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

Injury No.: 09-074541

Employee: Alan Holeman

Employer: Hussman Corporation

Insurer: Travelers Indemnity Company of America

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 briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction
The parties submitted the following issues for determination by the administrative law judge: (1) whether employee sustained an accident arising out of and in the course of employment on or about August 24, 2009; (2) whether the alleged accident is the medical cause of employee's injury and disability; (3) whether employer is liable to reimburse or pay the employee's past medical expenses of up to $159,933.60; (4) whether employee is entitled to temporary total disability benefits; (5) nature and extent of employee's permanent disability; and (6) Second Injury Fund liability. In addition, employer indicated that if employee was alleging an occupational disease, employer wished to raise the issues of notice and statute of limitations with respect to that theory of the case. Employee, meanwhile, indicated that he was alleging injury by accident, not occupational disease.

The administrative law judge concluded that employee sustained an accident arising out of and in the course of employment, but that employee's accident is not the prevailing factor in causing both the resulting medical condition and disability.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in crediting Dr. Kitchens over Dr. Kennedy as to the issue whether employee's accident is the prevailing factor in causing employee's neck injury and disability; (2) in declining to award employee permanent total disability benefits; (3) in declining to award temporary total disability benefits; and (4) because the result reached by the administrative law judge leaves no remedy for an employee that sustains an accident in the course and scope of employment where the employee has a preexisting condition to the same area of the body.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

Findings of Fact
Employee worked for employer for over 30 years. In 1996, employee suffered a cervical spine injury while working for employer. Employer sent employee to Dr. David Kennedy,

who performed an anterior cervical microdiscectomy with fusion to treat a herniated C4-5 disk. Dr. Kennedy released employee to return to work in June 1997 with permanent restrictions intended to avoid pain, aggravation, or worsening of his condition. These restrictions included no lifting greater than 30 pounds, and only occasional overhead lifting, not to exceed once or twice per hour. Employee settled his claim against employer for the 1996 cervical spine injury for 20% permanent partial disability of the body as a whole.

Following his 1996 neck injury, surgery, and release from care, employee suffered from some ongoing pain, but was able to manage this condition with prescription medications. Employer honored employee's restrictions and permitted him to perform work that did not involve repetitive or overhead lifting. From 1997 to August 2009, employee never missed any work due to neck or radicular pain. He also routinely passed medical evaluations in connection with his duties for the U.S. Army National Guard. Employee was able to hunt, fish, camp, cut the grass, go to drag races, and help his wife around the home while adhering to his permanent restrictions.

Employee had been working on "Line 34," performing a task that involved spraying glue, taping, caulking, and drilling holes in pieces of Styrofoam. This was not overhead work and did not violate employee's permanent work restrictions as imposed by Dr. Kennedy. On August 24, 2009, employee's supervisor, Kenneth Hatcher, moved employee from Line 34 to a new position on "Line 7," which required employee to take aluminum coils out of a crate, lift them up, and place them onto a jig. Employee was then required to lock the coils in place on the jig. Employee estimated the coils weighed between 10 and 20 pounds individually. This work was done on a repetitive basis.

We note that the testimony from employee and two coworkers, Charles Sullivan and Robert Phelps, conflicts with that provided by Mr. Hatcher as to whether the Line 7 job required employee to lift the coils overhead or merely to chest height. We find the testimony on this point from employee, Mr. Sullivan, and Mr. Phelps more persuasive than that from Mr. Hatcher. Accordingly, we find that the Line 7 work required employee to lift the coils overhead.

Employee realized that the work on Line 7 would violate his permanent work restriction against lifting overhead repetitively. Employee reminded Mr. Hatcher of his permanent work restrictions, and even showed him a written copy of those restrictions. Mr. Hatcher replied, "It is what it is," and instructed employee to start working on Line 7. Employee did as he was told. At about 10:00 or 11:00 a.m., employee felt a sudden and sharp pain in his neck while lifting the coils. Employee also experienced pain in his low back. Employee informed Mr. Hatcher of his pain. Mr. Hatcher wrote off employee's complaints on the basis that employee just wasn't used to that type of work. Mr. Hatcher instructed employee to continue working.

Once again, employee did as he was told and returned to Line 7. Employee finished his 10 hour shift that day performing the repetitive overhead lifting. Employee estimated that he lifted between 190 and 270 coils during his shift; we note that this means employee's work on Line 7 caused him to violate Dr. Kennedy's restrictions between 17 and 25 times each hour he worked that day (190-270 coils / 10 hours = 19-27 overhead lifting incidents per hour; Dr. Kennedy's restriction was no more than twice per hour).

When employee got home, he was in pain. Employee took pain pills and muscle relaxers and reclined.

The next day, employee was again assigned to Line 7. Employee performed the work for the first couple of hours; he was in pain the entire time. At some point, Mr. Hatcher took employee off Line 7 and allowed him to do a job placing coils at a slower pace. At about 11:00 a.m., employee's arm started shaking. Mr. Hatcher noticed this and assigned employee to a different task.

The next morning, Mr. Hatcher assigned employee to a job that didn't involve any overhead lifting. On August 31, 2009, employee went to see the company nurse to tell her what happened, but she wasn't in. Employee went to see her the next day. The nurse put ice on employee's neck and had him lie down for about 45 minutes. She then sent him back to work. Employee returned to see the nurse again the next day. The nurse again put ice on employee's neck and had him lie down. When the nurse told employee to return to work, employee told the nurse he thought he should see a doctor. The nurse told employee he would need to see his own doctor.

Employee initially received conservative treatments with Dr. McDermot, Dr. Feinberg, and Dr. Kennedy. Ultimately, Dr. Kennedy performed a fusion surgery at the C4-5, C5-6, and C6-7 levels on February 4, 2010. Dr. Kennedy placed employee on increased permanent restrictions including no lifting more than 10 pounds; no overhead lifting; sit, stand, and walk on an alternating basis; and little or no bending, stooping, twisting, or climbing.

Employee testified he missed work on September 3, 2009, and December 11, 2009, in connection with the acute onset of neck symptoms on August 24, 2009. Employee believes his last day working for employer was January 22 or 23, 2010. The parties stipulate that employee reached maximum medical improvement on July 6, 2010. Given employee's credible testimony, we find that employee missed work on September 3, 2009, December 11, 2009, and from January 22, 2010, until he reached maximum medical improvement on July 6, 2010, referable to pain and treatment for his cervical spine condition.

Following the events of August 2009 and subsequent cervical spine treatment and surgery, employee suffers from ongoing pain for which he takes between three and four prescription pain pills and muscle relaxers per day. Employee limits his activities and has a generally sedentary lifestyle. To relieve his neck pain, employee lies down three to four times per day for up to 40 minutes at a time. Employee no longer goes fishing, hunting, or to the races.

Expert medical opinions

Employee presents the expert medical testimony of Dr. Kennedy, who opined that the August 2009 accident is the prevailing factor causing employee's current cervical spine condition. Dr. Kennedy acknowledged the preexisting 1996 injury and degeneration of employee's cervical spine, but ultimately opined that employee's lifting incident on August 2009 caused a new injury. Dr. Kennedy explained that when employee was forced to violate his work restrictions, he overloaded his neck, causing a new injury at C5-6 and C6-7 and the acute onset of radicular arm pain, and tremors in the right hand.

Dr. Kennedy identified new pathology at C5-6 and C6-7, which he described as a nerve root compression caused by the August 2009 accident. Dr. Kennedy rated employee's new injury at 20% permanent partial disability of the body as a whole, and opined that employee's preexisting cervical spine condition amounted to a 15% permanent partial disability of the body as a whole. Dr. Kennedy opined that employee could probably not return to his prior work or any gainful employment given his cervical spine condition.

Dr. Kennedy opined that the medical care and treatment employee received after the lifting incident of August 24, 2009, was reasonable and necessary to cure and relieve the effects of his cervical spine injury. Dr. Kennedy also opined that employee will continue to need pain medications in the future. Finally, Dr. Kennedy opined that the acute onset of neck symptoms on August 24, 2009, caused employee to miss work on September 3, 2009, December 11, 2009, and from January 22, 2010, to the present.

Employer presents the expert medical testimony of Dr. Daniel Kitchens, who opined that employee's work activities in August 2009 caused a temporary aggravation of his preexisting cervical and lumbar spondylosis, but that it does not constitute the prevailing factor in causing employee's current cervical spine condition. Dr. Kennedy noted employee's continued use of prescription medication after he was released from treatment in 1997. Dr. Kitchens believes there is no evidence of an acute disc herniation at the cervical spine. Dr. Kitchens believes that gradual worsening of employee's cervical spine is the prevailing factor giving rise to his need for additional medical treatment.

In addition, employer cites the records of Dr. David Raskas, who reviewed diagnostic studies and opined that employee had cervical spondylitic changes and degenerative changes, and that employee's work activity aggravated his condition to the point where he now has to take more medicine and has more problems.

After careful consideration, we find the opinions and ratings from Dr. Kennedy most persuasive. We adopt Dr. Kennedy's opinions and ratings in this matter as our own.

Expert vocational opinions

Employee presents the expert vocational testimony of Timothy Lalk, who opined that employee is permanently and totally disabled. Mr. Lalk explained that he does not believe any employer would hire employee because of his inability to work consistently through a full work shift without taking excessive breaks in order to control his symptoms of neck pain.

Employer presents the expert vocational testimony of Dolores Gonzalez, who opined that employee is permanently and totally disabled owing to his preexisting physical disabilities and conditions in combination with the effects of the primary injury. Ms. Gonzalez pointed to employee's restrictions and accommodated work prior to the primary injury, and Dr. Kennedy's extremely limiting restrictions following the 2010 cervical spine surgery.

We find persuasive the unanimous expert vocational opinion that employee is permanently and totally disabled. We specifically find most persuasive the testimony from Ms. Gonzalez that employee is permanently and totally disabled owing to his preexisting physical disabilities and conditions in combination with the effects of the primary injury.

Conclusions of Law

Accident arising out of and in the course of employment

The administrative law judge concluded that employee sustained an accident. We agree. Section 287.020.2 RSMo provides, as follows:

> The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

We have found that on August 24, 2009, employee was working for employer lifting coils overhead on Line 7 when, at about 10:00 or 11:00 a.m., he felt a sudden and sharp pain in his neck. We are persuaded that these facts satisfy each of the foregoing criteria for an "accident." We conclude employee suffered an accident for purposes of § 287.020.2.

Medical causation

Section 287.020.3(1) RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

> 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.

We have found persuasive and adopted the testimony from Dr. Kennedy that the August 2009 accident is the prevailing factor causing a new cervical spine injury including nerve root compression at C5-6 and C6-7. Dr. Kennedy explained that the work restrictions he imposed in 1997 were intended specifically to reduce the risk of new injury to employee's cervical spine. On August 24, 2009, employer assigned employee tasks that greatly exceeded those restrictions. As the administrative law judge notes in her award, employee had an excellent work record leading up to August 24, 2009. There is no reason to believe that the sudden, dramatic, and permanent increase in employee's symptoms, and resulting need for surgery, are not directly and primarily a result of a change in the pathology of employee's cervical spine caused by employer's failure to honor the work restrictions imposed by its own authorized treating doctor. Given our findings, we conclude that the August 2009 accident is the prevailing factor causing the resulting medical condition of a new cervical spine injury and associated disability.

Past medical expenses

Section 287.140.1 RSMo provides, 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 courts have made clear that "once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant." *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 519 (Mo. App. 2011).

We have found persuasive and adopted Dr. Kennedy's opinion that the medical care and treatment rendered to employee following the August 2009 accident was reasonable and required to cure and relieve the effects of employee's work injury. Accordingly, we conclude employee is entitled to the stipulated amount of $159,933.60 in past medical expenses for treatment that was reasonably required to cure and relieve from the effects of the cervical spine work injury.

Temporary total disability

Section 287.170 RSMo provides for temporary total disability benefits to cover the employee's healing period following a compensable work injury. The test for temporary total disability is whether, given employee's physical condition, an employer in the usual course of business would reasonably be expected to employ him during the time period claimed. *Cooper v. Medical Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997). Accordingly, we look to the evidence of employee's physical condition following the work injury.

We have found that employee missed work on September 3, 2009, December 11, 2009, and from January 22, 2010, until he reached maximum medical improvement on July 6, 2010, referable to pain and treatment for his cervical spine condition. We have also credited the opinions from Dr. Kennedy, who opined that the acute onset of neck symptoms on August 24, 2009, caused employee to miss work on September 3, 2009, December 11, 2009, and from January 22, 2010, to the present.

We conclude that, given employee's physical condition during the time periods at issue, no employer in the usual course of business would reasonably be expected to employ him. We conclude employer is liable for 23 and 6/7 weeks of temporary total disability benefits at the rate of $554.35 per week, for a total of $13,225.21.

Future medical treatment

Dr. Kennedy identified a need for future treatment referable to employee's cervical spine injury consisting of pain medications. We have found the opinions of Dr. Kennedy in this matter to be persuasive. We conclude that employer is obligated under § 287.140.1 RSMo to provide future medical treatments that may reasonably be required to cure and relieve from the effects of employee's work injuries.

Nature and extent of permanent disability

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee's compensable work injury. We have found that the August 2009 accident resulted in injury and disability amounting to a 20% permanent partial disability of the body as a whole referable to the cervical spine. This amounts to 80 weeks of permanent partial disability at the stipulated rate of $422.97. We conclude, therefore, that employer is liable for $33,837.60 in permanent partial disability benefits.

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).

We have adopted the opinions and ratings of Dr. Kennedy and found that employee suffered from a preexisting permanent partially disabling condition referable to his cervical spine at the time he sustained the work injury. We are convinced this condition was serious enough to constitute a hindrance or obstacle 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 the condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Having found that employee suffered from a preexisting permanent partially disabling condition that amounted to a hindrance or obstacle to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove his entitlement to such an award, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. 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. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have found employee sustained a 20% permanent partial disability of the body as a whole as a result of the primary injury, and credited the expert vocational opinion from Ms. Gonzalez that employee's permanent total disability results from a combination of his preexisting cervical spine disability with the effects of the primary injury. We find that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

We conclude employee is permanently and totally disabled owing to a combination of his preexisting disabling condition in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total disability benefits.

Award

We reverse the award of the administrative law judge. Employer is liable for $159,933.60 in past medical expenses, $33,837.60 in permanent partial disability benefits, $13,225.21 in temporary total disability benefits, and is ordered to provide future medical care that may reasonably be required to cure and relieve the effects of employee's injuries.

Beginning July 6, 2010, the date employee reached maximum medical improvement, the Second Injury Fund is liable for permanent total disability benefits at the differential rate of $131.38 for 80 weeks, and thereafter at the stipulated permanent total disability rate of $554.35 per week. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

This award is subject to a lien in favor of Eckenrode-Maupin, Attorneys at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued July 30, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 3rd day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Member

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge was correct and should be affirmed.

I disagree with the majority that Dr. Kennedy provides the more credible and persuasive testimony in this matter. On cross-examination, Dr. Kennedy made numerous concessions that call into question his opinion that the August 2009 lifting incidents caused any new injury with respect to employee's cervical spine at the C5-6 and C6-7 levels. Dr. Kennedy admitted that a pre-injury myelogram showed a disc bulge at C5-6, conceded that there was an element of degeneration at both levels, and that osteophyte buildup (which occurs over time and cannot have resulted from the August 2009 lifting incidents) caused foraminal encroachment. Dr. Kennedy also agreed that age (employee was 52 at the time of the accident) and tobacco use (employee smoked several packs of cigarettes per day until recently) can contribute to the development of spondylosis.

I find Dr. Kennedy's testimony in this matter wholly unpersuasive. I am convinced employee's cervical spine problems are related to his 1996 injury and subsequent degeneration, rather than the effects of his work on August 24, 2009. I believe the administrative law judge reached the appropriate result, and so would affirm.

Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee:	Alan Holeman	Injury No.: 09-074541
Dependents:	N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations Of Missouri
Employer:	Hussman Corp	
Additional Party	Second Injury Fund	
Insurer:	Traveler Indemnity Co of America	Jefferson City, Missouri
Hearing Date:	May 1, 2012	Checked by:KOB:dwp

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: August 24, 2009
5. State location where accident occurred or occupational disease was contracted: Saint Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Not determined
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Not determined
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant experienced symptoms of pain while repetitively lifting overhead, in violation of his work restrictions for a prior injury.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: $0.00
16. Value necessary medical aid paid to date by employer/insurer? N/A

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: $831.53

19. Weekly compensation rate: $554.35 / $422.97

20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: $ 0.00

23. Future requirements awarded: 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 0% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ann Piana

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Alan Holeman	Injury No.: 09-074541
Dependents:	N/A	Before the **Division of Workers' Compensation**
Employer:	Hussman Corp	Department of Labor and Industrial Relations
Additional Party	Second Injury Fund	Of Missouri
Insurer:	Traveler Indemnity Co of America	Jefferson City, Missouri
Hearing Date:	May 1, 2012	Checked by:KOB:dwp

PRELIMINARIES

The matter of Alan Holeman ("Claimant") proceeded to hearing to determine whether Claimant's entitlement benefits under the Missouri Workers' Compensation Act (the "Act"). Attorney Ann Piana represented Claimant. Attorney Hans Amann represented Hussman Corporation ("Employer") and its insurer, Travelers Indemnity. Assistant Attorney General Sam You represented the Second Injury Fund.

The parties agreed that on or about August 24, 2009, Claimant was an employee of Employer, earning an average weekly wage of $831.53, which qualifies for rates of compensation of $554.35 for temporary total disability ("TTD") and permanent total disability ("PTD") benefits, and $422.97 for permanent partial disability ("PPD") benefits. Venue and jurisdiction were established by stipulation. The parties also agree Claimant reached maximum medical improvement ("MMI") on July 6, 2010.

The issues to be determined are:

1. Did Claimant sustain an accident arising out of and in the course of employment;
2. Is the alleged accident the prevailing factor in causing both the resulting medical condition and disability;
3. Did Claimant fail to provide proper notice, and is so, was Employer prejudiced thereby;
4. Is all or part of the claim barred by the statute of limitations;
5. Is Employer liable for medical expenses;[1]
6. Is Claimant entitled to recover TTD;
7. What is the nature and extent of Claimant's permanent disability; and
8. What is the liability of the Second Injury Fund?

Claimant seeks to recover PTD benefits from Employer, or in the alternative, from the Second Injury Fund.

The parties offered exhibits that were admitted into evidence. Claimant initially offered Exhibits A to O and Q, however, due to the post-trial stipulation regarding medical expenses,

[1] Although the issue of medical expenses was fully disputed at the start of the hearing, subsequent to the close of evidence, the parties reached an agreement whereby Employer agreed to indemnify and hold harmless Claimant and his attorneys IN THE EVENT Employer was found liable for a work injury on or about 8/24/2009.

Exhibits E to K were withdrawn.[2] Employer offered Exhibits 1 to 11, and 13. The Second Injury Fund offered the deposition of Claimant as Roman Numeral I. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

FINDINGS OF FACT

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled, including the multiple, repetitive objections contained in the depositions.

Claimant is a 54-year old man who left high school after the 10th grade, served his county in the Army from 1976 to 1979, and was a member of the Army National Guard, operating heavy machinery, from 1985 to 2006. His 30+-year career with Employer began in July 1979 as an assembler, and later he became a certified brazier.

In early November, 1995, Claimant sustained an accidental injury to his cervical spine due to repetitive lifting at work. He initially had right arm pain, and when other sources of the pain were ruled out, Claimant was diagnosed with cervical radiculopathy. Diagnostic studies showed a herniated disc at C4-5 with osteophytes, bulging discs and lumbar involvement. He came under the care of Dr. David Kennedy, a neurosurgeon, who performed an anterior cervical microdiscectomy with allograft fusion. Dr. Kennedy testified that Claimant improved following the surgery, "but he was left with some pain, particularly at the base of the neck…and so I placed him on permanent restrictions to keep him from aggravating that pain." He also had intermittent neck spasms and arm pain. The permanent restrictions as of June 3, 1997, were no lifting greater than 30 pounds and only occasional overhead lifting (not to exceed 3 times per hour). Dr. Kennedy applied the restrictions because it was his concern that "exceeding those restrictions would, you know, lead to pain and aggravation and worsening of his condition." (Exhibit 9A, p. 9).

Claimant returned to work subject to the restrictions imposed by Dr. Kennedy. Employer accommodated the restrictions by placing Claimant on line 34, which involved work with Styrofoam and lighter parts. Claimant testified that for twelve years he did not miss work because of the neck, did not seek any chiropractic, medical or diagnostic treatment for his neck, and had no therapy, radicular or arm symptoms or complaints. He testified he was physically active within the restrictions, hunting, stock car racing, camping and so on.

However, during that twelve-year period, Claimant required prescription pain and muscle relaxing medication to function. In late 1997, Dr. McDermott's notes indicate Claimant complained of neck and back pain, and was "told he is going to be on pain medication all his life." Refills for Vicoprofen, Norflex, Vicoden, Lisinopril and various other pain medications are listed regularly throughout the records, with indications Claimant took several of the drugs daily.

In addition to the need for drugs, the medical records show that his primary care doctor regularly followed Claimant for his spine condition in the twelve years following his first neck surgery. Throughout the records of Dr. McDermott, his primary care physician, degenerative

[2] The withdrawn exhibits and the agreement will be added to the transcript as an addendum.

disc disease ("DDD") or degenerative joint disease ("DJD") of the neck and/or back, is listed under the Impression or Diagnostic plan sections of the medical record. On December 28, 2001, under musculo-skeletal, the doctor noted "neck – chronic pain + strength Rt arm" with the impression DJD neck. In 2002, Claimant continued to receive pain control medication and had a diagnostic plan for DDD back. In early 2005, Claimant complained of "back pain lately" in addition to cervical DDD. Throughout 2006 and 2007, Dr. McDermott continued to follow him for DDD, specifically noting complaints of neck pain on June 6, 2007. When Claimant did not present to the doctor in over 8 months, on April 30, 2008, Dr. McDermott chastised him about his need for regular follow up. At that visit, Dr. McDermott noted, among other complaints, "c/o R sciatica." Claimant continued to visit Dr. McDermott, and take prescription muscle relaxants and pain pills such as Hydrocodone, right up until the alleged injury date of August 24, 2009.

On August 24, 2009, Employer bumped Claimant and some co-workers from Line 34 to Line 7. Claimant was assigned "set up" duty, which involved unpacking coils and placing them on a jig to be brazed. The jig height required lifting chest high for a man 5'9" tall, but because of his 5'7" stature, Claimant was required to lift over his chest and chin and out from his body to place the coil. The coils weighed 10-20 pounds, and did not exceed his weight restriction. A typical 10-hour shift involved the placement of 190 to 270 coils. At the start up meeting soon after 5:00 am, Claimant made Ken Hatcher, his supervisor, aware of his restrictions. Claimant then started the set up job.

Claimant testified at hearing that sometime between 10 and 11:00 the morning of August 24th, he felt a sharp pain in his neck when he was lifting coils. At his deposition in late January 2010, he said the sharp pain he felt was in his neck and low back, and that the symptoms were from "repetitively lifting them [sic] coils just to get the job done," not from lifting one specific coil in any particular way. He told Ken Hatcher about the pain, and Ken told him he was just not used to the work. He completed the shift, went home, and medicated and rested. The next day, Claimant resumed the same set up tasks. After a few hours, management took Claimant off the line and gave him set up work he could do at his own pace. At 11:00, Claimant started to feel a stabbing pain in his right elbow, which began shaking uncontrollably. At this deposition, he also described shoulder blade and right knee "poking" and arm and right leg numbness. After lunch, Ken Hatcher moved Claimant to a lighter job with valves, and Claimant finished the shift. On the 26th, Claimant had the sticker job after disqualifying himself as a brazer on Line 7. Claimant told Ken Hatcher he was having pain, and eventually saw the plant nurse, who referred him to his own physician. Claimant's co-workers verified Claimant's testimony about the transfer to Line 7, the nature of the work, that he had a conversation with Ken Hatcher at the start up meeting, and that Claimant mentioned at lunch he had neck pain.

Dr. McDermott provided conservative treatment that proved unsuccessful. On October 27, 2009, Claimant came under the care of Dr. Kennedy, who had previously treated Claimant. The CT of the cervical spine taken November 11, 2009 revealed:

> 1. Failed fusion with pseudarthrosis formation at C4-5; 2. Multilevel DDD and DJD with signficiant foraminal encroachment on the right at C4-5, C5-6, and C6-7 with milder changes on the left. Left-sided encroachment is greater at C5-6; 3. Canal stenosis with cord effacement is produced by the changes, greater at C5-6 than at C4-5 on the right side.

The lumbar studies showed: Severe degenerative disc disease and facet osteoarthritis with changes lateralizing left greater than right at L5-S1, facet osteoarthritis; mild scoliosis, vascular calcification. The myleogram showed similar findings at both levels.

Claimant consulted with Dr. Raskas, who recorded Claimant's chief complaint was neck pain. Claimant stated he had on and off neck pain for the last several years since his anterior cervical fusion at C4-5, and he gets by with one or two Hydrocodone a day. He noted Claimant had a sharp increase in neck pain with periodic pain down his arm after doing a job that exceeded his permanent restrictions of no repetitive motion of his neck or repetitive lifting. Review of studies included cervical spondylotic changes and degenerative changes with foraminal narrowing at C3-4, non-union of fusion at C4-5 and degenerative changes at C5-6 and C6-7. Dr. Raskas concluded, "It appears his work activity has aggravated a pseudoarthrosis to the point now where he has to take more medicine and he is having more problems."

After a series of pain management attempts with Dr. Feinberg, Claimant elected to undergo a three level cervical fusion with Dr Kennedy on February 4, 2010. Dr. Kennedy also performed lumbar surgery at L4-5 and L5-S1 on April 23, 2010. Claimant reached MMI for the neck on July 6, 2010, and was released to return to work with restrictions. Dr. Kennedy noted, "[Claimant] is going to need significant restrictions relative to movement in both the cervical and lumbar spine areas, and, generally, I think it's best we would probably be looking at a sedentary lifestyle, sit, stand, walk on an alternating basis, very limited lifting, little or no bending or twisting, stooping, climbing." The specific restrictions were no lifting more than 10 pounds, no overhead lifting. Claimant worked until January 23 or 24, and used vacation and sick time until the neck surgery.

Claimant has been unable to return to any employment. He leads a very sedentary life, and still has daily pain. He takes twice as many pills for pain now as he did prior to the primary accident.

Expert Opinions

Dr. David Kennedy is the neurosurgeon who treated Claimant in 1997 and 2010. He testified the first surgery, a C4-5 microdiscectomy and fusion, improved Claimant's symptoms, but left him with some pain, particularly at the base of the neck, which was aggravated with certain motions. The permanent restrictions of no lifting greater than 30 pounds and no overhead lifting more than two times per hour were designed to avoid aggravating and worsening his pain. Dr. Kennedy discharged Claimant from the first cervical procedure on June 3, 1997, and did not see him again until October 27, 2009.

Dr. Kennedy took a history of the primary accident consistent with the evidence presented at hearing, that Claimant developed symptoms over the course of two days while performing work activities that exceeded his restrictions. The diagnostic studies revealed considerable nerve root impingement at both C5-6 and C6-7, which were new findings, and an incompletely fused C4-5, the previously operated level, which was an incidental finding since the symptoms were not coming from the C4-5 level. Conservative treatment failed, and Dr. Kennedy undertook surgical repair on February 4, 2010. Although the C4-5 non-union was asymptomatic and unrelated to the work accident, Dr. Kennedy testified he was mandated to fuse

that level because of the necessary fusion below. The symptoms improved, but surgery left Claimant with some measure of neck pain and limited mobility.

According to Dr. Kennedy, the work injury of August 24, the acute onset with continued aggravation through August 25, 2009, was the prevailing factor in his development of pain and need for treatment, including surgery. Such treatment was reasonable and necessary. Dr. Kennedy felt that although Claimant had cervical and lumbar spondylosis the fact remains that he was functioning quite well up until the events of August 24 and 25, and therefore "I believe that the prevailing factor and his need for further treatment including surgical treatment was the change in his work activities . The permanent partial disability relative to this injury to his neck was 35% for the August 15, 1995 and the August 24, 2009 injuries. He had previously rated the 1995 injury at 15% PPD, so he attributed 20% to the 2009 injury. Dr. Kennedy did not think Claimant could return to his prior work or any gainful employment because of the neck permanency from the 2009 injury.

In attempting to defend his position, Dr. Kennedy compared the prior diagnostic studies from the 1990's to more recent studies, explaining there was new pathology at C5-6 and C6-7. At C5-6, there was nerve root compression caused mostly, he thought, by disc, but also by bilateral foraminal encroachment. When presented with evidence of a prior bulging disc in 1997 at C5-6, Dr. Kennedy distinguished the finding stating there was no nerve root impingement in 1997. As for C6-7, the new pathology was right-sided foraminal encroachment at C6-7. He conceded there was an element of degeneration at both levels, including osteophytes that build up over time and cause foraminal encroachment. The degenerative conditions were not caused by Claimant's work activities in 2009. Claimant also has degenerative conditions affecting his lumbar spine, specifically spinal stenosis at L4-5 with spondylolisthesis at L5-S1, which required surgical intervention.

Dr. Daniel Kitchens is a board certified neurosurgeon who examined Claimant on September 1, 2010, reviewed all relevant medical records, generated a report, and testified on behalf of Employer. In making his assessment, Dr. Kitchens considered Claimant had continued discomfort in his neck and right arm on numerous occasions between his two work incidents. He continued to take Vicodin on a regular basis. The objective findings reveal cervical spondylosis. There is no evidence of an acute disc herniation in or a traumatic injury to his cervical or lumbar spine.

It was Dr. Kitchens' opinion, within a reasonable degree of medical certainty, that Claimant has preexisting cervical and lumbar degenerative disc disease and cervical lumbar spondylosis, and had been symptomatic from the cervical and lumbar spondylosis prior to August 24, 2009. The work activities of August 24 and 25, 2009 aggravated his preexisting cervical and lumbar spondylosis, and were not the prevailing factor in the need for medical treatment. The failed fusion, most likely caused by his tobacco abuse, correlates with the persistent neck pain and requirement for narcotic medications from 1997 to the more recent incident. According to Dr. Kitchens, there is no evidence of an acute disc herniation at the cervical or lumbar spine regarding the incident of August 2009, nor is there evidence of a traumatic injury. The gradual worsening of his cervical and lumbar spondylosis, which is the consequence of degenerative disc disease unrelated to work, is the prevailing factor that gave rise to the need for additional treatment.

Vocational experts Timothy Lalk and Delores Gonzalez testified Claimant was permanently and totally disabled from the open labor market.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri:

I. Claimant sustained an accident arising out of and in the course of employment.

A claimant has the burden to prove all the essential elements of his or her case, and a claim will not be validated where some essential element is lacking. *Thorsen v. Sachs Electric Company*, 52 S.W.3d 611, 618 (Mo.App. 2001)[3] Section 287.020.2 RSMo, defines "accident" for purposes of the Workers' Compensation Law. The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

I find credible Claimant's testimony that he felt a sharp pain in his neck around 11:00 am on the 24th of August, and the onset of upper extremity symptoms 24 hours later, which establishes the time and place of occurrence. Pain can be a symptom of an injury as required by the statute. Claimant identified repetitive lifting as the specific event producing the symptoms. I find Claimant has met his burden of establishing an accident.

II. The alleged accident is not the prevailing factor in causing both the resulting medical condition and disability.

"To be entitled to workers' compensation benefits, the claimant has the burden of proving ... that the alleged injury ... was directly caused by the accident. In other words, a claimant must establish a causal connection between the accident and the compensable injury." *Kerns v. Midwest Conveyor,* 126 S.W.3d 445, 453 (Mo.App.2004) (citation omitted). "Medical causation, which is not within common knowledge or experience, must be established by scientific or medical evidence showing the relationship between the complained of condition and the asserted cause." *Gordon v. City of Ellisville,* 268 S.W.3d 454, 461 (Mo.App.2008); *Lingo v. Midwest Block and Brick, Inc.,* 307 S.W.3d 233, 236 (Mo.App. W.D. 2010)

In 2005, the Missouri Legislature amended The Workers' Compensation Law. As part of the 2005 amendments, the Legislature "revised [§ 287.020.3(2)] to narrow the scope of those injuries that will be deemed to arise out of and in the course of employment." *Miller v. Missouri Highway and Transp. Com'n,* 287 S.W.3d 671, 673 (Mo. banc 2009). When the Worker's Compensation Law refers to an "injury," it means an injury arising out of and in the course of

[3] This is one of several cases cited herein that were overruled on unrelated grounds in part by *Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220, 225 (Mo.banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton*'s effect thereon.

employment. § 287.020.3(1); *Gordon v. City Of Ellisville*, 268 S.W.3d 454, 459 (Mo.App. E.D.,2008). Under the current version of § 287.020.3(2), an injury "is compensable *only* if the accident was the prevailing factor in causing both the resulting medical condition and disability." *Johnson v. Ind. Western Express, Inc.*, 281 S.W.3d 885, 891 (Mo. App. 2009); *see also Missouri Alliance for Retired Ams. v. Dep't of Labor and Indus. Relations*, 277 S.W.3d 670, 684 (Mo. banc 2009). Section 287.020.3(1) further states that "[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability." Finally, Section 287.020.3(1) defines "prevailing factor" as "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability." *Gordon* at 459. The Court is compelled to apply strict construction pursuant to § 287.020.3. *Id.*; *Hager v. Syberg's Westport*, 304 S.W.3d 771, 774 -775 (Mo.App. E.D. 2010).

One area where the changes have had a significant impact is in the context of work aggravations of preexisting conditions. In *Johnson v. Indiana Western Exp., Inc.*, 281 S.W.3d 885, 891 (Mo.App. S.D.,2009), the court noted while *Gordon v. City of Ellisville, supra,* observed aggravation of a preexisting condition arising out of and in the course of employment had been compensable prior to the 2005 amendments to § 287.020, the current version of §287.020 restricts compensation to injuries in which the work accident was the *prevailing factor* in causing the resulting medical condition and disability. *Gordon*, 268 S.W.3d at 459. The *Johnson* court went on to hold that in order for an event that arises out of and in the course of one's employment to entitle an employee who has a prior disability to additional benefits, the event must be a prevailing factor that results in further disability. It is not sufficient that the event simply aggravates a preexisting condition. *Johnson v. Indiana Western Exp., Inc.*, 281 S.W.3d 885, 892 -893 (Mo.App. S.D. 2009), *citing* § 287.020; *Gordon v. City of Ellisville,* 268 S.W.3d at 459.

I find that the credible evidence establishes the events of August 24 and 25, 2009 aggravated Claimant's prior cervical disability, and were not the prevailing factor that resulted in the medical condition and further disability. An objective review of the facts establishes Claimant was significantly disabled following the cervical injury and subsequent surgery of 1997, despite Claimant's emphasis of his stellar work history and his lack of complaints to doctors[4]. It is true Claimant maintained an excellent work record between 1997 and 2009. However, all his work was performed under the restrictions imposed by Dr. Kennedy after surgery, of no lifting more than 30 pounds and no more than one or two overhead lifts per hour. The restrictions were necessary, according to the doctors, to prevent aggravation of the underlying condition of the spine. Furthermore, Claimant could only perform his restricted work under the pain-relieving influence of narcotic and muscle-relaxing medications. In the twelve years between work accidents, Claimant was never free from work restrictions or prescription medication.

[4] Claimant's statement in the post- trial brief that the medical records "show no evidence Claimant complained about neck pain other than on four sporadic occasions during those twelve years, and establish Claimant never complained of arm or radicular arm pain" is somewhat misleading. Dr. McDermott followed Claimant for DDD of the neck and back and regularly prescribed pain medicine for those conditions. There is a 12/28/2000 note regarding "strength Rt arm," a 12/20/2001 note that may contain a complaint about the arm (partially illegible), and a note Claimant complained of right sciatica on 4/30/2008. Such statements disregard the chronic nature of Claimant's prior disability.

Furthermore, the medical records establish Claimant's primary care physician regularly followed him for his cervical and lumbar spine conditions of DDD and DJD. In nearly every encounter where an overall impression was noted, DDD, DJD, or neck pain is listed. Dr. McDermott regularly refilled his pain prescriptions, something she would not have done if Claimant were not making complaints of pain. Although there was a change in the nature and extent of the pain after August 24, Claimant was never pain free after 1997.

Claimant's spinal DDD and DJD is evidence of a systemic disease as opposed to a specific injury. For years, Claimant was followed for DDD of the neck and back, and shortly after his second neck surgery, Claimant underwent a lumbar fusion for this degenerative condition. Claimant had earlier complaints regarding his back and knee as well at the neck, but did not present evidence at hearing that the back and knee were related to work. The prior surgery and the existence of the degenerative process throughout the spine indicate other factors for the symptoms Claimant has experienced.

There is a conflict between the equally-qualified medical experts regarding the question of whether Claimant's work activities on August 24 and 25 were the prevailing factor in his medical condition and disability. Where the right to compensation depends upon which of two conflicting medical theories should be accepted, the issue is peculiarly for the [factfinder's] determination. *Claspill v. Fed Ex Freight East, Inc.*, 360 S.W.3d 894, 903 (Mo.App. S.D. 2012)(citations omitted). In this complicated case, I find the opinion of Dr. Kitchens to be more credible, consistent with the facts found, and in conformance with the legal standard than Dr. Kennedy's opinion to the contrary.

It was Dr. Kitchens' opinion, within a reasonable degree of medical certainty, that Claimant has preexisting cervical and lumbar degenerative disc disease and cervical lumbar spondylosis, and had been symptomatic from the cervical and lumbar spondylosis prior to August 24, 2009. The work activities of August 24 and 25, 2009 aggravated his preexisting cervical and lumbar spondylosis, and were not the prevailing factor in the need for medical treatment. He found no evidence of an acute disc herniation in or a traumatic injury to his cervical or lumbar spine. Likewise, Dr. Raskas examined Claimant and found no change of physiology of Claimant's spine resulting from the August 24 or 25 work events. Dr. Raskas found spondylotic and degenerative changes, and concluded, "It appears his work activity has aggravated a pseudoarthrosis to the point now where he has to take more medicine and he is having more problems." Dr. Kitchens opined that the gradual worsening of his cervical and lumbar spondylosis, which is the consequence of degenerative disc disease unrelated to work, is the prevailing factor that gave rise to the need for additional treatment. Dr. Raskas concurred, finding Claimant's work activity aggravated the prior condition .

Dr. David Kennedy repeated on several occasions that the work Claimant did on August 24 and 25 that exceeded his restrictions was the prevailing factor in the injury and resulting care and treatment. Yet I find he failed to establish within a reasonable degree of medical certainty that the work activities did more than simply aggravate his underlying degenerative condition. Dr. Kennedy stated the August work activity brought on symptoms caused by nerve root irritation or compression. He conceded the osteophyte and other degenerative changes at C5-6 and C6-7 were degenerative in nature, unrelated to the work event, and encroaching on the foramen which irritated the nerve root. He also thought a new disc bulge at C5-6 was causing the

nerve root compression, and seemed surprised to review a 1997 MRI showing a preexisting bulging disc at C5-6. He imposed restrictions initially to avoid aggravations of the underlying condition. He discounted the impact of the failed fusion in contributing to ongoing symptoms and development of further degeneration.

Although both doctors make good cases for their respective opinions, I find Dr. Kitchens' opinion to be more credible. In order for this case to be compensable, the work Claimant performed has to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Dr. Kitchens applies this standard in reaching his conclusion. Dr. Kennedy uses the "prevailing factor" language required by the statute, but by describing the mechanism of injury as overhead lifting and excessive motion which "readily aggravated" Claimant's previously disabled spine, Dr. Kennedy is acknowledging a primary factor other than the proclaimed mechanism of injury.

I find the medical opinions of Dr. Kitchens and Dr. Raskas credible, consistent with the facts found, and in conformance with the Law. The work incidents on August 24 and 25, 2009, aggravated an underlying, non-work related disability. I do not believe the activities caused a change in the physiology of Claimant's spine; nor are they the prevailing factor in causing Claimant's resulting back condition, its sequela, or Claimant's resultant disability. Claimant's back injury did not arise out of or in the course of his employment. In short, Claimant did not sustain an injury as that term is defined in the Workers' Compensation Law.

III. Remaining Issues.

Having found the case to be non-compensable because the alleged accident is not the prevailing factor in causing both the resulting medical condition and disability, the remaining issues are moot. No additional findings or rulings are necessary.

CONCLUSION

Claimant has not met his burden of establishing that his work accident was the prevailing factor in causing both the resulting medical condition and disability. Following the 2005 statutory changes, the onset of disabling symptoms does not make a case compensable then the symptoms flow from the aggravation of a preexisting condition. The primary and Second Injury Fund claims are denied.

Dated this _____ day of July 2013

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation