, an orthopedic surgeon. Claimant advised Dr. Jeffries that he was scheduled to go to New York and return to work. Dr. Jeffries' note reads: "I think it is reasonable that the patient return to work without restriction. I have cautioned him not to needless (sic) expose himself to trauma with regard to the cervical spine."

Claimant testified that he did begin work in New York in May 2008 (according to Dr. Koprivica's history, Claimant began work in New York in April 2008; if Dr. Koprivica's history is correct, it would have been *after* the April 18, 2008 appointment with Dr. Jeffries), performing service and maintenance on trucks and heavy equipment. Claimant testified that he was paid \$42.00 per hour and worked up to 100 hours per week. Claimant testified that his neck and back hurt and he sought medical treatment while working in New York. Claimant testified that his last date of work in New York was August 16, 2008; he testified that he "quit" because he "just couldn't work anymore." (Per Dr. Koprivica's history, Claimant was "laid off".) Claimant is now back on Social Security Disability.

Claimant alleges that he is permanently and totally disabled, and is seeking permanent total disability benefits from the Second Injury Fund.

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Under section 287.020.7, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is whether a claimant is able to competently compete in the open labor market given his or her condition and situation. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 210 (Mo.App. E.D.1999). When the claimant is disabled by a combination of the work-related event and pre-existing disabilities the responsibility for benefits lies with the Second Injury Fund. Section 287.220.1 RSMo. If the last injury in and of itself renders a claimant permanently and totally disabled the Second Injury Fund has no liability and the employer is responsible for the entire compensation. *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

As noted above, Dr. P. Brent Koprivica evaluated Claimant on September 24, 2009, authored a report of the same date, and testified by deposition taken November 10, 2011. In analyzing these cases, Dr. Koprivica treated the 10-29-07 and 11-3-07 motor vehicle accidents as a single accident and injury. Dr. Koprivica opined that Claimant sustained a permanent partial disability of 25% of the body as a whole (15% low back and 10% neck). Dr. Koprivica opined that Claimant had preexisting disability of 15% of the body as a whole attributable to the low back and an additional 15% of the body as a whole attributable to the neck. (Dr. Koprivica did not discuss any disability attributable to Claimant's 1994 right shoulder injury.) Dr. Koprivica further opined that Claimant had preexisting disability due to psychiatric problems, which he did not rate. Dr. Koprivica opined that Claimant was permanently and totally disabled as a result of the 10-29-07 and 11-3-07 motor vehicle accidents in combination with the preexisting back, neck and psychiatric disabilities. Dr. Koprivica deferred to a psychiatrist on the issue of Claimant's psychiatric disability, and he also felt that Claimant needed to be evaluated by a vocational expert on the issue of permanent total disability. Regarding Claimant's work in New York in 2008, Dr. Koprivica's report states:

He has worked subsequent to the primary work injury claims. My understanding is that he worked at Precision Pipeline Motor Company in New York as a mechanic. He worked there from April of 2008 to August 16, 2008. He was having to take Vicodin during this time period in order to sustain employment. He was then laid off.

Dr. A. E. Daniel, a Columbia psychiatrist, evaluated Claimant in January and February of 2011 at the request of Claimant's attorney. Dr. Daniel's report of March 8, 2011 was in evidence, as was his deposition testimony taken on October 7, 2011. Dr. Daniel testified that Claimant had significant psychiatric disability prior to the work accidents of 10-29-07 and 11-3-07, which he estimated to be 45% permanent partial disability of the body as a whole. Dr. Daniel opined that Claimant was permanently and totally disabled as a result of the 10-29-07 and 11-3-07 motor vehicle accidents in combination with the preexisting psychiatric disability. I note Dr. Daniel's only mention of Claimant's work in New York in 2008 is as follows:

He started physical therapy, began feeling better, and subsequently saw Joel Jeffries, M.D., an orthopedist who allowed him to return to work in New York for his brother,

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which lasted approximately three months. As he was taking Vicodin, he could not drive; therefore he left the job.

At the request of his attorney, Claimant was evaluated by James M. England, Jr., a licensed rehabilitation counselor, on February 18, 2010. England's report of February 24, 2010 was in evidence, as was his deposition testimony taken on November 30, 2011. England opined that Claimant was permanently and totally disabled as a result of the 10-29-07 and 11-3-07 motor vehicle accidents in combination with his preexisting disabilities. I note that, in Mr. England's eighteen-page, single-spaced report, the only mentions of Claimant's work in New York in 2008 are as follows: "He returned to work in April 2008 and continued doing this until his pain level became such that he had to stop work in August of 2008. ... He did keep track of the inventory of his supplies when he tried to return to work with a pipeline as a mechanic from around April through August of 2008."

During Mr. England's direct examination, there was no testimony elicited regarding Claimant's work in New York in 2008. On cross-examination, Mr. England testified as follows:

Q. You had the opportunity to review Dr. Koprivica's report in preparing your own report, correct?

A. Yes.

Q. In Dr. Koprivica's report he notes that Mr. Davy was subsequently employed after his work injury in New York, correct?

A. Right. He did try to work for a few months, that's correct.

Q. Do you know what kind of work he was performing?

A. I think the records indicated that -- well, no, it really doesn't say. Hold on just a second and let me just see if I have anything in the rest of my records that show. It looks like --I'm trying to read my own notes.

It looks like he tried to work on some equipment and trucks that were used on pipelines or on a pipeline in New York and said that he had to stop because of the pain level. He had also tried driving a truck briefly and he said he had to stop that because he couldn't handle the pain from doing the clutch.

Q. Do you know how long he was employed as a truck driver after his work injuries?

A. I've just got May of '08 and that he tried the other job around August of '08 with the pipeline, but that's as detailed as he was able to give me.

Q. Referring to Dr. Koprivica's report, he notes that Mr. Davy was laid off from the position with the pipeline company. Did Mr. Davy make that indication to you, or did he tell you he was unable to perform that job?

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A. He told me that he had to stop because of the pain level.

Q. Did you ask any questions regarding whether he had been laid off at the pipeline company?

A. No, that's what I said. When I asked him what he had done and he said that he was doing it and that -- the notes I've got just said he had to stop because of pain.

Q. What level of difficult exertion was required in this position as a mechanic at the pipeline company in New York?

A. I really don't know specifically. I would say generally in that kind of work you're probably looking at medium to heavy work activity.

Q. Do you know what kind of physical motions or movements he would have made on a daily basis on that job?

A. Not really. Obviously if it was similar to what he did with Weldon Construction Company, which there he was doing mechanical work for another pipeline company that involved, you know, a pretty wide variety of bending, kneeling, squatting, climbing, all kinds of activities like that.

Q. Do you know again when he was employed with the pipeline company in New York, do you know what the heaviest amount of weight he was required to lift on a daily basis?

A. No.

Q. Again when he was working for the pipeline company, do you know if he had to miss any time because of any physical or mental symptoms?

A. I don't know specifically. I just know that he said that he had to stop after a short period.

I understand that Claimant has had an extremely difficult life. I understand that he has some significant psychiatric problems. However, I am compelled to find that Claimant is not permanently and totally disabled. On April 18, 2008, Dr. Jeffries, Claimant's treating doctor, allowed Claimant to return to work without restrictions. Claimant went to work in New York as a maintenance mechanic on trucks and heavy equipment. This would have been a very physically demanding job at 35-40 hours a week; Claimant was working up to 100 hours per week for (at least) 3 ½ months. Claimant was paid \$42.00 per hour with time and a half for everything over 40 hours a week. This was no entry-level job; this was an excellent-paying, highly-coveted job. Claimant secured that job, and he did the work for at least three and a half months at up to 100 hours per week. There is no indication that Claimant was fired from this job. Claimant insists that he voluntarily quit because he hurt too much to continue to do the work; Claimant testified that Dr. Koprivica's assertion that he was "laid off" was incorrect, and

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that he could have continued to work until the project ended in early 2009. The fact that Claimant was NOT fired from the job, and that he could have continued to work until the project ended means that Claimant's employer was satisfied with the work he was doing. In other words, Claimant was able to compete for, and secure, an excellent-paying, highly-coveted job, and was able to perform the work to his employer's satisfaction. If this is not *prima facie* evidence of Claimant's to compete in the open labor market, what is? And, if indeed, Claimant is being truthful about why he left the New York employment, how does physical inability to sustain heavy employment for up to 100 hours a week translate into physical inability to sustain *any* employment for 40 hours per week?

In finding that Claimant is not permanently and totally disabled, I note that Dr. Daniel is a psychiatrist and not a vocational rehabilitation expert. Dr. Daniel's opinion that Claimant is permanently and totally disabled is instructive, but nevertheless is totally outside of Dr. Daniel's area of expertise. The same can be said for Dr. Koprivica; he is an expert on medical issues, but not on vocational issues. I also note that Dr. Daniel obviously knew next to nothing about Claimant's work in New York, and that Dr. Koprivica did not know much more. They did not know that Claimant was making \$42.00 per hour with time and a half for everything over 40 hours a week. They did not know that Claimant was working up to 100 hours a week.

Mr. England is an excellent expert on vocational issues, whose opinion is usually of significant value to the administrative law judge. However, his lack of curiosity regarding the nature of Claimant's 2008 work in New York is disappointing. Mr. England's ultimate conclusions in this case were made without the benefit of all the material facts, and thus have no real probative value. I find it extremely difficult to believe that Mr. England would have dismissed Claimant's work in New York as merely "a failed attempt at return to work" had he been made aware that Claimant was working in a job that paid \$42.00 per hour with time and a half after 40 hours, and had worked at that job to his employer's satisfaction for up to 100 hours per week for more than 3 ½ months.

In determining whether Claimant's 2008 work in New York was, in fact, definitive proof of Claimant's ability to compete in the open market for employment or was a failed attempt at return to work, I believe Claimant's work in 2007 and 2008 must be examined in light of Claimant's clearly-established pattern of "disability/work/disability/work/disability." Claimant began working for Welded Construction in Missouri on May 29, 2007; he worked 80-100 hour weeks continuously until at least November 3, 2007. Welded Construction and its insurer paid Claimant temporary total disability benefits until Claimant began working in New York in late April or early May of 2008.¹ Claimant then worked up to 100 hours per week in New York until August 16, 2008, and then went back on Social Security Disability. This fits in precisely with Claimant's previously-established pattern of "working for about a year and then going on Social Security disability for a few years". Even if Claimant is being truthful about why he left his job in New York, how is that any different than his separation from his previous employments? The

¹ The settlement stipulation between Claimant and Welded Construction states that Claimant was paid 23 weeks of temporary total disability benefits. Assuming that Claimant did not work for Welded at all after November 3, 2007, this would have paid Claimant through April 19, 2008. There is no evidence that Claimant was receiving Social Security Disability benefits at anytime between November 3, 2007 and the start of his employment in New York.

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pattern has stayed the same. There is little doubt in my mind that Claimant will soon be making his next sojourn into employment (if he has not already done so).

Therefore, Claimant's claim for permanent total disability benefits against the Second Injury Fund must be denied.

I must also consider the possibility that Claimant may be entitled to permanent *partial* disability benefits from the Second Injury Fund. Dr. Daniel clearly did not analyze this case as a potential case of permanent partial disability. I believe Dr. Koprivica's analysis could be considered as a basis for an award of permanent partial disability benefits against the Second Injury Fund. Claimant settled Injury No. 07-109992 with Employer for 12.5% permanent partial disability of the body as a whole/low back (which meets the statutory threshold for a potential award). Claimant settled Injury No. 07-132271 for \$1000.00 and Employer's agreement to waive any subrogation right against Claimant's third-party liability claim arising out of the November 3, 2007 automobile accident; this simply does not meet the statutory threshold requirements for a potential award of permanent partial disability benefits.

I believe Claimant is entitled to permanent partial disability benefits in Injury No. 07-109992. I find that Claimant sustained a compensable last injury on October 29, 2007, which resulted in permanent partial disability of 12.5% of the body as a whole, rated at the low back, and that such disability constituted a hindrance or obstacle to Claimant's employment or reemployment. I find that as of the time the last injury was sustained, Claimant had a preexisting permanent partial disability of the body as a whole, rated at the low back, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 15% of the body as a whole (60 weeks). I also find that as of the time the last injury was sustained, Claimant had a preexisting permanent partial disability of the body as a whole, due to mental and psychiatric illness, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 35% of the body as a whole (140 weeks). I also find that as of the time the last injury was sustained, Claimant had a preexisting permanent partial disability of the body as a whole, rated at the neck, being an additional 10% of the body as a whole (40 weeks). The evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. I find that a loading factor of 10% is appropriate to compensation, Claimant for the greater overall disability. The Second Injury Fund liability is thus calculated as follows: 50 weeks for the last injury + 240 weeks for preexisting disability = 290 weeks X 10% load = 29 weeks. 29 weeks times \$389.04 equals \$11,282.16.

FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties stipulated, I find the following:

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1. The October 29, 2007 accident caused injury to Claimant's low back and resulted in a permanent partial disability of 12.5% of the body as a whole;
- 2.
3. The November 3, 2007 accident caused injury to Claimant's neck and caused minimal permanent partial disability, significantly less than 12.5% of the body as a whole;
4. Claimant returned to work for another employer in the state of New York in late April or early May of 2008 as a truck and heavy equipment maintenance mechanic;
5. Claimant was paid \$42.00 per hour for his work in New York with time and a half for all work over 40 hours per week;
6. Claimant worked as much as 100 hours per week in his 2008 employment in New York;
7. Claimant's 2008 work in New York was heavy demand work;
8. Claimant's last day of work in New York was August 16, 2008;
9. Dr. A. E. Daniel and Dr. P. Brent Koprivica are not experts in the field of vocational rehabilitation;
10. Mr. James M. England, Jr. ("England") is an expert in the field of vocational rehabilitation;
11. England's opinions that Claimant is unable to compete in the open market for employment and that Claimant is permanently and totally disabled are not credible, because England was not aware of certain material facts concerning Claimant's 2008 employment in New York; England was unaware that Claimant was paid \$42.00 per hour for his work in New York with time and a half for all work over 40 hours per week, and England was unaware that Claimant worked as much as 100 hours per week while in New York;
12. Claimant's ability to secure and maintain his employment in New York for 3½ months is evidence of Claimant's ability to compete in the open market for employment;
13. Claimant is able to compete in the open market for employment;
14. Claimant is not permanently and totally disabled;
15. The injury and disability to Claimant's low back, caused by the October 29, 2007 accident constituted a hindrance or obstacle to Claimant's employment or reemployment;
16. At the time the October 29, 2007 injury was sustained, Claimant had a preexisting permanent partial disability of the body as a whole, rated at the low back, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 15% of the body as a whole (60 weeks);
17. At the time the October 29, 2007 injury was sustained, Claimant also had a preexisting permanent partial disability of the body as a whole, due to mental and psychiatric illness, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 35% of the body as a whole (140 weeks);

Employee: David Davy

Injury No. 07-109992

18. At the time the October 29, 2007 injury was sustained, Claimant also had a preexisting permanent partial disability of the body as a whole, rated at the neck, being an additional 10% of the body as a whole (40 weeks);
19. The evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities; I further find that a loading factor of 10% is appropriate to compensate Claimant for the greater overall disability;
20. In Injury No. 07-109992 only, the Second Injury Fund liability for permanent partial disability benefits is thus calculated as follows: 50 weeks for the last injury + 240 weeks for preexisting disability = 290 weeks X 10% load = 29 weeks; 29 weeks times \$389.04 equals \$11,282.16; and
21. In Injury No. 07-109992 only, Claimant's attorney, Jonathan McQuilkin, is entitled to attorney's fees for necessary legal services rendered to Claimant in this matter.

ORDER

In Injury No. 07-109992, the Treasurer of the State of Missouri, as custodian of the Second Injury Fund, is ordered to pay Claimant \$11,282.16 for permanent partial disability benefits. Claimant's attorney, Jonathan McQuilkin, is allowed 25% of the benefits awarded herein, as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits. Any past due compensation shall bear interest as provided by law.

In Injury No. 07-132271, Claimant's Claim for Compensation against the Second Injury Fund is denied in full.

Made by:

ROBERT J. DIERKES
Chief Administrative Law Judge
Division of Workers' Compensation

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 07-132271

Employee: David Davy
Employer: Welded Construction (Settled)
Insurer: Hartford Fire Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision reversing the August 17, 2012, award and decision of the administrative law judge. Nonetheless, we adopt the findings and conclusions of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and award herein.

Preliminaries

Employee sustained two work-related motor vehicle accidents within 5 days. Employee and employer entered into settlements to resolve employee's workers' compensation claims against employer regarding the two accidents. Employee proceeded to trial of his claims against the Second Injury Fund.

The administrative law judge heard this claim with Injury No. 07-109992. The administrative law judge issued an award of compensation against the Second Injury Fund in Injury No. 07-109992. The administrative law judge denied all compensation in this matter (Injury No. 07-132271). Employee appealed alleging the administrative law judge erred by not finding him permanently and totally disabled.

Findings

Treatment Summary

We find it unnecessary to recite the details of employee's medical treatment over the years, however, we will describe highlights of the treatment employee received in the months after his work accidents to complete our narrative.

Employee's first motor vehicle accident was on October 29, 2007. On that date, employee reported to MediQuick complaining of low back pain radiating into his left leg. Dr. Turnbaugh first saw employee on November 1, 2007, and diagnosed acute on chronic left low back pain with radiation into left leg. Dr. Turnbaugh ordered an MRI and prescribed pain medication. Before the MRI was performed, employee was involved in the second motor vehicle accident on November 3, 2007. Employee never returned to work for employer after the November 3, 2007, accident.

¹ Statutory references are to the Revised Statutes of Missouri 2007, unless otherwise indicated.

Employee: David Davy

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After the second accident, employee was treated a short while longer by Dr. Turnbaugh who referred employee for an epidural steroid injection. Employee reported the injection provided no relief. Dr. Turnbaugh recommended to employer's workers' compensation case manager that employee be referred to a back specialist, orthopedic surgeon Dr. Joel T. Jeffries.

In December 2007 and February 2008, Dr. Abraham Bachu of Great Lakes Spine, Sports, and Pain (located in Michigan) treated employee for complaints of low back pain.

Dr. Jeffries first saw employee on February 21, 2008, at which time he prescribed pain medication and an epidural steroid injection. Dr. Jeffries also prescribed physical therapy and recommended that employee remain off work. Dr. Jeffries saw employee again on March 17, 2008. Employee reported some relief from the injection. Dr. Jeffries continued employee off work and prescribed another steroid injection.

Due to employee's complaints of neck pain, employee's primary care physician ordered an MRI of employee's cervical spine. The MRI was performed on March 28, 2008, and revealed bulging discs at all levels (greatest at C4-5 and C5-6) and an annular tear at C6-7.

Employee returned to see Dr. Jeffries on April 18, 2008 and requested a work release from Dr. Jeffries so employee could accept a job with Precisions Pipeline Motor Company (Precisions Pipeline) as a mechanic. Employee's brother was the master mechanic for a Precisions Pipeline project that was expected to complete in early 2009. There is no evidence that employee interviewed for the job. It seems employee's brother just offered the employee the job.

Dr. Jeffries provided the release stating, "I think it is reasonable that the patient return to work without restriction. I have cautioned him not to needless[ly] expose himself to trauma with regard to his cervical spine." Dr. Jeffries prescribed narcotic pain medication to cover the next month and warned employee that if he needed ongoing pain medication, he should find a health care provider in New York.

Employee began working for Precisions Pipeline in May 2008. On June 30, 2008, after working less than two months for Precisions Pipeline, employee reported to Catskill Regional Medical Center (Catskill RMC) complaining of neck pain with radiculopathy. The Catskill RMC records contain the following entry: "David Davy is a 44 year-old Male who reports severe non radiating pain in the lower back, beginning November 2007 when he had MVA in Missouri and he is awaiting surgery, but today its...very bad." Employee reported a pain level of ten on a ten-point scale. Emergency room physician Dr. Gina Puglisi gave employee a shot of Demerol and scheduled an appointment for the following day so Dr. Waxman could examine/evaluate employee.

Dr. Waxman recorded that employee complained of pain in his neck radiating to his arms and pain in his lower back radiating to his legs. Dr. Waxman prescribed naprosyn and oxycodone.

Employee: David Davy

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By August 16, 2008, the duties of the job were simply too painful for employee to tolerate without the relief afforded by narcotic pain relievers. Unfortunately, employee could not continue in the position if he used narcotics because federal Department of Transportation regulations prohibit individuals from driving commercial vehicles while on narcotics. Consequently, employee was forced to leave his employment with Precisions Pipeline.

Employee returned to Dr. Jeffries on September 10, 2008, complaining of neck pain, lower back pain, and left lower extremity pain. Dr. Jeffries ordered a new MRI and recommended employee see Dr. Theodore Choma after the MRI was performed.

Dr. Choma saw employee one time on September 22, 2008. Dr. Choma reviewed the repeat MRI. He found no evidence of lumbar disc herniation but did note a possible annular tear posteriorly at L5-S1. Dr. Choma found disc desiccation consistent with the aging process, particularly of a smoker. Dr. Choma did not impose any work restrictions. Dr. Choma explained to employee that there was no lesion to be surgically repaired. Dr. Choma referred employee back to his primary care provider to develop a plan to cease his use of narcotics and perhaps to explore other causes of employee's chronic pain.

Employer paid for no medical treatment provided after employee's September 2008 evaluation by Dr. Choma. Employee has since sought pain management on his own from various providers including a chiropractor and a pain management specialist.

Employee's Functional Abilities

Employee testified about his current abilities and limitations. Employee experiences chronic pain. Employee can sit for a little less than an hour at a time and can stand for about one-half hour. Employee has a hard time driving, difficulty bending, squatting, kneeling, and lifting. Employee cannot work overhead. Employee experiences headaches and numbness/tingling in his right arm. Employee must lie down several times a day for 30 – 40 minutes to relieve numbness in his legs and pain in his neck. The only household chores employee can perform are light vacuuming and sweeping. Employee is on a variety of medications for his psychiatric conditions and his chronic pain and those medications cause drowsiness.

Expert Testimony

Dr. Koprivica examined employee for purposes of offering his expert medical opinion in this matter. Dr. Koprivica prepared a report dated September 24, 2009, setting forth his opinions. He also gave deposition testimony. Dr. Koprivica opined that employee sustained a 10% permanent partial disability of the body as a whole referable to the cervical spine as a result of the November 3, 2007, motor vehicle accident. Dr. Koprivica conceded the difficulty of apportioning the spinal disabilities between two motor vehicle accidents occurring so close in time. But he specifically testified, "in terms of the neck I would put that on the second work injury. And I would assign 10% for that." He thought employee's low back disability from the two motor vehicle accidents was 15% overall, of which he would attribute 10% to the November 3rd accident.

Dr. Koprivica deferred to a vocational expert as to the question of whether employee is permanently and totally disabled. But, Dr. Koprivica opined that if employee is

Employee: David Davy

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permanently and totally disabled, it is due to the effects of the work accident of November 3, 2007, in combination with employee's preexisting psychiatric disabilities.

Dr. Daniels, a forensic psychiatrist, reviewed employee's psychiatric records and met twice with employee for evaluation. Dr. Daniels believes employee had a permanent partial disability attributable to his psychiatric condition of 45% of the body as a whole, which disability pre-existed the work injuries. Dr. Daniels testified that the psychiatric records reflect treatment dating to when employee was a teenager. Dr. Daniels believes employee's psychiatric symptoms affect employee's concentration, persistence, pace, emotional regulation, and interpersonal functioning. Dr. Daniels believes employee is permanently and totally disabled due to a combination of his psychiatric disabilities and the effects of his work injuries.

Mr. England was the only vocational expert to testify. Mr. England reviewed employee's medical records and history and personally evaluated employee. Mr. England considered the physical restrictions imposed by Dr. Koprivica.² Mr. England also considered employee's education, training, and vocational history as well as, employee's report as to his daily activities and limitations. Finally, Mr. England considered employee's long history of psychiatric problems. Upon considering the above factors, Mr. England opined that employee cannot compete for sustained work of any type in the open labor market. Mr. England believes employee's inability to compete is due to the combination of employee's physical and emotional problems.

The administrative law judge discredited the opinions of Dr. Koprivica, Dr. Daniels, and Mr. England largely on the ground that they did not have very much information about employee's pay and job duties for Precisions Pipeline. Inasmuch as employee was unable to sustain the Precisions Pipeline duties, we do not think the experts' opinions are rendered valueless by their failure to know intimate details of the duties. Employee's effort to return to work ultimately failed. We find credible the opinions of Dr. Koprivica, Dr. Daniels and Mr. England.

We agree with the administrative law judge that employee had preexisting permanent partial disabilities that were a hindrance or obstacle to employee's employment or reemployment (primarily low back and psychiatric). We find that as a result of his November 3, 2007, motor vehicle accident employee sustained permanent partial disabilities to his cervical spine and his lumbar spine. We find these disabilities equal 10% of the body as a whole (40 weeks) and 10% of the body as a whole (80 weeks), respectively. We find that the November 3, 2007, motor vehicle accident was the prevailing factor in causing injury to employee's cervical spine and low back and in causing the disabilities found in the preceding sentence.

We find employee reached maximum medical improvement on September 22, 2008, when Dr. Chomo indicated he did not believe employee was a candidate for surgical intervention.

² Limitations or prohibitions on bending, pushing, pulling, twisting, and lifting, as well as, postural limitations.

Employee: David Davy

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Discussion

The administrative law judge denied employee's claim that he is permanently and totally disabled. The administrative law judge explained his denial as follows: "[Employee] was able to compete for, and secure, an excellent-paying, highly-coveted job, and was able to perform the work to his employer's satisfaction. If this is not *prima facie* evidence of [employee's] to compete (sic)³ in the open labor market, what is?"

The administrative law judge's reasoning fails to take into consideration two facts crucial to our permanent total disability determination. First, employee's brother provided him the job at Precisions Pipeline. Further, employee was unable to maintain the job because the work made his pain intolerable.

The Second Injury Fund compensates injured workers who are permanently and totally disabled by a combination of past disabilities and a primary work injury. Section 287.020.6, RSMo Cum. Supp. 2010, defines the term "total disability" as the "inability to return to any employment and not merely [an] inability to return to the employment in which the employee was engaged at the time of the accident. The test for permanent total disability is whether the worker is able to compete in the open labor market. Total disability means the inability to return to any reasonable or normal employment, it does not require that the employee be completely inactive or inert. "Any employment" means any reasonable or normal employment or occupation. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

Carkeek v. Treasurer of Mo., 352 S.W.3d 604, 608 (Mo. App. 2011)(internal citations and quotations omitted).

Missouri courts have made clear that the Commission is not prevented from finding that a claimant is permanently and totally disabled simply because he or she holds limited, sporadic and/or highly accommodated employment. Certainly the ability to perform some work is relevant to the total disability determination, but it is not dispositive. To the contrary, a number of cases have recognized that a claimant can be totally disabled even if able to perform sporadic or light duty work.

Cases in this area specifically state that neither the worker's ability to engage in occasional or light duty work *nor the worker's good fortune in obtaining work other than through competition on the open labor market* should disqualify the worker from receiving total disability benefits under the Workers' Compensation Law.

Molder v. Mo. State Treasurer, 342 S.W.3d 406, 412 (Mo. App. 2011)(internal citations and quotations omitted)(emphasis ours).

³ We presume the administrative law judge meant to say "prima facie evidence of [employee's] *ability* to compete."

Employee: David Davy

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The hiring of employee by employee's brother is not evidence that employee earned the position with Precisions Pipeline by competing with other applicants on the open labor market. There is no evidence to suggest employee even had to apply for the job. Undoubtedly, employee had good fortune when his brother gave him a job with Precisions Pipeline. But employee's good fortune does not preclude us from finding that employee is permanently and totally disabled. Less than two months into his limited run with Precisions Pipeline, employee ended up in the emergency room for pain relief. Six weeks later, employee had to quit the job due to pain.

We reject the administrative law judge's conclusion that employee's employment with Precisions Pipeline is prima facie proof of employee's ability to compete in the open labor market. We find that employee's 3-month stint with Precisions Pipeline was not employment that employee secured by competing on the open labor market. We note that even if employee had secured the job in the open labor market, employee was ultimately unable to perform the duties of the job.

We accept the uncontradicted opinions of Dr. Koprivica, Dr. Daniel, and Mr. England. Mr. England's opinion in particular persuades us that no employer could reasonably be expected to hire employee in his current condition. Each of the experts believes employee is permanently and totally disabled due to the effects of his primary injury in combination with his pre-existing disabilities. Consequently, we find that employee is permanently and totally disabled due to the combination of the effects of his primary injury with his pre-existing disabilities.

Award

We reverse the award of the administrative law judge. Employee is entitled to permanent total disability benefits from the Second Injury Fund. We have found that employee sustained 80 weeks of permanent partial disability due to the last injury alone. For the period September 23, 2008, through April 6, 2010, the Second Injury Fund owes to employee the weekly amount of \$ 353.68 for a total of \$28,294.40 (\$353.68 X 80 weeks).⁴ Thereafter, the Second Injury Fund shall pay to employee a weekly permanent total disability benefit of \$742.72 weekly for his lifetime, or until modified by law. In all other respects, we affirm the award of the administrative law judge.

Jonathan D. McQuilkin, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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

⁴ The Second Injury Fund is not liable for the 80 weeks of permanent partial disability attributable to the November 3, 2007, injury so the Second Injury Fund weekly obligation is reduced by employee's permanent partial disability rate for the first 80 weeks of the permanent total disability period.

Employee: David Davy

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The August 17, 2012, award and decision of Chief Administrative Law Judge Robert J. Dierkes, is attached and incorporated by this reference, to the extent it is not inconsistent with this award.

Given at Jefferson City, State of Missouri, this 17th day of April 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: David Davy

Injury No. 07-132271

Dependents:

Employer: Welded Construction (settled)

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Hartford Fire Insurance Company (settled)

Hearing Date: May 29, 2012

Checked by: RJD/ga

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No additional benefits are awarded. No benefits are awarded from the Second Injury Fund.
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: November 3, 2007
5. State location where accident occurred or occupational disease was contracted: Audrain 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 was driving a vehicle in the course of his employment when the vehicle he was driving was struck in the rear by another vehicle.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Neck.
14. Nature and extent of any permanent disability: minimal.
15. Compensation paid to-date for temporary disability: Unknown.
16. Value necessary medical aid paid to date by employer/insurer? Unknown.

Employee: David Davy

Injury No. 07-132271

17. Value necessary medical aid not furnished by employer/insurer? Unknown.
18. Employee's average weekly wages: sufficient for maximum compensation rates
19. Weekly compensation rate: \$742.72 for temporary total disability and permanent total disability; \$389.04 for permanent partial disability.
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Second Injury Fund liability:

None. The claim for compensation against the Second Injury Fund is denied in full.

Employee: David Davy

Injury No. 07-132271

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Davy

Injury No: 07-132271

Employer: Welded Construction (settled)

Insurer: Hartford Fire Insurance Company (settled)

Add'l Party: Second Injury Fund

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: RJD/ga

ISSUES DECIDED

These cases (Injury No. 07-109992 and Injury No. 07-132271) were consolidated for hearing. The evidentiary hearing was held on May 29, 2012 in Columbia. The hearing was held to determine the liability of the Second Injury Fund, if any, for permanent partial disability benefits or permanent total disability benefits in each case. The employee is seeking permanent total disability benefits from the Second Injury Fund. The claim against Welded Construction ("Employer") in each case was settled by stipulation on February 15, 2012.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over each case;
2. That venue for the evidentiary hearing in each case is proper in Audrain County and adjoining counties, including Boone County;
3. That the claim for compensation in each was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;

Employee: David Davy

Injury No. 07-132271

5. That Claimant's average weekly wage was sufficient for the maximum compensation rates, and thus the compensation rate for temporary total disability benefits and permanent total disability benefits in each case is \$742.72, and the compensation rate for permanent partial disability benefits in each case is \$389.04;
6. That Claimant, David Davy, sustained an accident arising out of and in the course of his employment with Welded Construction on October 29, 2007; and
7. That Claimant, David Davy, sustained an accident arising out of and in the course of his employment with Welded Construction on November 3, 2007.

EVIDENCE

The evidence consisted of the testimony of Claimant, David Davy; medical records; the deposition testimony and medical report of Dr. P. Brent Koprivica; the deposition testimony and medical report of Dr. A. E. Daniel; and the deposition testimony and narrative report of James M. England, Jr., a vocational rehabilitation counselor.

DISCUSSION

Claimant, David Davy, was born on August 17, 1963. Claimant dropped out of school in the ninth grade. According to Claimant's testimony, he did receive a GED while in the military. Claimant testified that he entered the military at age 17, and received a less than honorable discharge in July 1982.

Claimant has apparently had psychiatric problems throughout his life, starting in childhood. Claimant was apparently physically and emotionally abused by his parents, and was apparently sexually abused by an older female cousin. Claimant has a history of multiple suicide attempts. Claimant has a long history of drug and alcohol abuse starting in his early teens. Claimant reports having auditory hallucinations since age 14, which have continued off and on throughout his life. Claimant has been treated for Major Depression with Psychotic Features throughout his life, including inpatient hospital stays.

Claimant began working for Welded Construction ("Employer") on May 29, 2007 and sustained the two work injuries with Employer on 10-29-07 and 11-3-07. There is no question that Claimant's psychiatric condition affected Claimant vocationally prior to May 2007, and thus I believe it is important to have an accurate vocational picture of Claimant prior to May 2007. In this regard, Claimant testified at the hearing as follows:

Q: Has it (psychological condition) ever prevented you from working in the past?

Employee: David Davy

Injury No. 07-132271

A: Yes, sir.

Q: Have you ever sought Social Security Disability as a result of your psychological issues before this?

A: Yes, sir I have.

Q: And you were actually approved and were on Social Security Disability?

A: Yes, sir.

Q: And you have been kind of off and on Social Security Disability throughout your adult life?

A: Yes, sir.

Q: Alright. About how many times?

A: Uh, every time I started to work, like four times, four different times. And then I'd go back on Social Security.

Q: Can you tell me when you first went on disability?

A: I think when I was 30 years old.

Q: And how old are you now, I should be able to do the math; how old are you?

A: Forty-eight.

Q: OK. And so then most recently before your employment with Welded, had you been on Social Security before that?

A: Yeah, yes sir.

Q: OK. And you actually had to go off of disability to do this work for Welded Construction?

A: Yes, sir.

Q: And what was it, your situation, or what was it that led you to do this return to work?

Employee: David Davy

Injury No. 07-132271

A: Encouragement from my brother, and trying to get me into the union, trying to make a better life for myself and for my family.

Q: Uh, and so it seems then kind of throughout your adult life you had kind of the experience where you would go and work with the truck driving, and work with the union, and then have an increase in your symptoms and you'd go on Social Security Disability?

A: Yes, sir.

Q: OK, and then you might then have, your symptoms would improve, and you would get out and attempt to work again?

A: Yes, sir.

Q: And are we talking, in regards to the prior work, before Welded, is that something where you'd be off for several months you'd be off disability or several years you'd be out working?

A: It'd be about a year or so, usually. And then I'd be back on disability, several years before I'd get back to work again.

Claimant was born in August 1963; if he first went on Social Security Disability at age 30, that would have been in 1993 or 1994. On September 25, 2003, Claimant's psychiatrist in Michigan, Dr. Gary Ralph, noted: "(h)e has now been approved for disabilities benefits apparently." Claimant told Dr. Koprivica that he was on Social Security Disability following a 1994 work-related injury to the right shoulder injury. Therefore, the way I understand Claimant's quoted testimony, from 1993 (or 1994) through 2007, Claimant would have been "on and off" Social Security Disability three or four times; he would be on disability for a few years, work for about a year, go back on disability for a few years, work for about a year, etc.

At the request of his attorney, Claimant saw Dr. P. Brent Koprivica for a medical evaluation on September 24, 2009. Dr. Koprivica authored a report of the same date, which is in evidence. That report contains an "Educational and Vocational History" which reads as follows:

Mr. Davy completed the ninth grade of formal education. He has a GED.

He told me that he attended Central Michigan Community College from the fall semester of 1998 through the fall semester of 1999. Overall, he believes he has twelve hours of college study. He does not have a degree.

Employee: David Davy

Injury No. 07-132271

Mr. Davy was trained as a mechanic in the United States Army. He served from September 3, 1980, through July 3, 1983. He denies having any military disabilities.

He worked at Kraft's Construction as a parts runner from August 1, 1979, to August 31, 1980, prior to going into the Army.

After his military service, he began working as a construction laborer out of Laborer's Union Local #1098 in Saginaw, Michigan. He did this work from August of 1983 through May 30, 1988. He denies having any permanent injuries, while working as a construction laborer.

He then worked at a Cummins International Dealership as a diesel mechanic. He worked there from September 1, 1988, through June 30, 1989, without permanent injuries.

Mr. Davy next worked at S&D Tree Farm. He was actually self-employed owning the tree farm. He produced Christmas trees.

He did that from July 1, 1989, through April 1, 1993, without permanent work-related injuries.

He then worked at Packaging Resources. He was employed there from May 1, 1993, to August 15, 1995. He was a grinder. This was a plastic manufacturer.

He had a work injury in 1994.

My understanding is that he had an 800-pound dust bag fall and injured his right shoulder.

He was treated with subacromial steroid injections. This treatment was by Dr. Montez.

He did not have any surgery.

He received a \$27,000.00 settlement.

He then went to work at Tony's Heating and Cooling, which was owned by his brother. He worked there from September 1, 1995, through October 1, 2002. He was an installer during this employment. He had no permanent work injuries during this employment. Mr. Davy then worked at MCT Trucking from December 2002 to 2005 without any permanent work-related injuries.

Employee: David Davy

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He had a motor vehicle accident in 2002 when he was driving a half-ton pickup. An ongoing vehicle struck a deer that resulted in contact with Mr. Davy's vehicle on the driver's side.

He began at Welded Construction in May of 2007.

Associated with the initial work injury accident of October 29, 2007, Mr. Davy had no lost time.

He was temporarily totally disabled from November 3, 2007, through November 7, 2007.

I would point out that Mr. Davy was previously on Social Security disability. This followed the 1994 work injury.

He has worked subsequent to the primary work injury claims. My understanding is that he worked at Precision Pipeline Motor Company in New York as a mechanic. He worked there from April of 2008 to August 16, 2008.

He was having to take Vicodin during this time period in order to sustain employment.

He was then laid off.

Subsequent to being laid off, he went back on Social Security disability, which he received previously.

In addition to his 1994 shoulder injury, Claimant also had neck and back problems prior to 2007. On November 4, 2002, Claimant was seen at Michigan Spine and Pain Clinic for "pain in lower back into left leg". Claimant attributed the onset to a work injury in California on September 27, 2002. Claimant also stated on the intake form: "Had similar injury about 5-6 years ago." On November 25, 2002, Claimant was complaining of neck and back pain, with tingling and numbness in his left leg with pain of "8/10". On December 6, 2002, Claimant complained of increased neck and back pain with tingling and numbness of left lower extremity. His pain was "9/10". Claimant was seen by Michigan Spine and Pain Clinic on 1/21/03, 2/19/03, 2/27/03, 3/10/03, 4/7/03, 5/5/03, 5/12/03, 5/27/03, and 8/4/03, all with complaints of neck, back and left lower extremity pain. On July 3, 2006, Claimant was again seen by Michigan Spine and Pain Clinic. Claimant stated he had moved to Arizona and was being treated for his neck, back and left lower extremity pain in Arizona. Claimant reported he had received a series of three epidural steroid injections in both his neck and back within the previous six months.

On August 9, 2006, Claimant was seen at Community Mental Health for Central Michigan. It was noted that Claimant had recently moved back to Michigan from Arizona and

Employee: David Davy

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was on Social Security Disability. On that date, he denied any illegal drug use. On November 8, 2006, Claimant tested positive for cocaine. On a December 13, 2006 visit to Community Mental Health for Central Michigan, it was noted that Claimant had recently tested positive for cocaine, Opioids and marijuana.

In May 2007, Claimant moved to central Missouri to work for Welded Construction. As stipulated, Claimant sustained two work injuries while working with Welded Construction, both occurring in Audrain County, Missouri, and both being motor vehicle accidents. Claimant complained of neck and back pain after these accidents. He was diagnosed with a L5-S1 disk herniation and received an epidural steroid injection. On April 18, 2008, Claimant was seen by Dr. Joel T. Jeffries, an orthopedic surgeon. Claimant advised Dr. Jeffries that he was scheduled to go to New York and return to work. Dr. Jeffries' note reads: "I think it is reasonable that the patient return to work without restriction. I have cautioned him not to needless (sic) expose himself to trauma with regard to the cervical spine."

Claimant testified that he did begin work in New York in May 2008 (according to Dr. Koprivica's history, Claimant began work in New York in April 2008; if Dr. Koprivica's history is correct, it would have been *after* the April 18, 2008 appointment with Dr. Jeffries), performing service and maintenance on trucks and heavy equipment. Claimant testified that he was paid \$42.00 per hour and worked up to 100 hours per week. Claimant testified that his neck and back hurt and he sought medical treatment while working in New York. Claimant testified that his last date of work in New York was August 16, 2008; he testified that he "quit" because he "just couldn't work anymore." (Per Dr. Koprivica's history, Claimant was "laid off".) Claimant is now back on Social Security Disability.

Claimant alleges that he is permanently and totally disabled, and is seeking permanent total disability benefits from the Second Injury Fund.

Under section 287.020.7, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is whether a claimant is able to competently compete in the open labor market given his or her condition and situation. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 210 (Mo.App. E.D.1999). When the claimant is disabled by a combination of the work-related event and pre-existing disabilities the responsibility for benefits lies with the Second Injury Fund. Section 287.220.1 RSMo. If the last injury in and of itself renders a claimant permanently and totally disabled the Second Injury Fund has no liability and the employer is responsible for the entire compensation. *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

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As noted above, Dr. P. Brent Koprivica evaluated Claimant on September 24, 2009, authored a report of the same date, and testified by deposition taken November 10, 2011. In analyzing these cases, Dr. Koprivica treated the 10-29-07 and 11-3-07 motor vehicle accidents as a single accident and injury. Dr. Koprivica opined that Claimant sustained a permanent partial disability of 25% of the body as a whole (15% low back and 10% neck). Dr. Koprivica opined that Claimant had preexisting disability of 15% of the body as a whole attributable to the low back and an additional 15% of the body as a whole attributable to the neck. (Dr. Koprivica did not discuss any disability attributable to Claimant's 1994 right shoulder injury.) Dr. Koprivica further opined that Claimant had preexisting disability due to psychiatric problems, which he did not rate. Dr. Koprivica opined that Claimant was permanently and totally disabled as a result of the 10-29-07 and 11-3-07 motor vehicle accidents in combination with the preexisting back, neck and psychiatric disabilities. Dr. Koprivica deferred to a psychiatrist on the issue of Claimant's psychiatric disability, and he also felt that Claimant needed to be evaluated by a vocational expert on the issue of permanent total disability. Regarding Claimant's work in New York in 2008, Dr. Koprivica's report states:

He has worked subsequent to the primary work injury claims. My understanding is that he worked at Precision Pipeline Motor Company in New York as a mechanic. He worked there from April of 2008 to August 16, 2008. He was having to take Vicodin during this time period in order to sustain employment. He was then laid off.

Dr. A. E. Daniel, a Columbia psychiatrist, evaluated Claimant in January and February of 2011 at the request of Claimant's attorney. Dr. Daniel's report of March 8, 2011 was in evidence, as was his deposition testimony taken on October 7, 2011. Dr. Daniel testified that Claimant had significant psychiatric disability prior to the work accidents of 10-29-07 and 11-3-07, which he estimated to be 45% permanent partial disability of the body as a whole. Dr. Daniel opined that Claimant was permanently and totally disabled as a result of the 10-29-07 and 11-3-07 motor vehicle accidents in combination with the preexisting psychiatric disability. I note Dr. Daniel's only mention of Claimant's work in New York in 2008 is as follows:

He started physical therapy, began feeling better, and subsequently saw Joel Jeffries, M.D., an orthopedist who allowed him to return to work in New York for his brother which lasted approximately three months. As he was taking Vicodin, he could not drive; therefore he left the job.

At the request of his attorney, Claimant was evaluated by James M. England, Jr., a licensed rehabilitation counselor, on February 18, 2010. England's report of February 24, 2010 was in evidence, as was his deposition testimony taken on November 30, 2011. England opined that Claimant was permanently and totally disabled as a result of the 10-29-07 and 11-3-07 motor vehicle accidents in combination with his preexisting disabilities. I note that, in Mr. England's eighteen-page, single-spaced report, the only mentions of Claimant's work in New York in 2008

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are as follows: "He returned to work in April 2008 and continued doing this until his pain level became such that he had to stop work in August of 2008. ... He did keep track of the inventory of his supplies when he tried to return to work with a pipeline as a mechanic from around April through August of 2008."

During Mr. England's direct examination, there was no testimony elicited regarding Claimant's work in New York in 2008. On cross-examination, Mr. England testified as follows:

Q. You had the opportunity to review Dr. Koprivica's report in preparing your own report, correct?

A. Yes.

Q. In Dr. Koprivica's report he notes that Mr. Davy was subsequently employed after his work injury in New York, correct?

A. Right. He did try to work for a few months, that's correct.

Q. Do you know what kind of work he was performing?

A. I think the records indicated that -- well, no, it really doesn't say. Hold on just a second and let me just see if I have anything in the rest of my records that show. It looks like --I'm trying to read my own notes.

It looks like he tried to work on some equipment and trucks that were used on pipelines or on a pipeline in New York and said that he had to stop because of the pain level. He had also tried driving a truck briefly and he said he had to stop that because he couldn't handle the pain from doing the clutch.

Q. Do you know how long he was employed as a truck driver after his work injuries?

A. I've just got May of '08 and that he tried the other job around August of '08 with the pipeline, but that's as detailed as he was able to give me.

Q. Referring to Dr. Koprivica's report, he notes that Mr. Davy was laid off from the position with the pipeline company. Did Mr. Davy make that indication to you, or did he tell you he was unable to perform that job?

A. He told me that he had to stop because of the pain level.

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Q. Did you ask any questions regarding whether he had been laid off at the pipeline company?

A. No, that's what I said. When I asked him what he had done and he said that he was doing it and that -- the notes I've got just said he had to stop because of pain.

Q. What level of difficult exertion was required in this position as a mechanic at the pipeline company in New York?

A. I really don't know specifically. I would say generally in that kind of work you're probably looking at medium to heavy work activity.

Q. Do you know what kind of physical motions or movements he would have made on a daily basis on that job?

A. Not really. Obviously if it was similar to what he did with Weldon Construction Company, which there he was doing mechanical work for another pipeline company that involved, you know, a pretty wide variety of bending, kneeling, squatting, climbing, all kinds of activities like that.

Q. Do you know again when he was employed with the pipeline company in New York, do you know what the heaviest amount of weight he was required to lift on a daily basis?

A. No.

Q. Again when he was working for the pipeline company, do you know if he had to miss any time because of any physical or mental symptoms?

A. I don't know specifically. I just know that he said that he had to stop after a short period.

I understand that Claimant has had an extremely difficult life. I understand that he has some significant psychiatric problems. However, I am compelled to find that Claimant is not permanently and totally disabled. On April 18, 2008, Dr. Jeffries, Claimant's treating doctor, allowed Claimant to return to work without restrictions. Claimant went to work in New York as a maintenance mechanic on trucks and heavy equipment. This would have been a very physically demanding job at 35-40 hours a week; Claimant was working up to 100 hours per week for (at least) 3 ½ months. Claimant was paid \$42.00 per hour with time and a half for everything over 40 hours a week. This was no entry-level job; this was an excellent-paying, highly-coveted job. Claimant secured that job, and he did the work for at least three and a half

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months at up to 100 hours per week. There is no indication that Claimant was fired from this job. Claimant insists that he voluntarily quit because he hurt too much to continue to do the work; Claimant testified that Dr. Koprivica's assertion that he was "laid off" was incorrect, and that he could have continued to work until the project ended in early 2009. The fact that Claimant was NOT fired from the job, and that he could have continued to work until the project ended means that Claimant's employer was satisfied with the work he was doing. In other words, Claimant was able to compete for, and secure, an excellent-paying, highly-coveted job, and was able to perform the work to his employer's satisfaction. If this is not *prima facie* evidence of Claimant's to compete in the open labor market, what is? And, if indeed, Claimant is being truthful about why he left the New York employment, how does physical inability to sustain heavy employment for up to 100 hours a week translate into physical inability to sustain *any* employment for 40 hours per week?

In finding that Claimant is not permanently and totally disabled, I note that Dr. Daniel is a psychiatrist and not a vocational rehabilitation expert. Dr. Daniel's opinion that Claimant is permanently and totally disabled is instructive, but nevertheless is totally outside of Dr. Daniel's area of expertise. The same can be said for Dr. Koprivica; he is an expert on medical issues, but not on vocational issues. I also note that Dr. Daniel obviously knew next to nothing about Claimant's work in New York, and that Dr. Koprivica did not know much more. They did not know that Claimant was making \$42.00 per hour with time and a half for everything over 40 hours a week. They did not know that Claimant was working up to 100 hours a week.

Mr. England is an excellent expert on vocational issues, whose opinion is usually of significant value to the administrative law judge. However, his lack of curiosity regarding the nature of Claimant's 2008 work in New York is disappointing. Mr. England's ultimate conclusions in this case were made without the benefit of all the material facts, and thus have no real probative value. I find it extremely difficult to believe that Mr. England would have dismissed Claimant's work in New York as merely "a failed attempt at return to work" had he been made aware that Claimant was working in a job that paid \$42.00 per hour with time and a half after 40 hours, and had worked at that job to his employer's satisfaction for up to 100 hours per week for more than 3 ½ months.

In determining whether Claimant's 2008 work in New York was, in fact, definitive proof of Claimant's ability to compete in the open market for employment or was a failed attempt at return to work, I believe Claimant's work in 2007 and 2008 must be examined in light of Claimant's clearly-established pattern of "disability/work/disability/work/disability." Claimant began working for Welded Construction in Missouri on May 29, 2007; he worked 80-100 hour weeks continuously until at least November 3, 2007. Welded Construction and its insurer paid Claimant temporary total disability benefits until Claimant began working in New York in late

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April or early May of 2008.¹ Claimant then worked up to 100 hours per week in New York until August 16, 2008, and then went back on Social Security Disability. This fits in precisely with Claimant's previously-established pattern of "working for about a year and then going on Social Security disability for a few years". Even if Claimant is being truthful about why he left his job in New York, how is that any different than his separation from his previous employments? The pattern has stayed the same. There is little doubt in my mind that Claimant will soon be making his next sojourn into employment (if he has not already done so).

Therefore, Claimant's claim for permanent total disability benefits against the Second Injury Fund must be denied.

I must also consider the possibility that Claimant may be entitled to permanent *partial* disability benefits from the Second Injury Fund. Dr. Daniel clearly did not analyze this case as a potential case of permanent partial disability. I believe Dr. Koprivica's analysis could be considered as a basis for an award of permanent partial disability benefits against the Second Injury Fund. Claimant settled Injury No. 07-109992 with Employer for 12.5% permanent partial disability of the body as a whole/low back (which meets the statutory threshold for a potential award). Claimant settled Injury No. 07-132271 for \$1000.00 and Employer's agreement to waive any subrogation right against Claimant's third-party liability claim arising out of the November 3, 2007 automobile accident; this simply does not meet the statutory threshold requirements for a potential award of permanent partial disability benefits.

I believe Claimant is entitled to permanent partial disability benefits in Injury No. 07-109992. I find that Claimant sustained a compensable last injury on October 29, 2007, which resulted in permanent partial disability of 12.5% of the body as a whole, rated at the low back, and that such disability constituted a hindrance or obstacle to Claimant's employment or reemployment. I find that as of the time the last injury was sustained, Claimant had a preexisting permanent partial disability of the body as a whole, rated at the low back, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 15% of the body as a whole (60 weeks). I also find that as of the time the last injury was sustained, Claimant had a preexisting permanent partial disability of the body as a whole, due to mental and psychiatric illness, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 35% of the body as a whole (140 weeks). I also find that as of the time the last injury was sustained, Claimant had a preexisting permanent partial disability of the body as a whole, rated at the neck, being an additional 10% of the body as a whole (40 weeks). The evidence establishes that the last injury, combined with the pre-existing permanent partial

¹ The settlement stipulation between Claimant and Welded Construction states that Claimant was paid 23 weeks of temporary total disability benefits. Assuming that Claimant did not work for Welded at all after November 3, 2007, this would have paid Claimant through April 19, 2008. There is no evidence that Claimant was receiving Social Security Disability benefits at anytime between November 3, 2007 and the start of his employment in New York.

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disabilities, causes greater overall disability than the independent sum of the disabilities. I find that a loading factor of 10% is appropriate to compensation, Claimant for the greater overall disability. The Second Injury Fund liability is thus calculated as follows: 50 weeks for the last injury + 240 weeks for preexisting disability = 290 weeks X 10% load = 29 weeks. 29 weeks times \$389.04 equals \$11, 282.16.

FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties stipulated, I find the following:

1. The October 29, 2007 accident caused injury to Claimant's low back and resulted in a permanent partial disability of 12.5% of the body as a whole;
2. The November 3, 2007 accident caused injury to Claimant's neck and caused minimal permanent partial disability, significantly less than 12.5% of the body as a whole;
3. Claimant returned to work for another employer in the state of New York in late April or early May of 2008 as a truck and heavy equipment maintenance mechanic;
4. Claimant was paid \$42.00 per hour for his work in New York with time and a half for all work over 40 hours per week;
5. Claimant worked as much as 100 hours per week in his 2008 employment in New York;
6. Claimant's 2008 work in New York was heavy demand work;
7. Claimant's last day of work in New York was August 16, 2008;
8. Dr. A. E. Daniel and Dr. P. Brent Koprivica are not experts in the field of vocational rehabilitation;
9. Mr. James M. England, Jr. ("England") is an expert in the field of vocational rehabilitation;
10. England's opinions that Claimant is unable to compete in the open market for employment and that Claimant is permanently and totally disabled are not credible, because England was not aware of certain material facts concerning Claimant's 2008 employment in New York; England was unaware that Claimant was paid \$42.00 per hour for his work in New York with time and a half for all work over 40 hours per week, and England was unaware that Claimant worked as much as 100 hours per week while in New York;
11. Claimant's ability to secure and maintain his employment in New York for 3½ months is evidence of Claimant's ability to compete in the open market for employment;
12. Claimant is able to compete in the open market for employment;
13. Claimant is not permanently and totally disabled;

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14. The injury and disability to Claimant's low back, caused by the October 29, 2007 accident constituted a hindrance or obstacle to Claimant's employment or reemployment;
15. At the time the October 29, 2007 injury was sustained, Claimant had a preexisting permanent partial disability of the body as a whole, rated at the low back, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 15% of the body as a whole (60 weeks);
16. At the time the October 29, 2007 injury was sustained, Claimant also had a preexisting permanent partial disability of the body as a whole, due to mental and psychiatric illness, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 35% of the body as a whole (140 weeks);
17. At the time the October 29, 2007 injury was sustained, Claimant also had a preexisting permanent partial disability of the body as a whole, rated at the neck, being an additional 10% of the body as a whole (40 weeks);
18. The evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities; I further find that a loading factor of 10% is appropriate to compensate Claimant for the greater overall disability;
19. In Injury No. 07-109992 only, the Second Injury Fund liability for permanent partial disability benefits is thus calculated as follows: 50 weeks for the last injury + 240 weeks for preexisting disability = 290 weeks X 10% load = 29 weeks; 29 weeks times \$389.04 equals \$11,282.16; and
20. In Injury No. 07-109992 only, Claimant's attorney, Jonathan McQuilkin, is entitled to attorney's fees for necessary legal services rendered to Claimant in this matter.

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ORDER

In Injury No. 07-109992, the Treasurer of the State of Missouri, as custodian of the Second Injury Fund, is ordered to pay Claimant \$11,282.16 for permanent partial disability benefits. Claimant's attorney, Jonathan McQuilkin, is allowed 25% of the benefits awarded herein, as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits. Any past due compensation shall bear interest as provided by law.

In Injury No. 07-132271, Claimant's Claim for Compensation against the Second Injury Fund is denied in full.

Made by:

ROBERT J. DIERKES
Chief Administrative Law Judge
Division of Workers' Compensation