

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

Injury No.: 11-107851

Employee: Francis Garrett

Employer: Hannibal Board of Public Works

Insurer: Missouri Intergovernmental Risk Management Association

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

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to determine the following issues: (1) medical causation of the injuries alleged; (2) the liability of the employer for temporary disability benefits from February 12, 2012, through October 4, 2013; (3) nature and extent of permanent disability; (4) future medical care; and (5) the liability of the Second Injury Fund.

The administrative law judge determined as follows: (1) employee has sustained his burden of proof that he sustained a compensable accident and that he injured his back as the result of that accident of September 1, 2011; (2) employee has sustained his burden of proof that he is permanently and totally disabled as a result of the September 1, 2011, accident and injury; (3) employee has sustained his burden of proof that he is entitled to temporary total disability benefits from February 12, 2012, through October 4, 2013; (4) employee has sustained his burden of proof with regard to future medical treatment; and (5) employee has failed to sustain his burden of proof of Second Injury Fund liability where the evidence points to employee's September 1, 2011, accident and injury as the cause of his permanent and total disability.

Employer filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in concluding that employer is liable for permanent and total disability benefits; (2) in concluding employer is liable for temporary total disability benefits from February 12, 2012, through October 4, 2013; and (3) in concluding that employee is entitled to open future medical care and treatment to relieve and cure him of work-related injuries.

For the reasons stated below, we modify the award of the administrative law judge referable to the issues of: (1) the nature and extent of disability; and (2) the liability of the Second Injury Fund.

Discussion

Nature and extent of disability

The administrative law judge determined that employee is permanently and totally disabled as a result of the effects of the last work injury of September 1, 2011, considered alone, because employee was able to work prior to suffering that injury. We disagree. We find that the last work injury did not, in isolation, render employee permanently and totally disabled, for the following reasons.

None of the medical experts to testify in this matter offered any opinion that employee is permanently and totally disabled as a result of the effects of the September 2011 injury considered alone. Instead, Dr. Volarich testified that employee suffered a 25% permanent partial disability of the body as a whole referable to the lumbar spine as a result of the September 2011 accident, and that if employee is now unable to compete in the open labor market, it is due to a combination of the September 2011 injury with employee's preexisting disabling conditions, including preexisting chronic low back pain and an acute October 2010 low back injury which Dr. Volarich rated, altogether, at 25% permanent partial disability of the body as a whole referable to the lumbar spine, and coronary artery disease which Dr. Volarich rated at 20% permanent partial disability of the body as a whole.

Meanwhile, employer's evaluating expert, Dr. Coyle, rated 10% permanent partial disability of the body as a whole referable to the September 2011 injury, and believes employee is capable, in any event, of working. Meanwhile, the treating physician Dr. Abernathie did not provide a rating for the September 2011 injury or specifically address the question whether employee is permanently and totally disabled.

Nor do we read the expert vocational opinions in this matter as providing persuasive support for a finding that the September 2011 injury caused, in isolation, permanent and total disability. Employee's vocational expert, Stephen Dolan, offered the generalized opinion that employee is unable to compete for work in the open labor market based on his age, education, academic skills, work history, and the restrictions from Dr. Volarich. The Second Injury Fund argues that Mr. Dolan assigned permanent total disability to the effects of the September 2011 injury, because he opined at his deposition that he only considered the restrictions Dr. Volarich assigned with regard to the September 2011 injury in isolation. But Dr. Volarich did not assign any restrictions to the September 2011 injury "in isolation," instead, his report specifically describes those restrictions "[w]ith regard to work and other activities referable to the spine after 9/1/11[.]" *Transcript*, page 169.

Meanwhile, employer's vocational expert, James England, *specifically* declared in his report that if employee is permanently and totally disabled, it would be as a result of the combination of his two low back injuries and preexisting problems, rather than the September 2011 injury considered alone. Yet, the Second Injury Fund argues that Mr. England actually assigned permanent total disability to the September 2011 injury when he opined at his deposition (and credibly so) that employers would be unlikely to hire employee if he has to lie down throughout the day to relieve low back pain. But, critically, there is no evidence on this record to establish that such need is specifically referable to the effects of the September 2011 injury considered in isolation. That employee didn't begin lying down during the day to relieve low back pain until *after* the September 2011

injury does not, alone, compel a finding that the last injury *caused* that need. Such an analysis improperly confuses chronology with causality, as our courts have specifically cautioned against. See *Royal v. Advantica Rest. Group, Inc.*, 194 S.W.3d 371, 377 (Mo. App. 2006).

After careful consideration, the credible evidence suggests to us (and we so find) that employee's need to recline during the day is owing to a combination of the September 2011 injury and the preexisting and significantly compromised condition of employee's low back. Dr. Volarich explained how the September 2011 and October 2010 injuries combine with one another:

When we look at the back, the first injury caused radiating pain more to the right lower extremity. The second one added the other lower extremity, so we had bilateral opposing legs with neurogenic, discogenic pain. Each one of them contributed more problems with motion in the low back.

Transcript, page 121.

The Second Injury Fund further argues that because employee was returned to extremely heavy work duties without restriction following the October 2010 low back work injury, this compels a finding that employee did not actually suffer any permanent partial disability referable to that injury. We are not persuaded, for several reasons. First, the Second Injury Fund ignores the uncontested opinions from Drs. Volarich and Coyle that employee did suffer permanent disability referable to the October 2010 low back injury. Second, and as discussed in more detail below, the crucial inquiry for Second Injury Fund purposes is the *potential* for a preexisting disability to combine with a subsequent work injury, not whether the preexisting disability caused difficulty in the past. Third, the mere fact that employee was returned to heavy duty work without restrictions is not, standing alone, sufficient to compel a finding the employee did not suffer permanent disability referable to the October 2010 low back injury.

In our view, the fact that employee suffered a subsequent low back injury mere months after his return to heavy duty work calls into question the wisdom of relying on a one-day functional capacity evaluation to determine that it was safe for employee to return to unrestricted duties. Obviously, employee was eager to return to work, and employer's treating physicians were equally eager to help him accomplish this goal. In hindsight, however, and as credibly explained by Dr. Volarich, employee probably should have been working restricted duty after the October 2010 work injury if he hoped to avoid a further, and more disabling, injury to his low back.

Ultimately, we find Dr. Volarich's explanation and opinions most persuasive with respect to this issue. We find that the September 2011 injury resulted in a 20% permanent partial disability of the body as a whole referable to lumbar discogenic pain syndrome secondary to micro-trauma causing aggravation/progression of preexisting degenerative disc disease and degenerative joint disease. We find that employee is rendered permanently and totally disabled owing to a combination of the September 2011 injury and his preexisting conditions of ill-being.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

At the time of the September 2011 injury, employee suffered from preexisting conditions of ill-being including coronary artery disease and lumbar discogenic pain syndrome. We deem persuasive, and hereby adopt as our own, Dr. Volarich's opinion that employee suffered permanent partial disability with regard to these preexisting conditions; we note also that with regard to the October 2010 injury, the administrative law judge's award in Injury No. 10-089705 finding employee suffered 15% permanent partial disability of the body as a whole is now final.

Further, after careful consideration, we are convinced that employee's preexisting disabling conditions were serious enough to constitute hindrances or obstacles to employment. This is because we are convinced employee's preexisting conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of these preexisting conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Fund liability for PTD under Section 287.220.1 occurs when [the employee] establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. For [the employee] to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.

Lewis v. Treasurer of Mo., 435 S.W.3d 144, 157 (Mo. App. 2014).

Section 287.220 requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Id.*

We have found that the last injury resulted in a 20% permanent partial disability of the body as a whole referable to the lumbar spine; we find that this injury did not render employee permanently and totally disabled in isolation. We have credited the expert medical opinion from Dr. Volarich that employee is unable to compete for work in the open labor market as a result of the primary injury in combination with his preexisting disabling conditions. We conclude, therefore, that the Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issues of (1) the nature and extent of disability; and (2) the liability of the Second Injury Fund.

Employer is not liable for permanent total disability benefits. Instead, employer is liable for a total of \$34,015.20 in permanent partial disability benefits.

The Second Injury Fund is liable for weekly permanent total disability benefits beginning on the date of maximum medical improvement, October 25, 2013, at the differential rate of \$386.54 for 80 weeks, and thereafter at the weekly permanent total disability rate of \$811.73. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued February 4, 2016, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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

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

Given at Jefferson City, State of Missouri, this 13th day of September 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Francis Garrett

Injury No.: 11-107851

Dependents: N/A

Employer: Hannibal Board of Public Works

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Treasurer of the State of Missouri
Custodian of the Second Injury Fund

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

Insurer: Missouri Intergovernmental Risk Management Association

Hearing Date: January 5, 2016

Checked by: HDF/scb

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: September 1, 2011
5. State location where accident occurred or occupational disease was contracted: Marion County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
See Award
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: Permanent and total disability as of October 25, 2013
15. Compensation paid to-date for temporary disability: \$2,462.02
16. Value necessary medical aid paid to date by employer/insurer? \$4,472.88

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17. Value necessary medical aid not furnished by employer/insurer? Future medical treatment awarded
18. Employee's average weekly wages: ----
19. Weekly compensation rate: \$425.19/ \$811.73
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: Temporary total disability - \$69,576.86
Permanent total disability as of October 25, 2013
22. Second Injury Fund liability: No
23. Future Requirements Awarded: Future medical

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

The compensation awarded to 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: Dean Christianson.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Francis Garrett

Injury No: 11-107851

Dependents: Dependent Name

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Hannibal Board of Public Works

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

Additional Party: N/A

Insurer: Missouri Intergovernmental Risk Management Association

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on January 5, 2016. Memoranda were filed by January 22, 2016.

The parties stipulated that on or about September 1, 2011, the claimant, Francis Garrett, was in the employment of the Hannibal Board of Public Works. Mr. Garrett sustained an injury by accident; the accident arose out of and in the course of employment. The employer was operating under the provisions of the Missouri Workers' Compensation law. The employer's liability for workers' compensation was insured by the Missouri Intergovernmental Risk Management Association. The employer had notice of the injury. A claim for compensation was timely filed. The compensation rate for temporary and permanent total disability benefits is \$811.73 per week; the compensation rate for permanent partial disability benefits is \$425.19 per week. Temporary disability benefits have been paid in the amount of \$2,462.02, paid from October 4, 2013, through October 25, 2013. Medical aid has been provided in the amount of \$4,472.88.

The issues to be resolved by hearing include 1) medical causation, 2) the liability of the employer/insurer for temporary disability benefits from February 12, 2012, through October 4, 2013, 3) nature and extent of permanent disability (permanent total disability is alleged as of October 25, 2013), 4) the liability of the employer/insurer for future medical treatment, and 5) the liability of the Second Injury Fund.

FACTS

The claimant, Francis Leslie Garrett, was born in 1959, and started his work with the Hannibal Board of Public Works (Hannibal BPW) in 1998; his last date of work there was on February 10, 2012. Mr. Garrett described his work for the Hannibal BPW as a journeyman/lineman as building and maintaining high voltage power lines, including repair work after storms and providing electrical service lines to households. In doing his work for the Hannibal BPW, Mr. Garrett described working with power tools, as well as hand tools, and lifting weights up to 100 pounds.

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Mr. Garrett graduated from high school where he took some vocational training classes. Mr. Garrett's prior work history includes work similar to that which he was doing for the Hannibal BPW for the Palmyra Board of Public Works, as well as auto body work, factory work, and truck driving. Mr. Garrett testified that he has never been a "logger" and that any references to a "logger" in Dr. Coyle's report or deposition would have to be a reference to "LAGERS", a public employee retirement system for which Mr. Garrett is eligible.

On October 26, 2010, Mr. Garrett was unloading 80-pound bags of concrete from a truck bed in preparation for the repair of a sidewalk. Mr. Garrett was standing on a step about two feet off of the ground and stepped backward with his right foot with the 80-pound bag of concrete in his arms and felt pain in his lower back with shooting pain into the right leg. Mr. Garrett reported the injury, but continued working that day, thinking his injury not to be serious. Mr. Garrett's symptoms worsened and he was then sent to Dr. Henry, the company physician for the Hannibal BPW. Mr. Garrett eventually had an MRI, was sent to Dr. Taylor in St. Louis, and then was referred to Dr. Boutwell. Dr. Boutwell eventually performed radio frequency ablation, or burned the nerves in Mr. Garrett's low back, as Mr. Garrett described it. Thereafter, Mr. Garrett described his recovery as "awesome." Mr. Garrett described only backaches at the end of the day after his return to work. Mr. Garrett described being able to return to all of his job duties, including climbing utility poles, with only a back ache after a heavy day's work.

On September 1, 2011, Mr. Garrett was using a frost bar, a tool about seven to eight feet long, weighing about 40 pounds, to manually break up rock; Mr. Garrett was one of five persons on the crew taking turns using the frost bar to get through the rock. As Mr. Garrett bent over to get "thrust" to engage the frost bar, he felt severe pain in both legs and gave the frost bar to another crew member. Mr. Garrett reported the injury and asked for medical treatment but received no medical treatment. Mr. Garrett was given light duty work for two weeks and then returned to his normal job duties, which Mr. Garrett described as heavy construction. Mr. Garrett was sent out for a job evaluation to Dr. Gregory who restricted Mr. Garrett from climbing. Mr. Garrett was told on February 10, 2012, that he was put on FMLA; this was Mr. Garrett's last day of work for the Hannibal BPW or any other employer. Mr. Garrett then saw Dr. Knorr and Dr. Abernathie on his own.

Mr. Garrett described his back pain as of the date of hearing as an eight on a one to ten scale with most days at a five or six on a ten-point pain scale. Mr. Garrett described pain in his low back and going into either leg with a prevalence of pain on the right side. Mr. Garrett has constant pain in both feet. Mr. Garrett testified that he is on no medications for his back at present and that only lying down helps alleviate his back and leg pain.

A February 12, 2012 "report to employer" from Dr. Gregory indicates that Mr. Garrett is not to climb poles "pending completion of medical/surgical evaluation." (Dr. Gregory report clmt exh 16)

Mr. Garrett testified to a heart attack in 2007 which resulted in the placement of a stent. Mr. Garrett testified that prior to 2010 he had no problems with his heart and that although he took medication for his heart condition he was fully able to perform what he called the "high, heavy and hard" work of a lineman. Prior to 2010 Mr. Garrett had also seen a Hannibal chiropractor, Dr. Leinweber, sporadically, for spinal adjustments which always resulted in a

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return to a normal baseline. Mr. Garrett described the visits with Dr. Leinweber as occurring “once or twice every couple years” and not always for the back, because he saw him for his ribs as well. Prior to 2010 Mr. Garrett had no work restrictions.

Dr. David Volarich evaluated Mr. Garrett on June 2, 2014, and issued a report pertaining to his evaluation on that same day. In his deposition testimony, Dr. Volarich opined that Mr. Garrett had suffered lumbar discogenic pain syndrome with intermittent lower extremity radiculopathy secondary to aggravation of L5-S1 degenerative disc and joint disease as the result of the October 26, 2010 accident. Dr. Volarich opined to disability of 20 percent of the body attributable to the October 26, 2010 injury to the low back. Dr. Volarich indicated that any restrictions he would have imposed for the 2010 accident and injury would have been to tolerance while the restrictions imposed for the 2011 accident and injury are for specific weights and times. Dr. Volarich mentioned additional medical treatment in the form of radiofrequency ablations similar to those Mr. Garrett had after the 2010 accident and injury; the medical treatment described seems to address the 2011 accident and injury rather than the 2010 accident and injury. With regard to preexisting disability, Dr. Volarich opined to a five percent disability of the body for “mild recurrent lumbar syndrome” and 20 percent of the body for coronary artery disease. Dr. Volarich admitted that Mr. Garrett described no disability relating to the heart condition prior to 2010, that Mr. Garrett was asymptomatic with regard to his heart in 2010, and that Dr. Volarich opined to a 20 percent permanent disability because Mr. Garrett was on medication for his heart in 2010. Dr. Volarich testified that if Mr. Garrett is permanently and totally disabled, it is as a combination of his October 26, 2010 and September 1, 2011 injuries as well as his preexisting medical conditions.

Dr. Dennis Abernathie, board certified orthopedic surgeon, evaluated Mr. Garrett after his 2011 accident and opined that it was the second accident that caused Mr. Garrett’s symptoms. Dr. Abernathie described the 2010 accident as an aggravation of the sacroiliac joint which then “settled down” with treatment, while the 2011 accident caused a subluxation of the sacroiliac joint which then got stuck, causing a misalignment of the pelvis, resulting in more strain on the right side than the left side of the pelvis. (Abernathie depo p12, 120, 21) Dr. Abernathie stated that Mr. Garrett’s history was one of no symptoms after the October 26, 2010 accident. Dr. Abernathie recommended physical therapy to treat the symptoms of Mr. Garrett’s 2011 accident. In his report of October 26, 2012, Dr. Abernathie went on to say that should physical therapy not be successful in treating Mr. Garrett’s complaints, then a “bone scan/SPECT scan” should be performed and if inflammation is detected then an injection of the sacroiliac joint should be performed. (Abernathie depo exh2) In his June 18, 2013 report Dr. Abernathie recommended either re-denervation or injection of the facet joints of the lumbar spine should these joints “turn out to be hot” on the bone scan. (Abernathie depo exh3) In the June 18, 2013 report Dr. Abernathie stated that should the bone scan indicate that the “disc space at L5-S1 were the hot object, then that might suggest that there is more instability at L5-S1 than would be expected and a fusion at L5-S1 might be entertained.” (Abernathie depo exh3) Dr. Abernathie went on to say that it would be difficult for Mr. Garrett to return to his former job as a lineman and that “he could have a job where he could sit, stand and walk intermittently and work above his knees and below his shoulders...” (Abernathie depo exh2)

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Following physical therapy directed by Dr. Abernathie, Dr. Abernathie issued a note dated October 25, 2013, and contained in the records of the Columbia Orthopedic Group pertaining to services provided to Mr. Garrett. Dr. Abernathie stated that he didn't "see any good reason why [Mr. Garrett] is as bad as he is." (Col. Ortho. Gr. Records exh 10) Dr. Abernathie described pain as Mr. Garrett's impairment and stated that Mr. Garrett can find employment that allows him to sit, stand, and walk intermittently. Dr. Abernathie concluded that Mr. Garrett's limitations are "greater than what his physical findings and radiographic documentation would show." (Col. Ortho. Gr. Records exh 10)

Dr. James Coyle, board certified orthopedic surgeon, evaluated Mr. Garrett on March 19, 2013, and on April 10, 2013. Dr. Coyle testified by deposition on September 3, 2013, that Mr. Garrett has discogenic pain as the result of a tear in the annulus of his disc at the L5-S1 level. Dr. Coyle identified this tear after reviewing the MRI taken in November of 2010, after the 2010 accident and injury. Dr. Coyle elaborated on the discogenic pain by stating that the annulus contains sensitive nerve fibers which can cause pain when the fibers are stretched. Dr. Coyle only saw these torn or stretched fibers at the L5-S1 level of Mr. Garrett's spine. Dr. Coyle opined that Mr. Garrett sustained an aggravation of mild degenerative disc disease in his 2010 and 2011 accidents and has a ten percent permanent disability of the lumbar spine attributable to the October 26, 2010 accident as well as an additional ten percent permanent disability of the lumbar spine attributable to the September 1, 2011 accident. Dr. Coyle felt that Mr. Garrett would not benefit from a bone scan because a bone scan would show an increased signal as the result of the ablation and Dr. Coyle would not recommend either further ablation of the nerves or a spinal fusion to address Mr. Garrett's ongoing complaints. Dr. Coyle recommended weight loss and smoking cessation for Mr. Garrett, although he conceded that physical therapy could help Mr. Garrett by strengthening his abdominal and back muscles. Dr. Coyle's deposition was taken a second time, on September 29, 2015. During his second deposition Dr. Coyle diagnosed Mr. Garrett to have back complaints based on subjective complaints without objective findings. Dr. Coyle opined that Mr. Garrett has achieved maximum medical improvement. Dr. Coyle discussed what he regarded as a significant preexisting low back injury when Mr. Garrett was logging and for which Mr. Garrett was now receiving a logger's disability.

Stephen Dolan, vocational rehabilitation counselor, testified by deposition that he evaluated Mr. Garrett on August 20, 2014, and issued his report pertaining to his evaluation on September 2, 2014. Mr. Dolan concluded that based on his testing and evaluation of Mr. Garrett and Dr. Volarich's restrictions, Mr. Garrett is not able to "compete for jobs for which there's a reasonably stable labor market." (Dolan depo p19, 17,8) A major factor in Mr. Dolan's consideration was Mr. Garrett's need to lie down during the day to alleviate his back pain. Mr. Dolan testified that he was basing his opinion on the restrictions imposed by Dr. Volarich as the result of the September 1, 2011 injury alone. When asked about other factors such as Mr. Garrett's cardiac condition, Mr. Dolan responded that these factors supported his opinion that Mr. Garrett is not employable. When questioned about the stent in the heart as the result of the 2007 heart attack, Mr. Dolan said that the stent was "not a very big deal" in terms of finding employment. (Dolan depo p11, 119) Mr. Dolan opined that Mr. Garrett would be able to obtain employment based on Dr. Abernathie's restrictions alone.

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Mr. James England, vocational rehabilitation counselor, testified by deposition that he evaluated Mr. Garrett on August 4, 2015, and prepared a report dated August 19, 2015 pertaining to that evaluation. Mr. England opined that Mr. Garrett would be able to be employed under either Dr. Abernathie's restrictions or Dr. Volarich's restrictions. Mr. England stated that examples of work which Mr. Garrett could perform would be security work, cashiering, inside sales for electrical supply house dealing with contractors wanting to buy electrical supplies or parts, light assembly or packing. Mr. England testified that if Mr. Garrett's subjective complaints are believed and Mr. Garrett has to lie down periodically during the day due to pain, then Mr. Garrett would be considered permanently and totally disabled. Mr. England testified that Mr. Garrett's permanent and total disability would result from the combination of his work injuries and his preexisting conditions, but acknowledged that Mr. Garrett did not need to lie down prior to the September 1, 2011 accident.

APPLICABLE LAW

Having established that compensable accidents occurred, Missouri law then requires that Claimant establish a causal connection between the accidents and the claimed injuries. Davies v. Carter Carburetor Div., 429 S.W.2d 738 (Mo. 1968). Section 287.020.2 requires that the accident be "the prevailing factor" in causing the medical condition and disability. The quantum of proof 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). Expert testimony is required where there are complicated medical issues, such as where the cause and effect relationship between the claimed injury or condition and the alleged cause is not within the realm of common knowledge. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. 1994). Expert testimony is essential where the issue is whether a preexisting condition was aggravated by a subsequent injury. Modlin v. Sun Mark, Inc., 699 S.W.2d 5 (Mo.App. 1985).

Section 287.020.6. The term "total disability" as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

It is well settled in Missouri that a "claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability." Landman v. Ice Cream Specialties, Inc., 107 SW3d 240,249 (Mo. 2003)

RSMo Section 287.220. 1. There is hereby created in the state treasury a special fund to be known as the "Second Injury Fund" created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section [287.141](#). Maintenance of the second injury fund shall be as provided by section [287.710](#). The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by

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the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

AWARD

The claimant, Francis Garrett, has sustained his burden of proof that he sustained a compensable accident and that he injured his back as the result of that accident of September 1, 2011. The physicians who treated or examined Mr. Garrett are in agreement that he sustained an injury on September 1, 2011, and that work is the prevailing factor in causing his medical condition and disability.

Mr. Garrett has sustained his burden of proof that he is permanently and totally disabled as the result of the September 1, 2011 accident and injury. Mr. Garrett's testimony that he was able to return to heavy work as a lineman with minimal difficulties after his 2010 accident is in accord with the testimonies of the physicians who rated permanent disability. However, it is after the 2011 accident that Mr. Garrett needed to lie down to relieve his back and radiating leg and foot pain and was, therefore, no longer able to work. Mr. Dolan opined that the limitations imposed on Mr. Garrett by the September 1, 2011 accident and injury alone were sufficient to cause him to be permanently and totally disabled. Likewise, Mr. England opined that if Mr. Garrett must lie down during the day to relieve his back and lower extremity pain that he would consider him to be permanently and totally disabled. Mr. England acknowledged that Mr. Garrett had not had to lie down as the result of back and lower extremity pain prior to September 1, 2011. Mr. Garrett's permanent and total disability is as of the date of Dr. Abernathie's release from treatment, October 25, 2013. While Dr. Coyle did not concede a scenario in which Mr. Garrett would be permanently and totally disabled as the result of his work injury with Hannibal BPW, Dr. Coyle's opinion is rendered less credible due to his misperception about Mr. Garrett's past work as a logger and the significant disability he believed Mr. Garrett to have sustained while working in that industry.

Mr. Garrett has sustained his burden of proof that he is entitled to temporary total disability benefits from February 12, 2012, through October 4, 2013. Dr. Gregory evaluated Mr. Garrett and issued a report restricting him from climbing poles; since this was an element of his work for Hannibal BPW, he was not allowed to return to work there pending a "medical/surgical evaluation." Mr. Garrett was provided temporary disability benefits from October 4, 2013, through October 25, 2013, while receiving physical therapy at Dr. Abernathie's recommendation. Mr. Garrett was released from treatment on October 25, 2013.

Mr. Garrett has sustained his burden of proof with regard to future medical treatment where the treatment suggested by the opining physicians appears to be directed toward Mr. Garrett's condition after the 2011 accident and injury. All three physicians, Dr. Volarich, Dr. Coyle and Dr. Abernathie discussed physical therapy to address Mr. Garrett's back pain, while both Dr. Volarich and Dr. Abernathie testified to Mr. Garrett's need for radio frequency ablations to minimize Mr. Garrett's back pain. Dr. Abernathie recommended a bone scan/SPECT scan to determine the appropriateness of the radiofrequency ablations. Dr. Abernathie mentioned a

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potential fusion surgery should all other attempt at minimizing Mr. Garrett's symptoms fail, again depending on the outcome of the bone scan. Additional medical treatment to treat the symptoms of Mr. Garrett's 2011 back injury, as generally outlined by Dr. Abernathie, is awarded.

Mr. Garrett has failed to sustain his burden of proof of Second Injury Fund liability where the evidence points to Mr. Garrett's September 1, 2011 accident and injury as the cause of his permanent and total disability.

Made by: _____
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation