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

Injury No.: 07-065997

Employee: David Elrod

Employer: Curators of the University of Missouri

Insurer: Self-Insured c/o Corporate Claims Management, Inc.

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

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.[1] We have reviewed the evidence and briefs and have considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge (ALJ) dated March 16, 2012.

The ALJ found that as a result of the July 10, 2007, work injury, employee sustained a permanent partial disability of 25% of the body as a whole referable to the cervical spine, and 5% of the right shoulder. We affirm the ALJ's award of permanent partial disability benefits. However, as argued by employer, we note that the ALJ failed to account for a stipulation between the parties that employer be entitled to a credit of $2,500.00 against any permanent partial disability benefits awarded.

On page 10 of the December 14, 2011, hearing transcript, the ALJ recited the parties' stipulation as follows:

> The employee was provided an advance of $2,500.00 against any permanent partial disability he might get in an award. And the parties agree that if an award is issued in favor of the claimant that the employer/insurer should receive a credit for that $2,500.00.

In addition, employee's attorney agreed that he was not seeking an attorney's fee on the aforementioned $2,500.00 credit.

Based upon the foregoing, we find that employer is granted a $2,500.00 credit against the permanent partial disability benefits awarded for the July 10, 2007, work-related injury. All other aspects of the award are affirmed.

The award and decision of Administrative Law Judge Vicky Ruth, dated March 16, 2012, as modified, is attached hereto, and its findings and conclusions are incorporated to the extent they are not inconsistent with our findings and conclusions herein.

[1] Statutory references are to the Revised Statutes of Missouri 2006 unless otherwise indicated.

The Commission further approves and affirms the ALJ's allowance of attorney's fee as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 20th day of September 2012.

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 Elrod

Injury No. 07-065997

Dependents: N/A

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

Employer: Curators of the University of Missouri

Additional Party: Second Injury Fund

Insurer: Self-insured c/o Corporate Claims Management, Inc.

Hearing Date: December 14, 2011

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: July 10, 2007.

5. State location where accident occurred or occupational disease was contracted: Phelps Country, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? Yes.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee sustained an injury to his cervical spine while attempting to lift a hanging double door.

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: Right shoulder and body as a whole referable to the cervical spine.

14. Nature and extent of any permanent disability: 5% of the right shoulder and 25 % of the body as a whole referable to the cervical spine.

15. Compensation paid to-date for temporary disability: $7,080.79 for TTD and $1,440.42 for TPD.

16. Value necessary medical aid paid to date by employer/insurer? $66,277.03.

17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wage: $688.40.

19. Weekly compensation rate: $458.94/$389.04.

20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer:

PPD of 111.6 weeks x $389.04 = $43,416.86.

22. Second Injury Fund liability:

23.7 weeks x $389.04 = $9,220.25.

23. Future medical awarded: See Award.

Said payments to begin immediately and to be payable and 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 (excluding payment of future medical treatment) in favor of the following attorney for necessary legal services rendered to the claimant: Gary Matheny.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Elrod

Dependents: N/A

Employer: Curators of the University of Missouri.

Additional Party: Second Injury Fund

Insurer: Self-insured c/o Corporate Claims Management, Inc.

Injury No: 07-065997

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

On December 14, 2011, David Elrod, the Curators of the University of Missouri/Corporate Claims Management, Inc., and the Second Injury Fund appeared for a final award hearing. This case was tried at the same time as Injury No. 08-108953; however, a separate award will be issued in that case. David Elrod, the claimant, was represented by attorney Gary Matheny. The Curators of the University of Missouri/Corporate Claims Management, Inc. (the employer/insurer) were represented by attorney Mark Kornblum. Counsel for the Second Injury Fund was Cara Harris. Claimant testified at the trial. Dr. Shawn Berkin, Dr. James Coyle, Dr. Mitchell Rotman, Dr. Peter Mirkin, and Tim Lalk testified by depositions. Claimant submitted a brief/proposed award on January 9, 2012. The employer/insurer submitted a brief/proposed award on January 10, 2012, and the record closed at that time. The Second Injury Fund elected not to submit a brief.

STIPULATIONS

The parties stipulated to the following:

2007 Case

1. On or about July 10, 2007, David Elrod (the claimant) was an employee of the Curators of the University of Missouri (the employer) when he sustained an injury by accident to his body as a whole/neck and right shoulder. The accident arose out of and in the course of his employment.
2. Claimant's average weekly wage was $688.40, yielding weekly compensation rates of $458.94 (TTD) and $389.04 (PPD).
3. The employer/insurer paid temporary total disability benefits to claimant in the amount of $7,080.79, with those payments representing 15 and 3/7 weeks of benefits for the period of December 14, 2007 through March 30, 2008.
4. The employer/insurer paid temporary partial disability benefits to claimant in the amount of $1,440.42, with those payments representing 5 weeks of benefits for the period of March 31, 2008 through May 6, 2008.
5. The employer/insurer provided medical aid in the amount of $66,277.03.

2008 Case

6. On or about December 9, 2008, claimant was an employee of the employer when he sustained an injury by accident to his body as a whole/low back. The accident arose out of and in the course of employment.
7. Claimant's average weekly wage was $749.31, yielding weekly compensation rates of $499.53 (TTD) and $404.66 (PPD).
8. The employer/insurer paid temporary total disability benefits to claimant in the amount of $71.36, with that payment representing 1 day of benefits (February 26, 2009).
9. The employer/insurer paid temporary partial disability benefits to claimant in the amount of $152.34, with that payment representing one week of benefits for the period of February 1, 2009 through February 7, 2009.
10. The employer/insurer provided medical aid in the amount of $11,872.16.

Both Cases

11. Employer and claimant were operating subject to the provisions of Missouri Workers' Compensation Law.
12. The employer's liability for workers' compensation was self-insured in care of Corporate Claims Management, Inc.
13. The Missouri Division of Workers' Compensation has jurisdiction.
14. The accidents occurred in Phelps County and venue in Phelps County is proper.
15. Claims for Compensation within the time prescribed by law.

ISSUES

At the hearing, the parties agreed that the issues to be resolved in this proceeding are as follows:

1. Nature and extent of permanent partial disability benefits.
2. Unpaid medical bills – VA lien in the amount of $309.35.
3. Future medical benefits.
4. Liability of the Second Injury Fund.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence:

Exhibit A	Medical records from Harry S. Truman Veterans' Hospital.
Exhibit B	Medical records from St. John's Clinic-Rolla.
Exhibit C	Medical records from Dr. James Coyle.
Exhibit D	Medical records from Pain Management Services.
Exhibit E	Medical records from Phelps County Regional Medical Center.
Exhibit F	Medical records from Dr. Thomas Forget.
Exhibit G	Medical records from St. John's Mercy Medical Center.
Exhibit H	Medical records from Professional Imaging.
Exhibit I	Medical records from ProRehab.

Exhibit J	Medical records from Tesson Ferry Spine and Orthopedic.
Exhibit K	Medical records from Phelps County Regional Medical Center.
Exhibit L	Medical records from The Work Center.
Exhibit M	Medical records from BTE Technologies.
Exhibit N	Medical records from Tenet Health Systems / Des Peres Hospital.
Exhibit O	Records from Melanie Martin, MA.
Exhibit P	Medical records from Phelps County Regional Hospital.
Exhibit Q	Stipulations for Compromise Settlement.
Exhibit R	Bill from Phelps Country Regional.
Exhibit S	Records/bills from the Department of Veteran Affairs.
Exhibit T	Deposition of Tim Lalk.
Exhibit U	Deposition of Dr. Shawn Berkin.

On behalf of the employer, the following exhibits were admitted into the record:

Exhibit 1	Records from the Division of Workers' Compensation.
Exhibit 2	Records regarding right shoulder claim.
Exhibit 3	Deposition of Dr. James Coyle.
Exhibit 4	Deposition of Dr. Mitchell Rotman.
Exhibit 5	Deposition of Dr. Peter Mirkin.

The Second Injury Fund did not offer any exhibits.

Note: All marks, handwritten notations, highlighting, and tabs on the exhibits were present at the time the documents were admitted into evidence. Some of the depositions were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings in addition to the facts stipulated by the parties:

1. David Elrod (claimant) was born on September 27, 1953; at the time of the hearing he was 58 years old. He lives in Vichy, Missouri. He is unemployed, having last worked on or about March 26, 2009, for the employer (a/k/a the Curators of the University of Missouri, a/k/a Missouri Science and Technology, a/k/a the University of Missouri-Rolla).

2. Claimant began employment with the employer on or about February 3, 2003, as a laborer in a temporary position. He later secured the permanent position of a carpenter on a construction crew, mainly performing remodeling type work. After about two years he moved to maintenance work, which was less strenuous.

3. Before he worked for the employer, his employment background mainly consisted of construction work. He also worked for a propane company and as a surveyor. He described these positions as heavy work. One of his jobs did involve some office work.

4. Claimant was previously in the military. He has several years' worth of college credits.

5. On July 10, 2007, claimant was working for the employer when he sustained an injury by accident. The accident occurred when he was lifting a hanging double door. He heard and felt his shoulder pop and had soreness in his neck.

6. The employer referred claimant to Dr. After Hours Clinic. After an unsuccessful course of conservative treatment, claimant was referred to Dr. Mitchell Rotman, an orthopedic surgeon. Dr. Rotman's August 9, 2007 notes indicate that claimant had complaints in the neck with rotation. The doctor administered a subacromial injection to determine if the pain complaints were due to the neck or the shoulder.[1] Dr. Rotman also ordered x-rays and an MRI, which revealed a broad-based disc bulge at C5-6 causing bilateral foraminal encroachment, but no central canal stenosis or cord impingement. Dr. Rotman concluded that no additional shoulder treatment was necessary and instead referred claimant to a spine surgeon.

7. Claimant saw Dr. James Coyle on September 5, 2007. Dr. Coyle noted that claimant's past treatment has focused on his shoulder. However, the doctor did think that some of his symptoms were coming from the C5-6 disc. Dr. Coyle diagnosed C5-6 cervical radiculopathy with right upper extremity pain. Dr. Coyle recommended a course of conservative treatment, which included diagnostic selective nerve blocks at C5-6.[2] Conservative treatment provided little relief. On December 6, 2007, Dr. Coyle performed surgery, a micro discectomy and fusion at C5-6.

8. Claimant's right shoulder complaints did not resolve, and he was referred to Dr. Rotman for a supplemental evaluation. Dr. Rotman reviewed the 2004 and 2008 MRIs of claimant's shoulder, and determined that there were no new finding in the 2008 MRI that would account for claimant's symptoms or necessitate treatment. Dr. Rotman recommended physical therapy and a Functional Capacity Exam (FCE). The FCE, performed April 30, 2008, indicate that claimant can work at the heavy demand level. Dr. Rotman opined that claimant could return to work without restrictions for the right shoulder.

9. On May 6, 2008, Dr. Rotman found claimant to be at maximum medical improvement (MMI) and released him. At that visit, claimant complained of discomfort in the shoulder blade area; there is no mention of right arm radiculopathy or parathesis. At trial, however, claimant testified that he continued to experience some radicular complaints in the right arm after his release and return to work.

[1] ER/INS Exh. 4.
[2] ER/INS Exh. 3.

10. With regards to the July 10, 2007 injury, Dr. Rotman opined that claimant sustained no permanent partial disability to the right shoulder and that no additional medical treatment is necessary.

11. In October 2007, claimant experienced dizziness and nausea. Dr. Coyle referred claimant to Dr. Thomas Forget to rule out cerebral vascular occlusion. Claimant testified that he was subsequently diagnosed with Meniere's disease. No physician relates this condition to claimant's July 10, 2007 injury.

12. In March 2008, Dr. Coyle released claimant to return to work with instructions to avoid prolonged overhead work. On May 6, 2008, Dr. Coyle released claimant at maximum medical improvement (MMI) without any permanent restrictions. The doctor also opined that claimant has a permanent partial disability (PPD) of 15% of the cervical spine. Dr. Coyle indicated that this disability is attributable to the work injury.

13. At some point, Dr. Coyle referred claimant for some additional physical therapy and to Dr. Smith for trigger point injections.

14. Dr. Coyle's June 18, 2008 notes indicate that claimant returned to Dr. Coyle with neck complaints after working on ceiling tiles. The doctor again noted that claimant is at MMI. On June 18th, Dr. Coyle opined that claimant does not require any further medical treatment or medications for the work injury. He noted that the persistent complaints of dizziness and nausea are not related to the July 2007 injury or treatment.

15. At trial, claimant testified that he had some neck pain and limited range of motion following his release from Dr. Coyle.

16. Although claimant was not a perfect historian, becoming confused at times, he did testify to the best of his ability and he was a credible witness.

Pre-existing injuries

17. While working for the employer, claimant sustained an injury by accident on or about December 23, 2003. The accident occurred when he was tearing down cubicles and a counter fell on him. He developed problems with his right shoulder. On or about April 14, 2004, claimant underwent surgery by Dr. Herbert Haupt. The surgery consisted of an intraarticular debridement of the shoulder with subacromial decompression and debridement of the subacromial space, excision of the coracoacromial ligament, acromioplasty and resection of the distal clavicle. After claimant recovered from the surgery, he returned to full-duty with the employer. At the hearing, claimant testified that he continued to have problems with the shoulder when he did sheetrock work and working overhead. He indicated that his range of motion was limited; he had trouble reaching out in front of him and overhead. His shoulder would pop after the injury. He also had problems sleeping on his right ride.

18. After his 2003 shoulder injury, Dr. Shawn Berkin examined claimant in 2006. He concluded that claimant sustained a 40% permanent partial disability as a result of the

December 2003 event. Dr. Berkin assigned permanent lifting restrictions for the right arm of no lifting greater than 25 pounds from floor to waist and no lifting greater than 15 pounds from waist to shoulder. He recommended claimant avoid lifting away from his body and overhead, and he continued the use of anti-inflammatory medication.

19. Claimant settled his 2003 claim for 25% permanent partial disability of the right shoulder. Claimant also alleged four subsequent injuries or aggravations to his right shoulder: June 2005; August 2005; November 2005; and January 2006. Claimant received a nominal settlement ($100) in each of the additional cases.

20. Claimant has a history of left inguinal hernia and an upper trapezius surgical repair in 2006. Claimant indicated that after his surgery and recovery period, his symptoms resolved and he denied any residual complaints.

Dr. Shawn Berkin – August 2009 Evaluation

21. Dr. Berkin performed an Independent Medical Evaluation on August 8, 2009. Dr. Berkin diagnosed a cervical strain with right-sided radiculopathy, C5-6 herniation requiring discectomy and fusion, and a right shoulder strain. Dr. Berkin opined that the July 10, 2007 accident was the prevailing factor in these diagnoses. Dr. Berkin opined that claimant sustained a permanent partial disability of 40% of the cervical spine and 10% of the right shoulder. He also assigned a pre-existing permanent partial disability of 35% of the right shoulder for the 2003 injury. Dr. Berkin concluded that the combination of claimant's injuries is greater than the simple sum, and that a loading factor should be used.

22. Dr. Berkin did not explain why his 2006 report assigned a permanent partial disability (PPD) of 40% for the right shoulder and his 2009 report assigned this injury a 35% PPD.

23. Dr. Berkin recommended home exercises and the use of non-steroidal anti-inflammatory medication to control his neck symptoms. He assigned lifting restrictions of 35 pounds on an occasional basis and 25 pounds on a frequent basis. Dr. Berkin did not specify whether the restrictions are due to the shoulder, neck, or low back.

24. With regard to the right shoulder, Dr. Berkin directs that claimant should avoid lifting with his right arm extended away from his body and should avoid excessive lifting or working with his arms above shoulder level. These are the same restrictions he assigned to the right shoulder in his 2006 report. However, in the 2006 report, Dr. Berkin imposed a restriction of 25 pounds for lifting floor to waist and 15 pounds waist to shoulder.

25. In his deposition, Dr. Berkin indicates that the July 10, 2007 accident was the prevailing factor requiring medication management for the neck.[3] He opined that the December 9, 2008 incident is the prevailing factor in the need for medication management for the

[3] Claimant's Exh. V, p. 24.

back.[4] As to the right shoulder, Dr. Berkin indicates that the prevailing factor in the need for medication management is the 2003 injury.[5]

CONCLUSIONS OF LAW

Based upon the findings of fact, I find the following:

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.[6] Proof is made only by competent and substantial evidence, and may not rest on speculation.[7] Medical causation not within lay understanding or experience requires expert medical evidence.[8] When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.[9] In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.[10]

Issue 1: Nature and extent of permanent partial disability benefits

To be entitled to workers' compensation benefits, claimant has the burden of proving that the alleged injury was directly caused by the accident, that there is a causal connection between the accident and the compensable injury, and that the injury resulted in the disability claimed.[11] The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."[12]

An "injury" is defined to be "an injury which has arisen out of an in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."[13] An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and it does not come from a hazard or risk

[4] *Id*.
[5] *Id*.
[6] *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus*., 83 S.W.3d 581, 583 (Mo. App. 2002).
[7] *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).
[8] *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).
[9] *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).
[10] *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).
[11] *Kerns v. Midwest Conveyor*, 126 S.W.3d 445, 453 (Mo.App. W.D. 2004), *Rana v. Landstar TLC*, 46 S.W.3d 614, 622 (Mo.App. W.D. 2001).
[12] Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.
[13] Section 287.020.3(1).

unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.[14]

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.[15] The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.[16] A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.[17] It is the duty of the ALJ to weigh the medical evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.[18]

The fact finder is encumbered with determining the credibility of witnesses.[19] It is free to disregard that testimony which it does not hold credible.[20]

In his brief, claimant alleges that as a result of the work injury, he sustained a permanent partial disability of 40% of the body as a whole referable to the cervical spine and 10% of the right shoulder. The employer/insurer contends that, as a result of the 2007 work injury, claimant sustained permanent partial disability of 22% of the body as a whole referable to the cervical spine and no permanent disability to the right shoulder.

In regards to the July 2007 work accident, I find that the claimant sustained a permanent partial disability of 25% of the body as a whole referable to the cervical spine, and 5% of the right shoulder.

Issue 2: Past medical bill or VA lien
Issue 3: Future medical care

Subsection 1 of RSMo Section 287.140 states, in pertinent part, as follows:

> In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability to cure and relieve from the effects of the injury.

The employee need only show that he is likely to need additional treatment "as may reasonably be required . . . to cure and relieve . . . the effects of the injury . . . that flow from the accident [or disease]."[21] This has been interpreted to mean that an employee is entitled to

[14] Section 287.020.3(c).
[15] *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587, 594-595 (Mo.App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo.App. S.D. 1999).
[16] *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo.App. W.D. 2001).
[17] *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo.App. E.D. 1998).
[18] *Rana* at 626.
[19] *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo. App. E.D. 2008).
[20] *Id*. at 908.
[21] *Sullivan v. Masters and Jackson Paving*, 35 S.W.2d 879, 888 (Mo.App. 2001).

compensation for care and treatment that gives comfort, i.e., relieves the employee's work-related injury, even though a cure or restoration to soundness is not possible, if the employee establishes a reasonable probability that he or she needs additional future medical care.[22] "Probable" means founded on reason and experience that inclines the mind to believe but leaves room for doubt.[23] Claimant need not show evidence of the specific nature of the treatment required, but only that treatment is going to be required.[24]

While the employer has the right to select the provider of medical and other services, this right may be waived by the employer if the employer, after notice of the injury, refuses or neglects to provide the necessary care.[25]

In this case, claimant alleged that he treated with the "Veterans Administration" (U.S. Department of Veterans Affairs) for his 2007 work injury. Claimant testified that the VA has a lien in the amount of $309.95, for the treatment of his July 2007 work injury. No lien has been filed by the U.S. Department of Veterans Affairs (the VA). As such, the VA was not listed as an interested party on the Notice of Final Hearing in this case. Nevertheless, claimant argues that he is required to pursue the VA's lien under 42 U.S.C. Section 2651 and/or 38 U.S.C. section 1729, and he is required to make a demand for reimbursement on their behalf.

Claimant's Exhibit S includes a letter from the Department of Veterans Affairs, dated June 1, 2011, that indicates that the amount of its claim to date is $2,549.79. The exhibit includes medical records and bills from the Department of Veterans Affairs. The attached medical records and bills, however, appear to include treatment for lumbago, esophageal reflux, hyperlipidemia, chronic sinusitis, degeneration of lumbar or lumbosacral intervertebral disc, prurigo, hearing loss, and other conditions – which are *not* related to the July 2007 work injury. It is not clear which charges claimant believes are related to the July 2007 work injury. I find no competent and substantial evidence relating any of the charges to the 2007 work injury or showing that such treatment was reasonable and necessary to cure and relieve the effects of the 2007 injury. In addition, claimant did not present competent and substantial evidence demonstrating that he requested and the employer refused to provide additional treatment for the 2007 injury.

Claimant has failed to meet his burden of proof on these issues; no amount will be awarded for unpaid medical benefits or a VA lien.

As to the issue of future medical care, Dr. Berkin recommended that claimant use non-steroidal anti-inflammatory medical for control of claimant's "lower back, neck, and right shoulder pain."[26] Dr. Berkin is credible and convincing on this issue. I find that claimant is entitled to future medical care to relieve the affects of the 2007 work injury.

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[22] *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo.App. W.D. 2001); *Boyles v. USA Rebar Placement, Inc*. 26 S.W.3d 418 (Mo.App. W.D. 2000).
[23] *Rana* at 622, citing *Sifferman v. Sears, Roebuck & Co*., 906 S.W.2d 823, 828 (Mo.App. 1995).
[24] *Aldredge v. Southern Missouri Gas*, 131 S.W. 3rd 786 at 833 (Mo. App. D. D. 2004).
[25] *Shores v. General Motors Corp*, 842 S.W.2d 929 (Mo.App. 1992).
[26] Claimant's Exh. U.

Issue 4: Liability of the Second Injury Fund.

The Second Injury Fund is a creature of statute, and benefits from the Fund are awarded only if the employee proves that under Section 287.220.1, RSMo (2000), he or she is entitled to such benefits. In order to recover against the Second Injury Fund, a claimant must prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should be become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities.[27] Second Injury Fund liability exists only if the employee suffers from a pre-existing permanent partial disability (PPD) that combines with a compensable injury to create a disability greater than the simple sum of disabilities.[28] When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities.[29]

I find that claimant has established a right to recover from the Second Injury Fund. I find that on July 10, 2007, claimant sustained a compensable work injury that resulted in permanent partial disability of 25% of the body as a whole referable to the cervical spine; this injury resulted in a total of 100 weeks of disability.

I also find that at the time of the injury, claimant had the following pre-existing permanent partial disability that met the statutory threshold and was of such seriousness as to constitute a hindrance or obstacle to employment or re-employment: 25% of the right shoulder. Thus, the pre-existing injury resulted in 58 weeks of disability.

Based on the credible evidence presented, I find that the last injury combined with the pre-existing permanent partial disabilities to cause 15% greater overall disability than the independent sum of the disabilities. In making this determination, I find that the primary injury to the right shoulder and the body as a whole/neck did combine with the pre-existing injury to the right shoulder to create a disability that is greater than the sum of the two.

I find that the Second Injury Fund liability shall be calculated as follows: 100 weeks for the primary injuries plus 58 weeks for the pre-existing injury equals 158 weeks. I find that it is appropriate to multiply this figure, 158 weeks, by a 15% load factor, resulting in 23.7 weeks of overall greater disability. Thus, the Second Injury Fund is liable for $9,220.25 (23.7 weeks of overall greater disability x $389.04 weekly compensation rate).

[27] *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (MoApp. E.D. 2008) (Citations omitted).
[28] Section 287.220.1, RSMo.; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo. App. 1985).
[29] *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990).

This Award is subject to a lien in the amount of 25% of the payments hereunder (excluding future medical treatment) in favor of Gary Matheny for necessary legal services rendered to the claimant.

Made by: _____

Vicky Ruth

Administrative Law Judge

Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 08-108953

Employee: David Elrod

Employer: Curators of the University of Missouri

Insurer: Self-Insured c/o Corporate Claims Management, Inc.

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 16, 2012. The award and decision of Administrative Law Judge Vicky Ruth, issued March 16, 2012, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 20th day of September 2012.

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 Elrod

Injury No. 08-108953

Dependents: N/A

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

Employer: Curators of the University of Missouri

Additional Party: Second Injury Fund

Insurer: Self-insured c/o Corporate Claims Management, Inc.

Hearing Date: December 14, 2011

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.

2. Was the injury or occupational disease compensable under Chapter 287? Yes.

3. Was there an accident or incident of occupational disease under the Law? Yes.

4. Date of accident or onset of occupational disease: December 9, 2008.

5. State location where accident occurred or occupational disease was contracted: Phelps Country, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? Yes.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee sustained an injury to his lumbar spine while repeatedly using a dolly to move metal filing cabinets down a flight of stairs.

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: Body as a whole referable to the lumbar spine.

14. Nature and extent of any permanent disability: As to the employer/insurer, 12.5% PPD of the BAW referable to the lumbar spine; as to the Second Injury Fund, permanent and total disability benefits.

15. Compensation paid to-date for temporary disability: $71.36 for TTD and $152.34 for TPD.

16. Value necessary medical aid paid to date by employer/insurer? $11,872.16.

17. Value necessary medical aid not furnished by employer/insurer? See Award..

18. Employee's average weekly wage: $749.31.

19. Weekly compensation rate: $499.53 / $404.66.

20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer:

PPD of 50 weeks x $404.66 = $20,233.

22. Second Injury Fund liability:

Differential of $94.87 for 50 weeks (a sum of $4,743.50) commencing March 27, 2009; plus thereafter, permanent total disability benefits of $499.53/week for claimant's lifetime pursuant to statute.

23. Future medical awarded: See Award.

Said payments to begin immediately and to be payable and 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 (excluding payment of future medical treatment) in favor of the following attorney for necessary legal services rendered to the claimant: Gary Matheny.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Elrod

Dependents: N/A

Employer: Curators of the University of Missouri.

Additional Party: Second Injury Fund

Insurer: Self-insured c/o Corporate Claims Management, Inc.

Injury No: 08-108953

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

On December 14, 2011, David Elrod, the Curators of the University of Missouri/Corporate Claims Management, Inc., and the Second Injury Fund appeared for a final award hearing. This case was tried at the same time as Injury No. 07-065997; however, a separate award will be issued in that case. David Elrod, the claimant, was represented by attorney Gary Matheny. The Curators of the University of Missouri/Corporate Claims Management, Inc. (the employer/insurer) were represented by attorney Mark Kornblum. Counsel for the Second Injury Fund was Cara Harris. Claimant testified at the trial. Dr. Shawn Berkin, Dr. James Coyle, Dr. Mitchell Rotman, Dr. Peter Mirkin, and Tim Lalk testified by depositions. Claimant submitted a brief/proposed award on January 9, 2012. The employer/insurer submitted a brief/proposed award on January 10, 2012, and the record closed at that time. The Second Injury Fund elected not to submit a brief.

STIPULATIONS

The parties stipulated to the following:

2007 Case

1. On or about July 10, 2007, David Elrod (the claimant) was an employee of the Curators of the University of Missouri (the employer) when he sustained an injury by accident to his body as a whole/neck and right shoulder. The accident arose out of and in the course of his employment.
2. Claimant's average weekly wage was $688.40, yielding weekly compensation rates of $458.94 (TTD) and $389.04 (PPD).
3. The employer/insurer paid temporary total disability benefits to claimant in the amount of $7,080.79, with those payments representing 15 and 3/7 weeks of benefits for the period of December 14, 2007 through March 30, 2008.
4. The employer/insurer paid temporary partial disability benefits to claimant in the amount of $1,440.42, with those payments representing 5 weeks of benefits for the period of March 31, 2008 through May 6, 2008.
5. The employer/insurer provided medical aid in the amount of $66,277.03.

2008 Case

6. On or about December 9, 2008, claimant was an employee of the employer when he sustained an injury by accident to his body as a whole/low back. The accident arose out of and in the course of employment.
7. Claimant's average weekly wage was $749.31, yielding weekly compensation rates of $499.53 (TTD) and $404.66 (PPD).
8. The employer/insurer paid temporary total disability benefits to claimant in the amount of $71.36, with that payment representing 1 day of benefits (February 26, 2009).
9. The employer/insurer paid temporary partial disability benefits to claimant in the amount of $152.34, with that payment representing one week of benefits for the period of February 1, 2009 through February 7, 2009.
10. The employer/insurer provided medical aid in the amount of $11,872.16.

Both Cases

11. Employer and claimant were operating subject to the provisions of Missouri Workers' Compensation Law.
12. The employer's liability for workers' compensation was self-insured in care of Corporate Claims Management, Inc.
13. The Missouri Division of Workers' Compensation has jurisdiction.
14. The accidents occurred in Phelps County and venue in Phelps County is proper.
15. Claims for Compensation within the time prescribed by law.

ISSUES

At the hearing, the parties agreed that the issues to be resolved in this proceeding are as follows:

1. Nature and extent of permanent partial or permanent total disability benefits.
2. Liability of the Second Injury Fund.
3. Unpaid medical bills from Phelps County Regional ($551.85).
4. Unpaid medical bills / VA lien ($2,240.44).
5. Future medical benefits.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence:

Exhibit A	Medical records from Harry S. Truman Veterans' Hospital.
Exhibit B	Medical records from St. John's Clinic-Rolla.
Exhibit C	Medical records from Dr. James Coyle.
Exhibit D	Medical records from Pain Management Services.
Exhibit E	Medical records from Phelps County Regional Medical Center.
Exhibit F	Medical records from Dr. Thomas Forget.
Exhibit G	Medical records from St. John's Mercy Medical Center.
Exhibit H	Medical records from Professional Imaging.

Exhibit I	Medical records from ProRehab.
Exhibit J	Medical records from Tesson Ferry Spine and Orthopedic.
Exhibit K	Medical records from Phelps County Regional Medical Center.
Exhibit L	Medical records from The Work Center.
Exhibit M	Medical records from BTE Technologies.
Exhibit N	Medical records from Tenet Health Systems / Des Peres Hospital.
Exhibit O	Records from Melanie Martin, MA.
Exhibit P	Medical records from Phelps County Regional Hospital.
Exhibit Q	Stipulations for Compromise Settlement.
Exhibit R	Bill from Phelps Country Regional.
Exhibit S	Records/bills from the Department of Veteran Affairs.
Exhibit T	Deposition of Tim Lalk.
Exhibit U	Deposition of Dr. Shawn Berkin.

On behalf of the employer, the following exhibits were admitted into the record:

Exhibit 1	Records from the Division of Workers' Compensation.
Exhibit 2	Records regarding right shoulder claim.
Exhibit 3	Deposition of Dr. James Coyle.
Exhibit 4	Deposition of Dr. Mitchell Rotman.
Exhibit 5	Deposition of Dr. Peter Mirkin.

The Second Injury Fund did not offer any exhibits.

Note: All marks, handwritten notations, highlighting, and tabs on the exhibits were present at the time the documents were admitted into evidence. Some of the depositions were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings in addition to the facts stipulated by the parties:

1. David Elrod (claimant) was born on September 27, 1953; at the time of the hearing he was 58 years old. He lives in Vichy, Missouri. He is unemployed, having last worked on or about March 26, 2009, for the employer (a/k/a the Curators of the University of Missouri, a/k/a Missouri Science and Technology, a/k/a the University of Missouri-Rolla).

2. Claimant began employment with the employer on or about February 3, 2003, as a laborer in a temporary position. He later secured the permanent position of a carpenter on a construction crew, mainly performing remodeling type work. After about two years he moved to maintenance work, which was less strenuous.

3. Before he worked for the employer, his employment background mainly consisted of construction work. He also worked for a propane company and as a surveyor. He described these positions as heavy work. One of his jobs did involve some office work.

4. Claimant was previously in the military. He has several years' worth of college credits.

2007 Injury

5. On July 10, 2007, claimant was working for the employer when he sustained an injury by accident. The accident occurred when he was lifting a hanging double door. He heard and felt his shoulder pop and had soreness in his neck.

6. The employer referred claimant to Dr. After Hours Clinic. After an unsuccessful course of conservative treatment, claimant was referred to Dr. Mitchell Rotman, an orthopedic surgeon. Dr. Rotman's August 9, 2007 notes indicate that claimant had complaints in the neck with rotation. The doctor administered a subacromial injection to determine if the pain complaints were due to the neck or the shoulder.[1] Dr. Rotman also ordered x-rays and an MRI, which revealed a broad-based disc bulge at C5-6 causing bilateral foraminal encroachment, but no central canal stenosis or cord impingement. Dr. Rotman concluded that no additional shoulder treatment was necessary and instead referred claimant to a spine surgeon.

7. Claimant saw Dr. James Coyle on September 5, 2007. Dr. Coyle noted that claimant's past treatment has focused on his shoulder. However, the doctor did think that some of his symptoms were coming from the C5-6 disc. Dr. Coyle diagnosed C5-6 cervical radiculopathy with right upper extremity pain. Dr. Coyle recommended a course of conservative treatment, which included diagnostic selective nerve blocks at C5-6.[2] Conservative treatment provided little relief. On December 6, 2007, Dr. Coyle performed surgery, a micro discectomy and fusion at C5-6.

8. Claimant's right shoulder complaints did not resolve, and he was referred to Dr. Rotman for a supplemental evaluation. Dr. Rotman reviewed the 2004 and 2008 MRIs of claimant's shoulder, and determined that there were no new finding in the 2008 MRI that would account for claimant's symptoms or necessitate treatment. Dr. Rotman recommended physical therapy and a Functional Capacity Exam (FCE). The FCE, performed April 30, 2008, indicate that claimant can work at the heavy demand level. Dr. Rotman opined that claimant could return to work without restrictions for the right shoulder.

9. On May 6, 2008, Dr. Rotman found claimant to be at maximum medical improvement (MMI) and released him. At that visit, claimant complained of discomfort in the shoulder blade area; there is no mention of right arm radiculopathy or parathesis. At trial, however, claimant testified that he continued to experience some radicular complaints in the right arm after his release and return to work.

[1] ER/INS Exh. 4.
[2] ER/INS Exh. 3.

10. With regards to the July 10, 2007 injury, Dr. Rotman opined that claimant sustained no permanent partial disability to the right shoulder and that no additional medical treatment is necessary.

11. In October 2007, claimant experienced dizziness and nausea. Dr. Coyle referred claimant to Dr. Thomas Forget to rule out cerebral vascular occlusion. Claimant testified that he was subsequently diagnosed with Meniere's disease. No physician relates this condition to claimant's July 10, 2007 injury.

12. In March 2008, Dr. Coyle released claimant to return to work with instructions to avoid prolonged overhead work. On May 6, 2008, Dr. Coyle released claimant at maximum medical improvement (MMI) without any permanent restrictions. The doctor also opined that claimant has a permanent partial disability (PPD) of 15% of the cervical spine. Dr. Coyle indicated that this disability is attributable to the work injury.

13. At some point, Dr. Coyle referred claimant for some additional physical therapy and to Dr. Smith for trigger point injections.

14. Dr. Coyle's June 18, 2008 notes indicate that claimant returned to Dr. Coyle with neck complaints after working on ceiling tiles. The doctor again noted that claimant is at MMI. On June 18th, Dr. Coyle opined that claimant does not require any further medical treatment or medications for the work injury. He noted that the persistent complaints of dizziness and nausea are not related to the July 2007 injury or treatment.

15. At trial, claimant testified that he had some neck pain and limited range of motion following his release from Dr. Coyle.

2008 Injury

16. On December 9, 2008, claimant was working for the employer on the maintenance crew. Over the course of one day, claimant sustained an injury to his low back while using a dolly to repeatedly transport metal file cabinets down a narrow flight of stairs. Although he continued to work after the event, he reported increasing low back pain the days that followed.

17. An MRI from January 16, 2009, revealed degenerative changes in the lumbar spine and a left-sided bulge at L5-S1 that was not compressing the nerve root. Claimant saw Dr. Mirkin on or about January 19, 2009. Dr. Mirkin diagnosed a lumbar strain and recommended light duty work that did not require climbing a ladder, bending, stooping, or carrying more than 25 pounds. The doctor also suggested work hardening.

18. On February 11, 2009, claimant returned to Dr. Mirkin. The doctor ordered a Functional Capacity Evaluation (FCE), which took place on February 17, 2009. The FCE indicated that claimant was capable of working on a full-time basis at a heavy demand level. Claimant indicated that after the FCE, he was "down" for two days.

19. At a follow-up visit on February 23, 2009, claimant described incapacitating back pain. He also indicated that he thought he was hurt in the work hardening program. Dr. Mirkin noted that claimant's perception of pain was inconsistent when viewed in conjunction with the FCE therapist's perception of claimant's physical function. Claimant indicated that he passed the FCE because he had to in order to keep his job.

20. Dr. Mirkin ordered a CT myelogram, which revealed no new pathology but confirmed protrusions that were not compressing the nerves. Dr. Mirkin indicated that the protrusions may or may not be related to the December 2009 injury.

21. On or about March 4, 2009, Dr. Mirkin released claimant as being at MMI and returned him to work at full duty without restrictions.

22. On or about March 25, 2009, just three weeks after his release, claimant reported acute symptoms in the low back after lifting and twisting at work. Claimant requested treatment, and the employer/insurer referred him to Dr. After Hours. Claimant indicated that his symptoms persisted, and he went to the emergency room at Phelps County Hospital. He was diagnosed with acute low back pain, prescribed Vicodin, and 3 days of bed rest.

23. Claimant's last day of work was March 26, 2009.

24. Dr. Mirkin saw claimant on April 1, 2009, for the purpose of an Independent Medical Examination. In his report, Dr. Mirkin indicates that the events on March 25, 2009, were at most a triggering or precipitating factor causing claimant's acute low back pain and trip to the emergency room. Dr. Mirkin did not relate this treatment to the December 2008 work injury. Dr. Mirkin ordered a repeat MRI.

25. In his report dated April 8, 2009, Dr. Mirkin noted his diagnosis remained low back pain with symptom magnification. He continued to believe that the claimant was at MMI. Based on claimant's subjective complaints, the doctor assigned a lifting restriction of 35 pounds and recommended that claimant avoid repetitive bending, stooping, and squatting. Dr. Mirkin opined that claimant had a permanent partial disability of 2% of the body as a whole referable to the lumbar spine as a result of the December 2009 injury. The doctor also concluded that claimant did not require additional medical treatment or medication to treat the December 2009 injury.

Other pre-existing injuries

26. While working for the employer, claimant sustained an injury by accident on or about December 23, 2003. The accident occurred when he was tearing down cubicles and a counter fell on him. He developed problems with his right shoulder. On or about April 14, 2004, claimant underwent surgery by Dr. Herbert Haupt. The surgery consisted of an intraarticular debridement of the shoulder with subacromial decompression and debridement of the subacromial space, excision of the coracoacromial ligament, acromioplasty and resection of the distal clavicle. After claimant recovered from the surgery, he returned to full-duty with the employer. At the hearing, claimant testified that

he continued to have problems with the shoulder when he did sheetrock work and working overhead. He indicated that his range of motion was limited; he had trouble reaching out in front of him and overhead. His shoulder would pop after the injury. He also had problems sleeping on his right ride.

27. After his 2003 shoulder injury, Dr. Shawn Berkin examined claimant in 2006. He concluded that claimant sustained a 40% permanent partial disability as a result of the December 2003 event. Dr. Berkin assigned permanent lifting restrictions for the right arm of no lifting greater than 25 pounds from floor to waist and no lifting greater than 15 pounds from waist to shoulder. He recommended claimant avoid lifting away from his body and overhead, and he continued the use of anti-inflammatory medication.

28. Claimant settled his 2003 claim for 25% permanent partial disability of the right shoulder. Claimant also alleged four subsequent injuries or aggravations to his right shoulder: June 2005; August 2005; November 2005; and January 2006. Claimant received a nominal settlement ($100) in each of the additional cases.

29. Claimant has a history of left inguinal hernia and an upper trapezius surgical repair in 2006. Claimant indicated that after his surgery and recovery period, his symptoms resolved and he denied any residual complaints.

Dr. Shawn Berkin – August 2009 Evaluation

30. Dr. Berkin performed an Independent Medical Evaluation on August 8, 2009. As to the 2007 work injury, Dr. Berkin diagnosed a cervical strain with right-sided radiculopathy, C5-6 herniation requiring discectomy and fusion, and a right shoulder strain. Dr. Berkin opined that the July 10, 2007 accident was the prevailing factor in these diagnoses. Dr. Berkin opined that claimant sustained a permanent partial disability of 40% of the cervical spine and 10% of the right shoulder. He also assigned a pre-existing permanent partial disability of 35% of the right shoulder for the 2003 injury. Dr. Berkin concluded that the combination of claimant's injuries is greater than the simple sum, and that a loading factor should be used.

31. Dr. Berkin did not explain why his 2006 report assigned a permanent partial disability (PPD) of 40% for the right shoulder and his 2009 report assigned this injury a 35% PPD.

32. Dr. Berkin recommended home exercises and the use of non-steroidal anti-inflammatory medication to control his neck symptoms. He assigned lifting restrictions of 35 pounds on an occasional basis and 25 pounds on a frequent basis. Dr. Berkin did not specify whether the restrictions are due to the shoulder, neck, or low back.

33. With regard to the right shoulder, Dr. Berkin directs that claimant should avoid lifting with his right arm extended away from his body and should avoid excessive lifting or working with his arms above shoulder level. These are the same restrictions he assigned to the right shoulder in his 2006 report. However, in the 2006 report, Dr. Berkin imposed a restriction of 25 pounds for lifting floor to waist and 15 pounds waist to shoulder.

34. In his deposition, Dr. Berkin indicates that the July 10, 2007 accident was the prevailing factor requiring medication management for the neck.[3] He opined that the December 9, 2008 incident is the prevailing factor in the need for medication management for the back.[4] As to the right shoulder, Dr. Berkin indicates that the prevailing factor in the need for medication management is the 2003 injury.[5]

35. As to the 2008 work injury, Dr. Berkin determined that claimant sustained a cervical strain, disc protrusion at L5-S1, and disc bulges at multiple levels. Dr. Berkin does not specifically assign restrictions to the lumbar spine relative to the December 2008 injury, but he does agree with the lifting restriction of 35 pounds assigned by Dr. Mirkin. Dr. Berkin opined that claimant has a permanent partial disability of 25% of the body as a whole referable to the lumbar spine. He recommended home exercises and the use of non-steroidal anti-inflammatory medication for the lumbar spine.

Tim Lalk – Vocational Evaluation

36. Claimant saw Tim Lalk, a vocational expert, on December 2, 2009. Based on the symptoms and limitations reported by the claimant, and the restrictions assigned by Dr. Berkin, Mr. Lalk did not believe that claimant could secure or maintain employment in the open labor market. In his deposition, Dr. Lalk explained that claimant's permanent and total disability is due to combination of his primary injury (2008) plus his pre-existing disabilities.[6]

Miscellaneous

37. Although claimant was not a perfect historian, becoming confused at times, he did testify to the best of his ability and he was a credible witness.

38. Claimant testified that he still has some occasional neck pain and limited range of motion, but his low back pain is his primary complaint. He takes Vicodin, which helps control his symptoms, and he uses a heating pad daily. He testified that he continues to receive pain medication through the VA.

39. Claimant is able to do his grocery shopping and cooking. He does his laundry and does some cleaning tasks. He is able to do some hunting, but he requires help and has considerable pain. He can ride in his john boat if he has help. The last time he walked the fields looking for arrowheads, he became dizzy and almost passed out.

[3] Claimant's Exh. V, p. 24.
[4] *Id*.
[5] *Id*.
[6] Claimant's Exh. T, p. 21-22.

CONCLUSIONS OF LAW

Based upon the findings of fact, I find the following:

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.[7] Proof is made only by competent and substantial evidence, and may not rest on speculation.[8] Medical causation not within lay understanding or experience requires expert medical evidence.[9] When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.[10] In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.[11]

Issue 1: Nature and extent of permanent partial or permanent total disability benefits
Issue 2: Liability of the Second Injury Fund

To be entitled to workers' compensation benefits, claimant has the burden of proving that the alleged injury was directly caused by the accident, that there is a causal connection between the accident and the compensable injury, and that the injury resulted in the disability claimed.[12] The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."[13]

An "injury" is defined to be "an injury which has arisen out of an in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."[14] An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.[15]

The fact finder is encumbered with determining the credibility of witnesses.[16] It is free to disregard that testimony which it does not hold credible.[17]

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[7] *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus*., 83 S.W.3d 581, 583 (Mo. App. 2002).
[8] *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).
[9] *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).
[10] *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).
[11] *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).
[12] *Kerns v. Midwest Conveyor*, 126 S.W.3d 445, 453 (Mo.App. W.D. 2004), *Rana v. Landstar TLC*, 46 S.W.3d 614, 622 (Mo.App. W.D. 2001).
[13] Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.
[14] Section 287.020.3(1).
[15] Section 287.020.3(c).
[16] *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo. App. E.D. 2008).

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.[18] The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.[19] A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.[20] It is the duty of the ALJ to weigh the medical evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.[21]

Section 287.020.7, RSMo, provides that "total disability" is 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.[22] The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.[23] The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.[24] 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.[25] 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.[26]

That is, Second Injury Fund liability exists only if the employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a disability greater than the simple sum of disabilities.[27] When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities.[28] In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as the result of the last compensable injury, and that the disability has combined with a prior permanent partial disability to result in total disability.[29] Where a pre-existing permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the disability resulting from the work-related injury.[30] In determining the extent of disability attributable to the employer and the

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[17] *Id*. at 908.
[18] *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587, 594-595 (Mo.App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo.App. S.D. 1999).
[19] *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo.App. W.D. 2001).
[20] *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo.App. E.D. 1998).
[21] *Rana* at 626.
[22] See also *Houston v. Roadway Express, Inc*., 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).
[23] *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).
[24] *Id*.
[25] Section 287.200.1, RSMo.
[26] *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).
[27] Section 287.220.1, RSMo.; *Anderson v. Emerson Elec. Co*., 698 S.W.2d 574, 576 (Mo. App. 1985).
[28] *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990).
[29] Section 287.220.1, RSMo.; *Brown* at 482; *Anderson* at 576.
[30] *Reiner v. Treasurer of State of Mo*., 837 S.W.2d 363, 366 (Mo. App. 1992).

Second Injury Fund, an administrative law judge must determine the extent of the compensable injury first.[31] If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made.[32] Therefore, it is necessary that the employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability.

I find that claimant was credible and persuasive. His appearance, attitude, and demeanor at the hearing were appropriate and he testified forthrightly and candidly, although he did have some difficulty remembering dates and details.

I find that as a result of the 2008 work injury, claimant sustained a permanent partial disability of 12.5% of the body as a whole referable to the lumbar spine (50 weeks). I also find that the claimant has the following pre-existing permanent partial disabilities: 25% of the body as a whole (cervical spine) and 30% of the right shoulder (5% from 2007 plus 25% from 2003). These pre-existing disabilities were each a hindrance or obstacle to claimant's employment or obtaining re-employment.

Taking into consideration the evidence as a whole, I find that the claimant is unable to compete for any employment on the open labor market and is permanently and totally disabled. I also find that claimant is permanently and totally disabled as a result of the primary injury *combined* with his pre-existing disabilities; therefore, the Second Injury Fund is liable for permanent and total disability benefits. In making this determination, I find the opinions of Dr. Berkin and Mr. Lalk to be credible and persuasive.

In addition, I find that claimant last worked on March 26, 2009, and that claimant's permanent total disability benefits should begin the following day, March 27, 2009, subject to an offset for the permanent partial disability benefits due from the employer/insurer. That is, the Fund is liable for a differential of $94.87/week for 50 weeks (a sum of $4,743.50) beginning March 27, 2009. At the conclusion of that 50-week period (i.e. beginning on March 13, 2010) and thereafter, the Fund is liable for permanent total disability benefits of $499.53/week for claimant's lifetime pursuant to statute.

Issue 3: Unpaid medical bills from Phelps County Regional ($551.85)
Issue 4: Unpaid medical bills / VA lien ($2,240.44)
Issue 5: Future medical care

Subsection 1 of RSMo Section 287.140 states, in pertinent part, as follows:

> In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability to cure and relieve from the effects of the injury.

[31] *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-743 (Mo.App. 1996).
[32] *Id.*

The employee need only show that he is likely to need additional treatment "as may reasonably be required . . . to cure and relieve . . . the effects of the injury . . . that flow from the accident [or disease]."[33] This has been interpreted to mean that an employee is entitled to compensation for care and treatment that gives comfort, i.e., relieves the employee's work-related injury, even though a cure or restoration to soundness is not possible, if the employee establishes a reasonable probability that he or she needs additional future medical care.[34] "Probable" means founded on reason and experience that inclines the mind to believe but leaves room for doubt.[35] Claimant need not show evidence of the specific nature of the treatment required, but only that treatment is going to be required.[36]

While the employer has the right to select the provider of medical and other services, this right may be waived by the employer if the employer, after notice of the injury, refuses or neglects to provide the necessary care.[37]

I find that the March 26, 2009 emergency room visit was related to the 2008 work injury. In addition, the emergency room visit was reasonable and necessary to cure and relieve claimant from the effects of the injury. Although there is no evidence that claimant request treatment or permission to go to the emergency room, the evidence does demonstrate that in this case, claimant's condition, including his pain, made the visit to the emergency room reasonable and necessary. I find that the employer is liable for the March 26, 2009 bill from Phelps County Regional, in the amount of $551.85.

However, the bills from the VA appear to include considerable treatment for numerous conditions unrelated to the 2008 work injury. Claimant has not provided competent or credible evidence to show that the treatment received by claimant at the VA was related to the work injury or that it was reasonable and necessary to cure and relieve the effects of the 2008 injury. In addition, claimant has not provided credible evidence that he even requested additional treatment before deciding to treat on his own at the VA. Claimant has failed to meet his burden on the issues of unpaid medical benefits from the VA.

As to future medical treatment, Dr. Berkin recommended that claimant use non-steroidal anti-inflammatory medical for control of claimant's "lower back, neck, and right shoulder pain."[38] Dr. Berkin is credible and convincing on this issue. I find that claimant is entitled to future medical care to relieve the affects of the 2008 injury.

[33] *Sullivan v. Masters and Jackson Paving*, 35 S.W.2d 879, 888 (Mo.App. 2001).
[34] *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo.App. W.D. 2001); *Boyles v. USA Rebar Placement, Inc*. 26 S.W.3d 418 (Mo.App. W.D. 2000).
[35] *Rana* at 622, citing *Sifferman v. Sears, Roebuck & Co*., 906 S.W.2d 823, 828 (Mo.App. 1995).
[36] *Aldredge v. Southern Missouri Gas*, 131 S.W. 3rd 786 at 833 (Mo. App. D. D. 2004).
[37] *Shores v. General Motors Corp*, 842 S.W.2d 929 (Mo.App. 1992).
[38] Claimant's Exh. U.

This Award is subject to a lien in the amount of 25% of the payments hereunder (excluding future medical treatment) in favor of Gary Matheny for necessary legal services rendered to the claimant.

Made by: _____

Vicky Ruth

Administrative Law Judge

Division of Workers' Compensation