

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

Injury No.: 10-060072

Employee: James Fonville  
Employer: Fulton State Hospital  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 28, 2016. The award and decision of Administrative Law Judge Robert J. Dierkes, issued April 28, 2016, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 14<sup>th</sup> day of September 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: **James Fonville**

Injury No. **10-060072**

Dependents:

Employer: **Fulton State Hospital**

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Additional Party: **Second Injury Fund**

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

Insurer: **Self-insured**

Hearing Date: **February 29, 2016**

Checked by: **RJD/njp**

### 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 30, 2010.**
5. State location where accident occurred or occupational disease was contracted: **Callaway 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? **Employer is self-insured.**
11. Describe work employee was doing and how accident occurred or occupational disease contracted: **Employee injured his neck and left shoulder restraining unruly clients and catching a client who was falling in a bathroom.**
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: **Left shoulder, cervical spine.**
14. Nature and extent of any permanent disability: **Permanent total disability**
15. Compensation paid to-date for temporary disability: **\$39,068.99.**
16. Value necessary medical aid paid to date by employer/insurer? **\$170,563.78.**
17. Value necessary medical aid not furnished by employer/insurer? **\$202.63.**

Employee: **James Fonville**

Injury No. **10-060072**

18. Employee's average weekly wages: **\$549.92.**
19. Weekly compensation rate: **\$366.60.**
20. Method wages computation: **Stipulation.**

#### **COMPENSATION PAYABLE**

Employer liability:

Employer is ordered to pay Claimant weekly permanent total disability benefits of \$366.60 per week beginning October 29, 2013 for Claimant's lifetime.

Employer is ordered to pay Claimant the additional sum of \$202.63 for reimbursement of prescription medication charges.

Employer is ordered to pay Claimant the sum of \$2,463.40 for additional mileage reimbursement.

Employer is also ordered to provide Claimant with future medical benefits to cure and relieve Claimant from the effects of the work-related injury, pursuant to Section 287.140. RSMo..

Second Injury Fund liability:

**None.**

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

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

**Van Camp Law Firm, LLC**

Employee: **James Fonville**

Injury No. **10-060072**

## **FINDINGS OF FACT AND RULINGS OF LAW**

Employee: **James Fonville**

Injury No. **10-060072**

Dependents:

Employer: **Fulton State Hospital**

Additional Party: **Second Injury Fund**

Insurer: **Self-insured**

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

### **ISSUES DECIDED**

An evidentiary hearing was held in this case in Jefferson City on February 29, 2016. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on March 25, 2016. Employee, James Fonville, appeared personally and by counsel, Elizabeth Skinner. Employer, Fulton State Hospital, appeared by counsel, Brian Herman, Assistant Attorney General. The Second Injury Fund appeared by counsel, Rachael Houser, Assistant Attorney General. The evidentiary hearing was held to decide the following issues:

1. The liability, if any, of Employer-Insurer for permanent partial disability benefits or permanent total disability benefits;
2. The liability, if any, of Employer-Insurer to provide future medical benefits pursuant to §287.140, RSMo;
3. The liability, if any, of Employer-Insurer to reimburse Employee for past medical expenses; and
4. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

### **STIPULATIONS**

The parties stipulated as follows:

1. The Division of Workers' Compensation has jurisdiction over this case;
2. Venue for the hearing is proper in Callaway County and adjoining counties, including Cole County;
3. The claim is not barred by Section 287.420 or Section 287.430, RSMo;
4. Both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. Employee sustained an accident arising out of and in the course of his employment with Fulton State Hospital on July 30, 2010;
6. The average weekly wage is \$549.92, with compensation rate of \$366.60;
7. Employer was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times;

Employee: **James Fonville**

Injury No. **10-060072**

8. Employer paid TTD benefits in the amount of \$39,068.99, representing 106 4/7 weeks of benefits, paid through October 28, 2013;
9. Employer-Insurer paid medical benefits in the amount of \$170,563.78; and
10. That the award shall include an order requiring Employer to pay the amount of \$2,463.40 for additional mileage reimbursement.

**EVIDENCE**

Claimant’s evidence consisted of the testimony of James Andrew Fonville (“Claimant”). Claimant also offered the following exhibits which were received into evidence:

1	Dr. David Volarich Reports Dated June 24, 2014 and August 17, 2015
2	Deposition and Report of Phillip Eldred
3	Callaway Community Hospital Records
4	Runde Occupational & Environmental Physicians Records
5	Advanced Radiology Records
6	Advanced Radiology Records
7	Select Physical Therapy Records
8	Peak Performance Records
9	Peak Performance Records
10	Columbia Orthopedic Group Records
11	Columbia Orthopedic Group Records
12	Neurology, Inc. Records
13	Neurology, Inc. Records
14	Family Health Center Records
15	Family Health Center Records
16	Pain Management Services Records
17	The Orthopedic Center of St. Louis/Dr. Lyndon Gross, M.D Records
18	David M. Peeples, M.D. Records
19	Mercy Hospital St. Louis Records
20	Aquatic Fitness Records
21	Barnes-Jewish Hospital Records
22	Parkcrest Orthopedics Records
23	Midwest Spine Surgeons Records
24	Boone Hospital Center Records
25	VCLF Expenses
26	VCLF Contingent Fee Agreement
27	List of prescription medication costs

Employer’s evidence consisted of the following exhibits which were offered and admitted into evidence:

Exhibit A	Reports of Dr. James J. Coyle, dated May 13, 2013 and November 26, 2013
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Employee: **James Fonville**

Injury No. **10-060072**

Exhibit B	Report of Dr. James P. Emanuel, dated November 8, 2013
Exhibit C	Certified Records Packets of the Missouri Department of Conservation
Exhibit D	Deposition of Michael J. Dreiling, dated August 26, 2015, with Exhibits
Exhibit E	Deposition of James Fonville dated February 4, 2015
Exhibit F	Surveillance Video Footage (DVD)

The Second Injury Fund offered no evidence.

### **DISCUSSION**

James Fonville (“Claimant”) was born May 20, 1964, and resides in Auxvasse, Missouri with his wife and two minor children. Claimant graduated from high school in 1982 and also received some training at a technical school in auto diesel mechanics. He attended a community college in the St. Louis area and received twelve credit hours in basic courses. Claimant’s work history includes twenty-six years in the automobile industry working at various dealerships in the Vienna, Missouri area and the St. Louis, Missouri area. He worked as a parts counterman and driver, which required him to control inventory, move stock, and work with individuals in the maintenance shop at the dealerships. He testified that he would have to stand, climb ladders, bend, stoop, and lift both light and heavy items. He became a GM Parts certified counterman during his work in the dealerships and had some supervisory roles.

Claimant left his employment in 2010 St. Louis due to medical reasons of high blood pressure which Claimant related to the stress of his employment. It was at that time that he moved to Auxvasse, Missouri. Claimant testified that he continues to take medication for his high blood pressure.

Claimant began working at Fulton State Hospital in April of 2010 as a forensic rehabilitation specialist. He testified that his job duties included maintenance of safety of the clients and attending to the needs of the clients. He would get specific orders from the nurse on duty, but the job duties generally involved sitting, standing and walking throughout the day, with the additional need to lift patients to assist them with daily needs of bathing and similar tasks.

On July 30, 2010, Claimant had been mandated to work a second shift and it was on that second shift of the day that the injury occurred. Claimant was assigned to a one-on-one medical assist with a client who was in a walking boot. Claimant had taken the client by wheelchair to the restroom. He was then required to stay within arms-length of the individual. While the client was urinating in the restroom, the client fell backwards towards Claimant. Claimant was able to catch the client with his left arm and get him back to a standing position. Claimant was able to get the client back into the wheelchair and back to his room, and Claimant lifted the patient onto the bed. Shortly thereafter, Claimant was relieved from his one-on-one assignment and went to the dayroom area. While there, a staff support was called due to a client that had created a disturbance earlier in the shift. Claimant assisted in that staff support and he and other colleagues were able to restrain the client. Claimant testified that the client was released from those restraints and tried to attack a physician which caused a third staff support for the client and

Employee: James Fonville

Injury No. 10-060072

necessitated the use of restraints again on the individual. Claimant testified that it was after that last staff support that he first had a chance to sit down and began to feel pain in his left shoulder and neck. Claimant reported the pain to his supervisor, the nurse on the ward, and completed paperwork at the end of his shift.

The next day Claimant had burning pain down his left arm and into his hand. He was sent to the emergency room and was diagnosed with left rotator cuff pathology and cervical radiculopathy. Claimant was seen and treated by occupational medicine physician Dr. Eddie Runde throughout August 2010. Physical therapy was ordered by Dr. Runde along with an MRI arthrogram of the shoulder. Dr. Runde opined on August 12, 2010, that no cervical injury would be expected and therefore, it was not indicated to be evaluated at that time. The MRI indicated tears in the rotator cuff. Claimant was referred at that time to orthopedics.

Claimant was first seen by Dr. William Quinn of Columbia Orthopaedic Group for left shoulder pain on August 31, 2010. Dr. Quinn agreed with the assessment of rotator cuff tear as shown on the MRI and scheduled Claimant for surgery. Dr. Quinn noted numbness that radiated down Claimant's arm in addition to the shoulder problem. On September 16, 2010, Dr. Quinn performed a tendinoplasty of the supraspinatus tendon, decompression, subacromial bursectomy, and arthroscopic rotator cuff repair of Claimant's left shoulder. Claimant continued to treat with Dr. Quinn post-operatively but continued to have shoulder complaints and continuing arm numbness. Neurodiagnostic testing completed on October 7, 2010 was normal. He was sent to Dr. John Miles, a spine surgeon, due to continuing neck pain. Dr. Miles noted some weakness in the muscles on the left side and ordered an MRI, which was read to show herniations at C6-7 and C5-6. A discectomy and fusion at C6-7 was performed on April 20, 2011.

In August, 2011, with continuing pain in the left shoulder and numbness and tingling in the arm, Dr. Miles notes that Claimant had not responded to the fusion and opined that the smaller herniation at the C5-6 level may have progressed to cause him problems. A second MRI on August 26, 2011, showed a right paracentral disc protrusion abutting the spinal cord at C5-6. At that time, Dr. Miles ordered repeat neurodiagnostic testing, selective nerve root block at C5-6 and a return for shoulder evaluation with Dr. Quinn. The testing was done on October 20, 2011 and was positive for evidence of active and chronic denervation of the left supraspinatus muscle and a possible left C5 radiculopathy. Dr. Quinn noted continuing weakness in the shoulder but did not think further surgery would be in his best interest. Instead, he believed that the complaints were more radicular in nature. Dr. Miles ordered a CT myelogram then recommended a second cervical surgery for total disc arthroplasty of the C5-6 disc in January 2012.

Following that recommendation, Claimant was sent to Dr. James Coyle, a St. Louis-area spine surgeon, for a second opinion on February 14, 2012. At that time Claimant was continuing to have problems on the left side and was beginning to develop pain on the right side as well. The medical history form completed by Claimant noted symptoms of pain in the left lower extremity along with the pain in the neck, low back, left arm and shoulder. Dr. Coyle noted tenderness and pain of the cervical spine, limited range of motion of the arm, numbness and trace weakness on the left side. Dr. Coyle opined that a portion of the symptoms were coming from the shoulder, but that Claimant also had impingement at both C5-6 and C6-7. Dr. Coyle requested that a shoulder evaluation be completed before any further treatment on the neck.

Employee: James Fonville

Injury No. 10-060072

On March 1, 2012, Claimant was evaluated by Dr. Lyndon Gross for his left shoulder complaints. Dr. Gross noted positive rotator cuff pathology but that it overlapped with positive signs of cervical radiculopathy. He recommended conservative care for the shoulder and deferred to Dr. Coyle for management of the cervical complaints. Dr. Coyle then recommended additional testing and injections. Those selective nerve root injections were performed on April 9, 2012 and repeated two weeks later. Repeat EMG testing with Dr. Peebles revealed bilateral chronic C6-7 radiculopathies with minimal acute denervation on the left, with the C6 level being more prominent.

Dr. Coyle took Claimant to surgery for a second cervical fusion on August 30, 2012, with the procedures including removal of instrumentation at C6-7, discectomy and arthrodesis at C5-6, and placement of anterior cervical plate. During the hours following that surgery, Claimant developed left upper and lower extremity profound weakness. CT scans and MRI testing was completed and he was admitted into the ICU. A neurology consult was obtained with Dr. Lee, who noted that the examination was consistent with a myelopathic pattern and deferred to Dr. Coyle for treatment and care of the myelopathic injury. He was able to ambulate by day two and on September 3, 2012, he was discharged to home with a cane and residual weakness on the left side.

Dr. Coyle noted post-operatively that Claimant was healing well and that the postoperative weakness had resolved. Aquatic therapy was initiated and Claimant reported minimal improvement in the upper extremity symptoms since the surgery, pain in his back since removing the neck brace, and weakness and pain in his left lower extremity since the surgery. Claimant also expressed complaints of low back pain and left lower extremity pain to Dr. Coyle who thought such was unrelated to his cervical spine. On October 18, 2012, Claimant was again seen for his left shoulder by Dr. Gross who noted atrophy of the supraspinatus musculature and continuing provocative rotator cuff pathology. Dr. Gross stated that he was unsure of what to do for the problem, recommended observation of the continued shoulder complaints, and placed Claimant at maximum medical improvement for that condition. Claimant continued to treat with Dr. Coyle for his cervical spine and was placed at maximum medical improvement on February 20, 2013. Dr. Coyle opined in later correspondence that Claimant was rated at a combined twenty percent for the two cervical surgeries and injury he sustained on July 30, 2010.

On February 25, 2013, Claimant was sent for an evaluation of his shoulder with Dr. James Emanuel. An injection was provided and surgery was recommended at the following visit. On April 3, 2013, Claimant underwent a revision rotator cuff repair of a 3.5 cm tear, subacromial decompression and distal clavicle resection. He continued to treat with Dr. Emanuel following that surgery, and medical records document improvement following the surgery but continuing pain and limited motion. On October 7, 2013, a catching sensation and gradually progressing pain was noted by Claimant. Dr. Emanuel recommended an ultrasound which showed continued evidence of fatty atrophy of the rotator cuff muscle groups. He was placed at maximum medical improvement by Dr. Emanuel on October 28, 2013, with permanent restrictions of no lifting greater than 15 pounds from floor to waist, 10 pounds from waist to shoulder, and no lifting of any weight above shoulder height. He was again seen by Dr. Coyle on November 26, 2013, who noted approximately 70 percent of cervical rotation and pain on the left side of his cervical spine and extending over the trapezius. He remained at maximum medical improvement and had no restrictions for the cervical spine.

Employee: James Fonville

Injury No. 10-060072

Claimant testified that he continues to have pain in his neck, left shoulder, left leg and back. He testified that each day is different, but a bad day involves pain in his neck of an eight or nine on a 10-point pain scale and pain in his shoulder of a seven. He continues to get pain of a “pins and needles” sensation in his fingers. On a good day the pain is still a five to six in his neck and a four in his shoulder. He testified that he has more bad days than good days and that the pain intensity he described was with the utilization of medication. He notes that his activity affects his pain in his neck and arm and that he gets migraine-like headaches when the pain in his neck is bad.

He described the pain in his neck as a sharp dagger stabbing him through the neck. As to the pain in the shoulder, he testified that it was a constant ache, but changes to a sharp, shooting pain when he raises his arm or if his arm or shoulder is grabbed. Claimant testified that he has continued to have weakness and numbness in the back of his left leg, into his calf and foot. He has a “pins and needles” sensation in his foot that he testified has been present since the second cervical fusion. He stated that it does cause him pain and causes him to limp. He has low back pain that he testified is a five out of ten in intensity.

Claimant testified that he takes several medications to help with the pain and “pins and needles” sensations. He had been receiving medications from his treating physicians until he was placed at maximum medical improvement. After that time, he obtained the medications from his primary care physician as he was able. The pain medications make his symptoms more tolerable but cause him to be drowsy during the day.

Claimant testified that his daily activities have changed as a result of this injury. He testified that he now gets about four to six hours of sleep on a good night, coming in increments of two hours. He testified that he was diagnosed with sleep apnea prior to the injury and continues to use a CPAP machine. He testified that it is harder to find a comfortable position when sleeping and that is further limited by the CPAP machine. He is able to dress himself, but it takes much longer than before because of his neck and left arm. He lies down several times per day which takes the stress off of his shoulder and neck. He will also nap in the afternoon as the pain medication makes him very tired. Claimant testified that he changes position from sitting to standing due to pain. He reported that he can sit for about 30 minutes, but it depends on the pain he has that day and the type of chair he’s sitting in. He testified that it is hard to continuously walk or stand, but that he can do both for longer periods of time if he can alternate activities. He is able to kneel and squat, but testified that it causes him pain and he is slower than before the accident. He has not tried running.

Claimant testified that he will typically wake up around eight in the morning and will have cereal or whatever food his wife has left for him. He will check the news and then spend time organizing and paying bills. He stated that this task can occupy several hours of his time as he must organize the bills by date and often has to reorganize them as he makes mistakes. He testified that this is something that used to take very little time, but that the medication makes it harder to concentrate. He will lie down in the morning. He will fix a sandwich or other easily prepared food for lunch and will lie down again in the afternoon and often will fall asleep due to being tired from lack of sleep and the side effects of the medication. On a good day, he will do some light housework such as putting a few dishes into the dishwasher. His minor daughter is otherwise responsible for the household chores. He will walk the 30 to 35 yards to the mailbox

Employee: James Fonville

Injury No. 10-060072

and back to get the mail in the afternoon. He tries to continue to do the stretches as taught to him by the physical therapist, including pulleys, ball-rolls, and “walking the wall” to try to maintain his mobility in the left shoulder and therefore, he will try to raise his arm as high or as far out as he can when doing these activities.

Claimant testified that he will leave the house to go to doctor appointments or to take the children to their activities if his wife is working. He relies on friends and family to do the yardwork and will now pay others to do the maintenance on the family’s vehicles. These were tasks that he completed on his own before the injury. He testified that he does at times accompany his wife and children when they go to flea markets but spends much of that time sitting or reclining in the car.

When asked about returning to work, Claimant testified that he did not think he was capable of working. He testified that the pain medication and lack of sleep often makes his head cloudy. He has more bad times than good, and it changes throughout the day. He uses a heating pad and ice to get through the day and it is hard to function with just the limited tasks that he accomplishes.

Claimant testified that he had not had prior problems with his neck, shoulder, back or leg and had not sustained prior injuries. He had been diagnosed with sleep apnea and high blood pressure prior to the July 30, 2010 injury and continued to receive medical care and attention for those conditions. The sleep apnea required him to use a CPAP machine during the night and he had typically awakened once during the night. For the high blood pressure, he continued on medication that helped to control the condition. Claimant testified that he left prior employment due to the high blood pressure and testified that he did not feel he could return to that type of employment.

Claimant was evaluated by Dr. David Volarich on June 24, 2014. Dr. Volarich opined that the injury occurring on July 30, 2010 was the prevailing factor causing the internal derangement in the left shoulder that required two separate surgical repairs, as well as causing the cervical radiculopathy that required two separate cervical fusions. Dr. Volarich gave a diagnosis from the injury of July 30, 2010 of left shoulder internal derangement, persistent left shoulder internal derangement, cervical left arm radiculopathy secondary to disc herniation at C6-7, persistent cervical left arm radiculopathy secondary to adjacent level disc herniation at C5-6, left upper and lower extremity hemiplegia/paresis secondary to acute cord syndrome with mild residual weakness of the left extremities, and back pain secondary to abnormal weight bearing due to the left lower extremity weakness. Dr. Volarich opined that Claimant sustained a 50% permanent partial disability of the left shoulder, a 65% permanent partial disability of the body as a whole rated at the cervical spine, and 15% permanent partial disability of the body as a whole rated at the lumbar spine, all as a result of the work injury of July 30, 2010. Dr. Volarich also opined that Claimant is unable to engage in any substantial gainful activity, and that Claimant is permanently and totally disabled as a direct result of the July 30, 2010 injury alone.

Employee: **James Fonville**

Injury No. **10-060072**

Dr. Volarich provided work restrictions. Specifically, he restricted Claimant's activity as follows:

Spine:

1. He was advised to avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing, and other similar tasks;
2. He should not handle weight any greater than 10-15 pounds, and limit the task to an occasional basis with proper lifting techniques;
3. He should not handle weight overhead or away from his body, nor should he carry weight over long distances or uneven terrain;
4. He is advised to avoid remaining in a fixed position for any more than about 30 minutes at a time, including sitting and standing, and he should change positions frequently to maximize comfort and rest when needed, including in a recumbent fashion; and
5. He was advised to pursue an appropriate stretching, strengthening and range of motion exercise program in addition to non-impact aerobic conditioning program.

Left Shoulder:

1. He should avoid all overhead use of the left arm and prolonged use of the left arm away from the body, especially above chest level;
2. He should minimize pushing, pulling, and particularly traction maneuvers with the left upper extremity;
3. He should not handle weights greater than about two to three pounds with the left arm extended away from the body or overhead, and limit those tasks as tolerated;
4. He can handle weight to tolerance with the left arm dependent, assuming proper lifting techniques, but generally recommended 10 to 15 pounds with the left arm alone; and
5. He was advised to pursue an appropriate stretching, strengthening, and range of motion exercise program daily for the left shoulder to tolerance.

Dr. Volarich recommended ongoing care for Claimant's pain symptoms, including medications, physical therapy, and similar treatments. He also noted that Claimant was taking Tramadol, Neurontin, and occasionally Tylenol and Percocet. He noted that if symptoms worsened, then injections, TENS units and other treatments will be needed to control those symptoms. He also noted that the orthopedic fixating hardware in the neck may need to be removed or replaced in the future, though surgery was not indicated at the time of the evaluation.

Claimant was evaluated by vocational counselor Phillip Eldred on June 10, 2015. Mr. Eldred observed that Claimant was friendly and personable, but alternated sitting and standing during the evaluation. Mr. Eldred noted that Claimant had graduated high school in 1982 and had some college coursework and vocational training, along with certification through his employment. The Wide Range Achievement Test was completed and showed that Claimant was between the 32nd and 50th percentiles for individuals of his age group. Claimant was asked to complete the Purdue pegboard which tests dexterity of his hands and arms, but was unable to complete the test due to the inability to extend his left arm far enough. Mr. Eldred noted the pre-

Employee: James Fonville

Injury No. 10-060072

existing conditions and impairments but found that they did not constitute a hindrance or obstacle to his employment. Mr. Eldred opined that Claimant is unable to return to any of his past work and did not have transferable job skills for the sedentary work level, even if he could perform work at that level. He also noted that there were no jobs available for which he had training potential if he could perform at a sedentary level. Mr. Eldred found that Claimant was unemployable in the open labor market and permanently and totally disabled as a result of the injury of July 30, 2010 injury, in isolation.

Claimant was evaluated by vocational counselor Michael Dreiling on April 30, 2015. Mr. Dreiling noted that Claimant is a 51 year old gentleman with some limited education and training in the automotive industry, limited or basic computer skills, and no typing skills. Claimant was administered aptitude testing which showed average abilities and was consistent with the individual's work background. As to retraining, Mr. Dreiling suggested that he would be able to learn new skills but recommended a shorter-term training objective given Claimant's age. He also stated that Claimant would be unlikely to physically tolerate further retraining activities based upon his description of his difficulties on a daily basis.

Mr. Dreiling stated that if one were to assume the restrictions of Drs. Coyle and Emanuel, then Claimant would be able to perform lighter work. However, based upon the daily functioning level that Claimant described along with the restrictions of Dr. Volarich, Mr. Dreiling opined that Claimant would not be able to return to any type of work in the open labor market.

When asked on cross-examination if he knew of any employment that Claimant was able to do at the present time, Mr. Dreiling said he did not. Mr. Dreiling also agreed on cross-examination that if Claimant was unable to be employed in the open labor market, that would be as a result of his last injury alone.

Claimant alleges permanent total disability, and is seeking weekly permanent total disability benefits from Employer, or, alternatively, 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 the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo.App. E.D. 2007). The primary inquiry is whether an employer can reasonably be expected to hire the claimant, given his present physical condition, and reasonably expect the claimant to successfully perform the work. *Id.*

Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that constitutes a hindrance or obstacle to employment or re-employment, that combines with a compensable injury to create a disability greater than the simple sums of disabilities. § 287.220.1 RSMo 2000; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576, (Mo.App.E.D. 1985). 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. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990). In order to find permanent total disability against the Second Injury Fund, it is necessary that Employee suffer from a permanent partial disability as a result of the last compensable injury, and that

Employee: James Fonville

Injury No. 10-060072

disability has combined with prior permanent partial disability(ies) to result in total disability. 287.220.1 RSMo 1994, *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990), *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo.App. 1985). Where preexisting 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. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 366 (Mo.App. 1992) (emphasis added). In determining the extent of disability attributable to the employer and the Second Injury Fund, an Administrative Law Judge must determine the extent of the compensable injury first. *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-43 (Mo.App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is, therefore, 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, thereby alleviating any Second Injury Fund liability.

The medical evidence and the vocational evidence make a very strong case for permanent total disability in this case. There are, however, some issues regarding Claimant's credibility that need to be addressed. The first is in regard to Claimant's hunting records. Claimant testified that he was an avid deer hunter prior to the work injury of July 30, 2010. Claimant testified that he has not hunted since 2009 when he shot an eleven point buck, which is mounted and hanging on the wall in his home. Records from the Department of Conservation show that deer were "telechecked" in Claimant's name from November 2010 to November 2014. Claimant vehemently denies that he shot deer after 2009, and he testified that after he became aware of the Department of Conservation records, he contacted the Department of Conservation and requested that his file be closed "due to concern that someone else was using his information". I find it nearly impossible to believe that the Conservation records are incorrect. Therefore, I find it likely that either Claimant did hunt deer from 2010-2014, or Claimant allowed others to use his information to harvest additional deer, or some combination of the two. I find it most likely that Claimant did not hunt, but rather allowed others to use his information, which practice is unlawful. While the Conservation records do not prove that Claimant hunted deer after 2009 (and I find it unlikely that he did), Claimant's allowing others to use his information unlawfully does shed doubt on Claimant's credibility.

The second issue regarding Claimant's credibility has to do with the surveillance video. The video shows Claimant doing various activities with his family on two Saturdays in March 2015. I have reviewed the video in depth. Regarding Claimant's activities on March 21, 2015, I observed nothing that was inconsistent with Claimant's testimony or the medical evidence. Regarding Claimant's activities on March 28, 2015, there was a sequence between 2:58 PM and 3:17 PM during which Claimant, at a car wash, squats repeatedly, and bends over at the waist. I observed 9 periods of squatting/kneeling and 4 periods of bending over into the car to vacuum. This sequence does appear to be inconsistent with Claimant's testimony and Dr. Volarich's restrictions regarding the low back/lumbar spine (notwithstanding Claimant's testimony that he was having a "very good day" when the video was taken). While I am not suggesting that the squatting and bending shown on the video are proof that Claimant can compete in the open labor

Employee: **James Fonville**

Injury No. **10-060072**

market, Claimant's lack of complete truthfulness regarding his ability to squat and bend does shed some additional doubt upon Claimant's credibility.

While Claimant's lack of complete truthfulness with the tribunal is deplorable, it does not change the fact that Claimant has sustained devastating injuries to his neck and left shoulder. While Claimant's actions on the video suggest that his low back injury is not as disabling as the remaining evidence would suggest, the low back symptoms are only a very small part of the disability equation under any circumstances. I note that none of Claimant's actions on the video suggest that his neck and left shoulder conditions are not significantly disabling. In spite of the credibility issue, the evidence of total disability is overwhelming. Even the testimony of Employer's vocational expert suggests total disability.

I find, therefore, that Claimant is permanently and totally disabled. The evidence is clear that Claimant's permanent total disability is as a result of the work injury of July 30, 2010, considered in isolation. Therefore, the Second Injury Fund has no liability in this case.

Claimant is also requesting an award of future medical benefits pursuant to §287.140.1, which reads:

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.

Treatment must be provided even if while comforting and relieving the claimant's pain, the underlying condition cannot be cured. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271 (Mo. App. 1996).

The threshold for determining if additional treatment is needed is reasonable probability. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986). Section 287.140.1, RSMo. does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992). Further, the employer/insurer may be ordered to provide medical treatment to cure and relieve a claimant from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. *Hall v. Spot Martin*, 304 S.W.2d 844, 854-55 (Mo. 1957).

Additional medical treatment is required to continue to cure and relieve the effects of Claimant's work-related injuries. Drs. Coyle and Emanuel each provided Claimant with ongoing medication until the time that they placed him at maximum medical improvement. Thereafter, Claimant has obtained that medication (as able) through his own physicians. Although Claimant testified that he continues to have pain with the medication, that pain is more tolerable. Dr. Volarich opined that such medication and other treatments are necessary to cure and relieve the effects of Claimant's injury.

Employee: **James Fonville**

Injury No. **10-060072**

Claimant is asking for reimbursement for costs of prescription medications in the amount of \$202.63. As noted above, Claimant has proven a continuing need of such medication. Claimant had made demand upon Employer to provide him with continuing medication, but Employer has not done so. Employer is ordered to reimburse Claimant for the cost of the medication.

### **FINDINGS OF FACT AND RULINGS OF LAW**

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

1. The work accident of July 30, 2010 was the prevailing factor in causing injury to Claimant's cervical spine and left shoulder.
2. The injury to Claimant's cervical spine, caused by the work accident of July 30, 2010, necessitated medical treatment, including surgeries.
3. On April 20, 2011, Dr. John Miles performed surgery on Claimant's cervical spine, including a discectomy and fusion at C6-7. Dr. James Coyle performed surgery on Claimant's cervical spine on August 30, 2012, consisting of removal of instrumentation at C6-7, discectomy and arthrodesis at C5-6, and placement of anterior cervical plate.
4. During the hours following the August 30, 2012 surgery, Claimant developed left upper and lower extremity profound weakness. CT scans and MRI testing was completed and Claimant was admitted into the ICU. A neurology consult was obtained with Dr. Lee, who noted that the examination was consistent with a myelopathic pattern and deferred to Dr. Coyle for treatment and care of the myelopathic injury. He was able to ambulate by day two and on September 3, 2012, he was discharged to home with a cane and residual weakness on the left side.
5. The injury to Claimant's left shoulder, caused by the work accident of July 30, 2010, necessitated medical treatment, including surgeries.
6. On September 16, 2010, Dr. William Quinn performed a tendinoplasty of the supraspinatus tendon, decompression, subacromial bursectomy, and arthroscopic rotator cuff repair of Claimant's left shoulder.
7. On April 3, 2013, Dr. James Emanuel performed a revision rotator cuff repair of a 3.5 cm tear, subacromial decompression and distal clavicle resection on Claimant's left shoulder.
8. Claimant is unable to compete in the open market for employment.
9. Claimant is permanently and totally disabled.
10. The injuries sustained by Claimant in the July 30, 2010 accident, considered alone, have rendered Claimant permanently and totally disabled.
11. Employer is responsible for the payment of permanent total disability benefits in the weekly amount of \$366.60 beginning October 29, 2013.
12. Claimant has met his burden of proof regarding the need for future medical treatment.
13. Employer has a continuing duty, pursuant to §287.140, RSMo, to provide Claimant with medical care and treatment to cure and relieve him from the effects of the work-related cervical spine injury.

Employee: James Fonville

Injury No. 10-060072

14. The Second Injury Fund has no liability in this case.
15. Employer is responsible for reimbursing Claimant for prescription medication costs in the amount of \$202.63.

### **ORDER**

Employer is ordered to pay Claimant weekly permanent total disability benefits of \$366.60 per week, beginning October 29, 2013, for Claimant's lifetime.

Employer is ordered to pay Claimant the additional sum of \$202.63 for reimbursement of prescription medication charges. Employer is ordered to pay Claimant the sum of \$2,463.40 for additional mileage reimbursement. Employer is also ordered to provide Claimant with future medical care as required by Section 287.140, RSMo.

The claim for compensation against the Second Injury Fund is denied in full.

Claimant's attorney, Van Camp Law Firm, LLC, is allowed 25% of the benefits awarded herein, including future permanent total disability benefits, 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.

Made by /s/Robert J. Dierkes 4/28/16  
Robert J. Dierkes  
Chief Administrative Law Judge  
*Division of Workers' Compensation*