

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

Injury No.: 05-042539

Employee: Ronald A. Lawrence II  
Employer: Southwestern Bell Telephone LP (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

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

**Discussion**

*The concept of "credibility"*

We note that throughout the administrative law judge's award, he finds that a witness is credible as to a particular fact question, but lacking credibility as to other fact questions. It appears that the administrative law judge simply meant that he found certain statements by the witnesses more *persuasive* than other statements. But in our view, the concept of credibility carries more weight, and a statement finding a witness "lacks credibility" implies that the witness is not worthy of belief. We note this simply to clarify our own reasoning, rather than to criticize the administrative law judge's choice of words.

We find that none of the witnesses in this matter lack credibility. We further accept that the evidence suggests that employee is permanently and totally disabled. The question remains, however, whether employee has presented persuasive evidence to meet his burden of proving his entitlement to permanent total disability benefits from the Second Injury Fund. We are convinced that he failed to do so, for the reasons explained below.

*Permanent total disability*

The administrative law judge thoroughly and exhaustively summarized all of the evidence at trial, so there is no need to do so here. It will suffice to say that the issue of Second Injury Fund liability for permanent total disability benefits in this matter turns on several important fact questions. Because we deem the record insufficient to resolve those fact questions, we agree with the administrative law judge that employee failed to meet his burden of proving the Second Injury Fund is liable for permanent total disability benefits.

First, we note that employee takes the anti-anxiety medication Xanax for a preexisting diagnosis of anxiety and depression. Employee's credible testimony suggests (and we so find) that employee's use of this medication provides relief from his low back spasms. This would suggest to us that there may be a psychiatric component to employee's perception of his low back pain. But employee did not procure any expert psychiatric opinion evidence to establish this, or to demonstrate how his preexisting psychiatric diagnoses may factor into his permanent total disability. As a result, we feel unable to render findings resolving what

Employee: Ronald A. Lawrence II

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appears to be a critical question regarding employee's low back pain and his perception thereof, and ultimately, the cause of his permanent total disability.

Second, employee's credible testimony suggests (and we so find) that he lies down during the day to relieve sharp pains in his low back. But, as employee's counsel conceded at oral argument, the record does not include an opinion from a medical expert that employee has a need to lie down during the day, or that such a need is referable to a combination of the primary injury and his preexisting conditions. We acknowledge Dr. Koprivica's testimony, in response to a hypothetical question asking him to assume that employee would identify a need to lie down after the primary injury, that such a need would be referable to employee's overall lumbar condition. But Dr. Koprivica did not identify any such restriction in his report or at his deposition, and his answer to the hypothetical does not constitute an opinion from the doctor that employee does have a need to lie down during the day, or that such a need is a result of a combination of the primary injury and his preexisting conditions. We believe such evidence is necessary where employee's low back condition is medically complex and involves multiple injuries and disabling conditions.

Finally, we note that Dr. Koprivica specifically found employee did not suffer from any preexisting permanent partial disability to his right knee or right upper extremity. Mr. Dreiling appeared to include disability referable to both the right knee and right upper extremity in reaching his opinion regarding permanent total disability. Needless to say, Mr. Dreiling's expert vocational opinions cannot substitute for necessary expert medical opinion. Second Injury Fund liability cannot be proven by expert vocational opinion which includes, as a necessary element, reference to conditions of ill-being not identified in the record as a preexisting disability or disability related to the last accident.

### **Conclusion**

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Robert B. Miner, issued November 20, 2013, is attached and incorporated by this reference.

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 26<sup>th</sup> day of August 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Ronald A. Lawrence II

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. 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 should be modified to award permanent total disability benefits from the Second Injury Fund.

This employee worked for more than 30 years for employer, first as a lineman and then as a cable-splicer, despite a seriously disabling prior low back injury and injuries to both shoulders. After he suffered the last injury in May 2005, employee was physically incapable of continuing in his work as a cable-splicer. Employer provided employee with some light duty work, but employee was unable to handle the prolonged sitting required, and ultimately had to retire. He hasn't worked since.

Employee presented expert medical testimony from Dr. Brent Koprivica that if a vocational expert determines employee is unable to work, it would be Dr. Koprivica's medical opinion that employee's permanent total disability is the product of the primary injury in combination with his preexisting conditions of ill-being. Employee also provided testimony from Michael Dreiling, a vocational expert, who opined that employee is unemployable based on a combination of the primary injury and employee's preexisting conditions. The Second Injury Fund did not present any contrary evidence. Yet, the administrative law judge and now the majority of the Commission have rejected this evidence in favor of their own lay theories that there are other reasons employee may be permanently and totally disabled.

This is similar to the situation presented in *Abt v. Miss. Lime Co.*, 388 S.W.3d 571 (Mo. App. 2012), where the Commission threw out expert opinion evidence regarding the cause of employee's permanent total disability in favor of theories that found no support on the record. In reversing the Commission, the *Abt* court noted that "[r]ather than choosing one of the medical opinions, the Commission made a finding that is not consistent with any medical opinion in the record." *Id.* at 581. Here, the majority takes pains to find all of employee's evidence "credible," and specifically finds that employee is permanently and totally disabled, but then proceeds to deny the claim for permanent total disability benefits, relying upon the perceived existence of various alternative theories as to why employee is permanently and totally disabled.

Regarding employee's need to lie down during the day, I disagree with the majority's determination that the record lacks sufficient medical evidence verifying this need or linking it to a combination of the primary injury and his preexisting low back injury. Despite counsel's (apparently mistaken) concession at oral arguments, the record *does* contain the following testimony from Dr. Koprivica:

- Q. Now, if he is to testify at trial that he has to lie down during the day due to low-back pain subsequent to the May 2005 injury, that he didn't have to do that before that date, would you say that the need to lie down during the day would be due to the May '05 injury, and would that be totally disabling in and of itself?

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MR. TIERNEY [counsel for employer/insurer]: I'll just object to the hypothetical in that it's incomplete. It contains no indication as to when that behavior would have initiated, how frequently it's initiated, if it happened within a month of either date of accident or a year or five years.

MS. SHINE [counsel for the Second Injury Fund]: Well, I'm talking about after the May 2005 injury, anytime after that.

- A. The limitation of lying down in my opinion would be the result of the overall lumbar impairment and resultant disability. So I don't know that that would change my opinion that that injury alone is totally disabling. And I clearly believe that the need to unpredictably recline is going to be totally disabling. But my opinion would be that that incorporates the contribution of his prior disabilities with the additional disability of May 2005.

*Transcript, page 387.*

I fail to see why the foregoing does not resolve the majority's concern (which I do not agree with in the first place) that it needs a medical opinion to make any findings regarding employee's need to lie down, especially where they go so far as to specifically credit employee's hearing testimony on the topic.

It appears to me that despite the majority's remarkable eagerness to declare all witnesses to be credible, it has applied an unusually high level of scrutiny to employee's evidence. Indeed, why is the majority so reticent to make permissible inferences from the evidence presented? Has the majority forgotten that the nature and extent of permanent disability is a fact question within the "unique province" of this Commission to decide? *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo. App. 2007). One possibility is that the majority has mistakenly applied the 2005 amendments, which did not become effective until August 28, 2005, to this claim for an injury sustained on May 10, 2005. This would explain the perceived need for a doctor opinion certifying a need to lie down, as the 2005 amendments added § 287.190.6(2) RSMo, which requires that "permanent total disability shall be demonstrated and certified by a physician." But under the pre-2005 version of Chapter 287 applicable here, there is no § 287.190.6(2), or any "certification" requirement regarding permanent total disability findings, and more importantly, "the law shall be liberally construed with a view to the public welfare" and "[a]ny doubt as to the right of an employee to compensation should be resolved in favor of the injured employee." *Angus v. Second Injury Fund*, 328 S.W.3d 294, 298 (Mo. App. 2010). If there are doubts in this case as to employee's right to permanent total disability benefits from the Second Injury Fund, we must resolve them in favor of employee, rather than our own lay theories why employee may be permanently and totally disabled.

On a related note, why is the majority injecting an issue of possible psychiatric disability into this case? As they note, there is no expert psychiatric opinion evidence on record, so how can the majority suggest, based on a stray comment by the employee regarding the effect of Xanax on his back spasms, that employee's psychiatric condition impacts his perception of low back pain? On the one hand, the majority feels it can't resolve, without a doctor opinion, the issue why employee lies down; on the other, the majority feels comfortable rendering, without a doctor opinion, a finding that employee's psychiatric

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condition affects his permanent total disability. The contradiction is as obvious to me as it is puzzling.

For all of these reasons, I disagree with the majority's choice to disregard the uncontradicted expert opinion evidence regarding Second Injury Fund liability. I find that employee met his burden under § 287.220 RSMo of establishing that he is permanently and totally disabled due to a combination of the primary injury and his preexisting disabling conditions. I would modify the decision of the administrative law judge and award permanent total disability benefits from the Second Injury Fund.

Because the majority has determined otherwise, I respectfully dissent.

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Curtis E. Chick, Jr., Member

II  
AWARD  
(Second Injury Fund Only)

Employee: Ronald A. Lawrence II

Injury No.: 05-042539

Employer: Southwestern Bell Telephone LP (settled)

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

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri

Insurer: Southwestern Bell Telephone LP (settled)

Hearing Date: August 20, 2013

Checked by: RBM

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: May 11, 2005.
5. State location where accident occurred or occupational disease was contracted: St. Joseph, Buchanan County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee slipped while lifting a cable and injured his back.
12. Did accident or occupational disease cause death? No.

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13. Part(s) of body injured by accident or occupational disease: Back.
14. Nature and extent of any permanent disability: 12.5% of the body as a whole at the 400 week level combining with preexisting disability to result in Second Injury Fund permanent partial disability as described in Award.
15. Compensation paid to-date for temporary disability: \$2,992.58.
16. Value necessary medical aid paid to date by employer/insurer? \$2,332.12.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: \$1,013.85.
19. Weekly compensation rate: \$675.90 for temporary total disability and permanent total disability, and \$354.05 for permanent partial disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: None as to Employer/Insurer. Employee's claim against Employer settled previously.
22. Second Injury Fund liability:

31.68 weeks of permanent partial disability from Second Injury Fund at the rate of \$354.05 per week = \$11,216.30.

TOTAL FROM SECOND INJURY FUND: \$11,216.30

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: David W. Whipple.

II  
FINDINGS OF FACT and RULINGS OF LAW:  
(Second Injury Fund Only)

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Injury No.: 05-042539

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

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri

Insurer: Southwestern Bell Telephone LP (settled)

Hearing Date: August 20, 2013

Checked by: RBM

PRELIMINARIES

A final hearing was held in this case on Employee's claim against the Treasurer of the State of Missouri as Custodian of the Second Injury Fund on August 20, 2013 in St. Joseph, Missouri. Employee, Ronald A. Lawrence II, appeared in person and by his attorney, David W. Whipple. The Second Injury Fund appeared by its attorney, Richard C. Wiles. Self-insured Employer, Southwestern Bell Telephone LP, previously settled and did not appear or participate in the hearing. David W. Whipple requested an attorney's fee of 25% from all amounts awarded. It was agreed that post-hearing briefs would be due on September 10, 2013.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about May 11, 2005, Ronald A. Lawrence II ("Claimant") was an employee of Southwestern Bell Telephone LP ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about May 11, 2005, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was duly self-insured under the provisions of the Missouri Workers' Compensation Law.
3. Employer had notice of Claimant's alleged injury.
4. Claimant's Claim for Compensation was filed within the time allowed by law.

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5. The average weekly wage was \$1,013.85, the rate of compensation for temporary total disability and permanent total disability is \$675.90 per week, and the rate of compensation for permanent partial disability is \$354.05 per week.

6. Employer has paid \$2,992.58 in temporary total disability.

7. Employer has paid \$2,332.12 in medical aid.

ISSUES

The parties agreed that there are disputes on the following issues:

1. Did Claimant sustain an injury by accident arising out of and in the course of his employment on or about May 11, 2005?

2. Nature and extent of disability, including permanent partial disability and permanent total disability, and liability of the Second Injury Fund's liability for permanent disability benefits, including permanent partial disability, and permanent total disability.

Claimant testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence without objection (the depositions, Exhibits L and M, were admitted subject to objections contained in the deposition):

- A—Settlement Stipulation with Employer
- B—Heartland Regional Medical Center, Dr. William Miller Records
- C—Northwest Health Services, Dr. William D. Miller Records
- D—Orthopedic & Sports Medical Center Physical Therapy Records
- E—Heartland Regional Medical Center Physical Therapy Records
- F—Heartland Cardiovascular Consultants, Dr. Robert Grant Records
- G—Sleep Center Records
- H—Heartland Center for Pain Management, Dr. Alexandro Blachar Records
- I—Heartland Orthopedic & Sports Medicine, Dr. Brian M. Crites Records
- J—Heartland Complimentary & Integrative Medicine, Dr. Robert B. Levene Records
- K—Primary Care Associates, Dr. William Miller Records
- L—Deposition of Dr. Brent Koprivica taken on 11/14/11 with deposition exhibits
- M—Deposition of Michael Dreiling taken on 11/16/11 with deposition exhibits

Any objections not expressly ruled on during the hearing or in this award are now overruled. 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.

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Claimant's attorney's Post-Hearing Brief has been considered. A Post-Hearing Brief has not been received from the Second Injury Fund.

**Findings of Fact**

Claimant started working for Employer on November 23, 1973. He began as a telephone linesman. He placed and removed poles, placed guy wires and anchors in the ground, removed and replaced cables in the air, climbed telephone poles with climbing hooks, and occasionally used a ladder.

Claimant became a cable splicing technician after ten years working as a linesman. He worked as a cable splicer for twenty-two years. He worked for Employer altogether for about thirty two years.

When Claimant worked as a cable splicer, he physically joined cables together, rearranged the telephone plant on poles, and replaced terminals. He was not required to be in his climbing hooks as much when he worked as a splicer. He was thirty inches to six feet away from the pole when he worked as a splicer. He used a ladder sling in his job. The sling allowed a ladder to lean away from the place where he worked. Claimant's job as a cable splicer involved a lot of bending, twisting, and stooping. Claimant sat on a toolbox when he spliced cables.

Claimant injured his low back on May 11, 2005 while working for Employer when he was helping place cable on a rack. While he was lifting a cable about chest high, he slipped and went down. Claimant told a co-worker what happened. Claimant needed help getting to the truck after the incident. He was able to walk, but it was very painful to walk. Claimant reported the injury to Employer and then saw a doctor, Dr. Miller, on his own.

Dr. Miller treated Claimant's May 2005 back injury with prescription pain medication. Dr. Miller also prescribed physical therapy. Claimant also saw Dr. Blachar at Pain Management. Dr. Blachar was going to inject the injury site, but did not because of where the injury site was located.

Claimant worked light duty at Employer for several weeks after his May 11, 2005 injury. He worked on a Platte Fiber Optic Network in the engineering office. He was required to sit for long periods of time despite doctor's orders. His doctor said that he should not sit or stand for extended periods. Employer asked Claimant to do more than the doctors said that he should do, and he was not able to do that work.

Claimant understood that the light duty job with Employer was a temporary job only for him. Claimant's light duty position was eliminated.

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Claimant understood that before he would be able to return to work for Employer, he would have to be 100%.

Employer was Claimant's last employer. Claimant retired from Employer on September 29, 2005. The last day that Claimant actually worked for Employer was on or about September 29, 2005. He retired because he was not able to perform the cable splicer job, and because he could not perform the light duty work without further injuring himself. He stated that he retired on his doctor's advice.

*Prior Injuries and Conditions*

Claimant began having back pain in 1978 when he injured his back while removing a manhole cover from a street. He had sharp shooting pain in his low back, and had low back surgery on May 6, 1983 by Dr. Nelson Escobar. He was off of work for nine months after his back surgery. He was still a linesman at the time he had back surgery. He had to be more deliberate when he returned to work after his surgery.

Claimant's back slowed him down after his back surgery. He could not lift in the same way that he was used to lifting. He asked for assistance from his supervisor at times, or if co-workers were close, he would ask them for assistance. If he was assigned a job to do by himself and he needed assistance, he asked for it.

Claimant was having a lot of back pain when he became a cable splicing technician. Claimant's back bothered him when he sat and spliced cables. He spent a lot of time sitting and leaning forward to do that work. He stood and stretched after thirty to forty minutes of sitting. He took frequent breaks at work, but he got his work done.

Claimant continued to seek treatment for his back from Dr. William Miller after his back surgery. Dr. Miller prescribed Lortab and a muscle relaxer for his back. Dr. Miller took Claimant off of work at times because of back complaints.

Claimant reported to Dr. Miller in 2002 that he woke at night two to three nights per week because of back complaints.

Claimant bought a new bed in 2003 to help him sleep. He returned to Dr. Miller after that with increasing complaints of back pain.

Claimant had right shoulder surgery on January 25, 1995 by Dr. Brennan for a rotator cuff tear. No specific incident caused his shoulder injury. He was off work for four months after surgery. He was a cable splicer at that time. Claimant was released without restrictions after his right shoulder surgery. He returned to work after surgery. Parts of his job were more difficult after he returned to work. He carried a ladder on his left side instead of his right side after he returned to work. He did most of his lifting on

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the left side. He depended more on his left side because of strength issues. His right shoulder surgery caused him to climb a ladder differently.

Claimant later developed similar issues with his left shoulder. Dr. Brennan performed surgery on his left shoulder on September 29, 1997. Claimant did not have a specific injury. Dr. Brennan told Claimant it was a repetitive motion injury. Claimant was off of work for four months after his left shoulder surgery. He had trouble lifting and doing overhead work after returning to work after his left shoulder surgery. He had range of motion issues.

Claimant injured his right knee and had arthroscopic surgery to remove torn cartilage on October 4, 2000. He missed some work because of the injury. His right knee was substantially weaker than his left knee when he returned to work. It was difficult to sit and stand. He bought and used a brace for his right knee.

Claimant had frostbite in 1973. He developed Raynaud's phenomenon. He had circulation problems in his hands and feet when it got cold. He had to work barehanded. He would lose feeling in his fingers in cold weather and would have to go to the truck to warm up if there was no other heating available. He was not able to do splicing when his fingers got cold. He would lose feeling in his fingers. He had difficulty walking in the cold because the condition affected his feet.

Claimant had treatment for his heart and chest pain issues before the May 11, 2005 injury. He had an EKG that Dr. Miller said showed he had had a silent heart attack. He was not hospitalized for that condition. He was off of work for one month. He took medicine to make new blood pathways. The condition made him tired and he got tired more easily at work.

Claimant had prior complaints with his left hand. He spoke to Dr. Brennan about that prior to the May 11, 2005 injury. His hand would get stiff and sore a lot. His knuckles were swollen.

Dr. Miller has prescribed Xanax for Claimant. Claimant has taken Xanax for thirty-three years for anxiety and hyperactivity issues. He only used Xanax at night. He was supposed to take it during the day to deal with job issues. He had a lot of stress from the job to do the same amount of work that he had done before he sustained his injuries. He tried harder at work, but Employer still wanted him to do more.

Claimant could not recall if he had any side effects from taking Xanax. Claimant still takes Lortab. He has no side effects from the Lortab.

Claimant used an Albuterol puffer for asthma attacks until two years prior to the hearing. He had a history of asthma attacks since birth. When the weather was cold he

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would have to stop and sit down to rest because of breathing problems. He was hospitalized five to six times for pneumonia prior to the May 2005 injury, and once after that injury.

Claimant worked full time before the May 2005 injury. He worked eight hours a day, five days a week. He worked overtime when required—about once every couple of months. He performed the full duties required by his job before his May 2005 injury.

Claimant was required to stand when he worked as a cable splicer. He would have to stand twenty to thirty minutes at a time. He would come down the ladder after that and stretch and take a little walk. His sitting tolerance before the May 2005 injury was twenty to thirty minutes. He could walk one to one-and-one-half miles before the May 2005 injury.

Claimant stated that he was not able to bend without difficulty either before or after the May 2005 injury. His job required him to bend less than 45 degrees before the May 2005 injury. He leaned on a box when he sat while working before the May 2005 accident.

*Current Activities*

Claimant no longer does any yard work. He has only done yard work once or twice since May 2005. He does not do housecleaning. His wife does that. He does help with the laundry. He puts clothes into the washer and takes them out of the washer, puts them in the dryer, takes them out of the dryer, and folds them. He does not carry the clothes.

Sleeping is uncomfortable for Claimant. Xanax relaxes him and lets him sleep without having spasms.

Claimant takes two Lortab in the morning, two in the early afternoon, and one later in the day.

Claimant occasionally has spasms in his low back that wake him. He has spasms two to three times per week. Claimant lies on the floor for ten to fifteen minutes and puts his feet up when that happens. The spasms are sometimes very painful.

Claimant sits a lot in an oversized chair. The chair has a rigid back and a rigid seat. It is not a La-Z-Boy. If Claimant sits on a couch, he sits on several cushions to keep his hips high. He uses a stool in the basement.

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Claimant stated that he can sit comfortably for thirty to forty minutes. If he sits longer than that, he has to get up to stretch and move. He said his standing tolerance is ten minutes maximum. After ten minutes, he has to get up and walk or move.

Claimant feels that he can lift ten to twelve pounds at most. He is able to kneel. He does not bend. He stated he cannot bend without injuring himself.

Claimant can walk about one-third of a mile at a time. He walks that distance three times a day with five minute breaks in between each one third mile walk.

Claimant did not have back surgery after the May 2005 injury.

Claimant could carry at least 150 pounds, including his tools and things on his body, before the May 2005 injury. He feels that he can now only safely carry 10 to 12 pounds. He was given a restriction of 25 pounds, and he could lift that amount at the time he was given that restriction. The 25 pound restriction may have been from a doctor other than Dr. Miller. He agreed Dr. Miller may have put him on a 10 pound weight restriction.

In a typical day, Claimant gets up, takes a shower, drives his daughter to school, walks, does laundry, and takes out the trash. He can drive. He drives every day. He can drive between thirty and forty-five minutes before stopping and stretching. Claimant typically does not drive thirty to forty minutes in a day. He drives to the doctor's office, to the store, and to his daughter's school. His knees get stiff when he drives. He has a little difficulty driving. He could drive two to three hours at a time before his May 2005 injury.

Claimant stated that all of his injuries affected him, including his back surgery, his shoulder injuries, and his age. He did not feel that he was capable of substantial gainful employment after he retired on September 29, 2005. He felt no employer would hire him in his physical condition.

Claimant is on Social Security Disability. He received it after the May 2005 injury. He did not receive it on his first application. It was also denied on the first appeal, but was granted after the second appeal.

Claimant took a lump sum retirement after he stopped working for Employer and invested the money. He receives \$1,200.00 per month from that investment.

Claimant does not need to lie down during the day. Claimant does not lie down to sleep during the day. He does need to sit and rest.

Claimant did not do vocational rehabilitation after the May 2005 injury.

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Claimant lives with his wife, 11 year old daughter, and 18 year old daughter who just started college. He is 59 years old. He is six feet one and one-half inches tall and weighs 202 pounds. He graduated from high school in 1971 and attended Missouri Western College for a year after high school. He has not had any trade school. He was never in the armed services. He was not employed at the time of the hearing.

I find Claimant's testimony to be credible unless discussed otherwise later in this award.

The court notes that Claimant did not appear to be in pain during the hearing. He did not grimace or shift in his chair. He did not move and get up from his chair slowly. He did not frequently rub or hold his back, shoulders, or knees. He did not use any assistive device. He did not wear a back brace. He did not use a pillow to support his back while sitting. He stood once during the hearing for a few seconds and stretched briefly approximately one hour after the hearing began. He also left the courtroom during a recess.

*Medical Treatment Records*

Exhibit B contains records of Dr. William Miller. Exhibit B includes an Operative Procedure Report of Dr. Nelson Escobar and Dr. William Miller that notes a May 6, 1983 operation. The preoperative and postoperative diagnoses were "herniated nucleus pulposus, L5-S1, left." The operation performed was: "Left L5-S1 hemilaminectomy, discectomy and foraminotomy."

Exhibit B includes an Operative Report dated January 25, 1985 of Dr. Richard Brennan. The preoperative and postoperative diagnoses were impingement syndrome right shoulder. The procedure performed was: "1. Resection of coracoacromial ligament, right shoulder. 2. Neer anterior acromioplasty right shoulder."

Exhibit B includes an Operative Report of Dr. Richard Brennan dated September 29, 1997. The postoperative diagnosis was rotator cuff tear with impingement syndrome. The procedure performed was neer anterior acromioplasty, resection of coracoacromial ligament, and repair of left rotator cuff."

Exhibit B includes a Cardiac Cath Report dated May 25, 2000. The summary states: "Mild cardiomyopathy with normal coronary arteries."

Exhibit D contains records of Dr. Richard Brennan. Exhibit D includes Dr. Brennan's note dated October 17, 2000 that states Claimant had returned and was doing much better. It also states: "His EMG shows evidence of ulnar nerve entrapment, and

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cubital tunnel syndrome. He doesn't wish to do anything about it at this time. Bothers him only when he plays golf."

Exhibit D includes Dr. Brennan's note dated December 28, 2000 that states in part: "Ronald returnsn [*sic*]. He is doing well. No problems, no complaints. He is doing quite well. Knee is doing fine. I am going to release him from treatment today. No return."

Exhibit K contains records of Dr. William Miller. Dr. Miller's December 30, 2002 Progress Note in Exhibit K states Claimant was there for evaluation of his low back pain. The note states Claimant "has been worse over the last two or three month's time. Occasionally wakens at night screaming with bad pain. Has to be very careful at work. He works out of a bucket for the phone company. No other specific history of immediate injuries." Dr. Miller assessed low back pain and radiculopathy and scheduled Claimant for an MRI of the low back. Lortab was prescribed for pain with Trazodone at H.S. The note states Claimant "really cannot sleep very well. Hopefully that will help."

Exhibit B includes a Radiology Report, MRI lumbar spine dated January 15, 2003. The Impression states: "No disk herniation or nerve root abnormality is identified in the lumbar spine. There are degenerative end plate changes in L5-S1."

Dr. Miller's February 3, 2003 Progress Note in Exhibit K states Claimant was there for breathing problems and back pain. The note states his pain was worse when he "uses a soft mattress at home and they were going to get a new harder mattress or modify the one at home." He took two or three Hydrocodone so he could sleep and make his low back pain bearable.

Dr. Miller's April 17, 2003 Progress Note in Exhibit K states Claimant was there for evaluation of his back pain and gastroenteritis problems. He was given a refill of Lortab.

Exhibit B includes a Radiology Report dated May 12, 2004 that contains the Impression: "Mild pulmonary hyperinflation with no acute appearing abnormality of the chest."

Dr. Miller's records note refills of Lortab approximately monthly throughout 2004, and in February and March 2005.

Dr. Miller's April 12, 2005 Note in Exhibit K states Claimant was under increasing severe back pain and pain in the hands and knuckles. The note states his back pain at night was somewhat unbearable, and lately Claimant had had to increase Lortab. Dr. Miller noted positive straight leg raising sign with low back pain. He assessed low back pain, degenerative arthritis, hands, and degenerative disc disease, back.

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Dr. Miller's May 13, 2005 Note in Exhibit K states Claimant was there because of a lot of pain going down initially his right leg, and that day the left leg. The note states the pain began three days ago, "which would have been 5/10 when he was bent over pulling on a cable. Coincidentally, this similar position that he was in several years ago resulted in him ending up with back surgery. He felt a pop and pulling and the pain almost immediately went down his leg. He is having so much pain he could not sleep or relax last night." Dr. Miller assessed low back pain and acute radiculopathy secondary to lumbar disc disease. He started Claimant on Percocet.

A Radiology Report of the lumbar spine in Dr. Miller's records dated May 13, 2005 notes: "The bone density and pedicles are intact. There is straightening. There is no compression or subluxation. There is near complete loss of the L5-S1 disc space with large bridging anterior osteophytes and smaller posterior osteophytes. Impression: Dominant degenerative changes of L5-S1."

Dr. Miller's May 16, 2005 Note in Exhibit K states Claimant was there with increasing pain in his low back and down his right leg. He could not move, sleep, or ambulate well because of the persistent pain. Dr. Miller assessed severe low back pain and radiculopathy. Arrangements were made for an MRI.

Records of Heartland Regional Medical Center in Exhibit B include a report of an MRI Lumbar dated May 16, 2005. The report notes in part: "Indication: Low back pain. Left leg pain. Lifting injury. Prior lumbar surgery." The report recites the following Impression:

Impression: 1. There has been a left laminectomy at L5-S1. There is no recurrent disk herniation or evidence of enhancing post-operative fibrosis. There is a small amount of non-enhancing fibrosis. 2. There is slight encroachment on the right neuroforamen at this level secondary to osteophytes and disk bulge. The exiting nerve root is uninvolved in this patient with left leg pain. 3. There is a left paracentral broad-based bulge arising from the L4-5 disk space of no significance.

Dr. Miller's May 27, 2005 Note in Exhibit K states Claimant was there and could not stoop or kneel because that exacerbates his severe low back pain. Dr. Miller noted Claimant had moderate low back tenderness and pain with extreme flexion and extension. He assessed low back pain exacerbated by work condition, degenerative disc disease L5-6, and lumbar disc disease with disc bulging at L4-5.

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A handwritten note in Dr. Miller's records dated June 9, 2005 states in part: "Order given 6/2/05. He can't bend his body and lift over ten pounds. Written order Dr. Miller."

Exhibit H includes records of Dr. Alejandro Blatcher of Heartland Center for Pain Management. These records include Dr. Blachar's June 9, 2005 Office Note that states in part:

This is a 51 year old white male who is chiefly complaining of left-sided low back pain radiating around the hip into the lateral leg and the ankle. His VAS is 6-7/10. It is a pulling sensation. It is intense in pressure like. As I understand, he was in a work related injury on 5-12-05. He was in a pit with an employee lifting a cable up and felt a pop in his back. He has had pain though for three or four years, but his pain was exacerbated after this injury in May. He notes some numbness and tingling down the leg.

Dr. Blachar's Assessment on June 9, 2005 was: "1. Left lumbar radiculopathy. 2. Post lumbar laminectomy syndrome. 3. L4-5 Left paracentral disk bulge." The note states Dr. Blachar thought it would be reasonable to set up Claimant for a caudal epidural steroid injection, and he was going to set that up in the near future pending insurance authorization.

Dr. Miller's June 17, 2005 note in Exhibit K states Claimant was there and his back pain was better since he had not had to do any major lifting, bending, squatting, or climbing. He was doing supervisory work. He still had low back pain with sitting in a position too long or doing activities such as clutching a trunk. He had left-sided pain at the end of his leg. An examination revealed low back tenderness exacerbated by extension and bending forward. Range of motion was restricted. Straight leg raising was positive.

Dr. Miller's June 17, 2005 note in Exhibit K states in part:

I feel he should undergo physical therapy. He needs to be at home with regular pain management including the non-steroidal and his regular pain medicines. I do not see how he can work and do recurrent bending, twisting, lifting, squatting, or climbing because of his back problems. To me, the wonder is how he has been able to do these activities this long without any significant pain. I want [*sic*] see him back in three or four weeks time. FMA paper filled out to continue on restricted duties.

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Dr. Miller's June 29, 2005 Note in Exhibit K states he had a phone call from a case reviewer from the SMART Corporation, and Dr. Miller indicated that Claimant's work restrictions would be permanent. The note further states that Claimant needed to undergo therapy for the next four weeks time for three times weekly, and the physical therapy would help determine the exact permanent extent of the restrictions he would have. The note also states: "I indicated to her though he could not work where he was having to sit, bend forward constantly, working in a hole or other restricted areas and that he could not climb poles or do a lot of heavy lifting. The exact circumstances and restrictions would be further determined after his therapy is completed."

Dr. Miller's July 12, 2005 Progress Note in Exhibit K states Claimant was still having severe back pain that had been present since May 10, 2005 and since then had been having pain when he tried to bend, squat, or climb. The note states Claimant went on lighter duty and his pain was getting better. Dr. Miller assessed low back pain, degenerative disk disease, and degenerative arthritis, spine. The note states in part: "It appears to be as long as he is not having to sit then squat regularly that his pain is gradually improving." Prescriptions were written for Lortab and Percocet.

Exhibit B includes a Discharge Summary of Heartland Health dated July 22, 2005 that notes Claimant was admitted to Heartland on July 21, 2005. Exhibit B includes a Cardiac Cath Report dated July 21, 2005. The summary comments are: "1. Normal coronary arteries. 2. Normal LV function." The Discharge Diagnosis notes chest pain, atypical, tobacco usage, sleep apnea, and lumbar disc disease. Claimant was admitted to the hospital with chest pain. Discharge arrangements were made after a cardiac catheterization was noted to be normal. Claimant was discharged home to "just gradually increase his exercises and activity and to continue on Xanax .5 TID PRN, Paxil 10 mg daily, Zantac 150 daily, Voltaren 75 B.I.D., and Percocet 10/325 1-1.5 TID."

Exhibit H includes an Office Note of Dr. Blachar dated August 8, 2005. The History in the note states that Claimant was chiefly complaining of continued right-sided low back pain radiating into the hip, lateral leg to the ankle. The note states that they had postponed a previous caudal epidural steroid injection because of previous intertriginous rash as [*sic*] the caudal injection site. The note states that Claimant continued to have "an erythematous area in the intergluteal folds but it is significantly better."

Dr. Blachar's August 8, 2005 note includes the following Plan:

1. I have discussed the fact that since this is an elective procedure, and since he does have an infection at the injection site, I think it is reasonable to hold off until the injection completely heals. We will plan on seeing him back at the next scheduled appointment in a few weeks and hopefully the skin rash will clear completely. Once that does, we will proceed with further injections at that time.

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It is noted that Dr. Blachar's records in evidence contain no entries after August 8, 2005.

Dr. Miller's September 27, 2005 note in Exhibit K states Claimant was back that day and was still having some back pain when he bent down, had to pick anything up, or tried to sit in a bent over or squatting position. The note states in part: "I don't see how he can return to work and have to go back and do his job, because of the amount of bending, squatting, and climbing he has had to do and because of his low back problems." Dr. Miller refilled his Lortab. Dr. Miller's September 25, 2005 Note states in part: "A. 1. Low back pain. 2. Degenerative disk disease. 3. Degenerative arthritis."

Exhibit F includes records of Heartland Cardiovascular Consultants. These include Dr. Arvind Sharma's November 15, 2005 report noting Claimant had come in that day for a follow up. Claimant was noted not to have had any recurrence of chest pain and had been doing very well. The assessment/plan states: "1. Atypical chest pain with normal cardiac catheterization. 2. Dyslipidemia. 3. Hypertension. The report notes in part: "Though the pressure is mildly elevated today I am not making any blood pressure medications changes mainly because it is more likely to be part of his flu that he is going through."

Dr. Miller's December 6, 2005 record notes refills were written for Lortab 7.5/500 x 200.

Dr. Miller's March 3, 2006 Note in Exhibit K states Claimant was there for an evaluation of severe feet pain. The note states Claimant had some parasthesia and decreased sensation about the right foot, fourth and fifth toe, which he believed was from his lumbar disc problems. Dr. Miller assessed Raynaud's phenomena and radiculopathy.

Dr. Miller's March 31, 2006 Progress Note in Exhibit K states Claimant was there for evaluation and follow up for burning and pain in his feet and a little bit in the hands. The note states Claimant has also had "some paresthesias and problems lately too that have increased down into his calves, legs, and increasing pain." Dr. Miller's assessment was: "1. peripheral neuropathy. 2. Raynaud's phenomenon." Dr. Miller was "concerned about possible tarsal tunnel syndrome complicating this." The note states Claimant was placed on Lortab 10 one orally b.i.d. p.r.n."

Dr. Miller's records in Exhibit K include a report of Electrodiagnostic study of Dr. Nanda Kumar dated April 4, 2006. These reveal a "possible bilateral tarsal tunnel syndrome, mild, left slightly worse than the right."

Exhibit I contains records of Dr. Brian Crites of Heartland Orthopedic and Sports Medicines. These include a note of Dr. Crites dated April 10, 2006. Claimant appeared

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with a chief complaint of bilateral foot pain. It had been present for two years and was worse with activity. He was wearing some over-the-counter arch supports which helped but did not completely alleviate the claim. The note states in part: "He does walk every day for exercise and states that he can only go for half an hour or so before the pain hurts too bad." Dr. Crites' Assessment and Plan states: "1. Bilateral plantar fasciitis, left greater than right. We will get him fitted for some orthotics as his over-the-counter have benefitted him but not completely alleviated the problem. I think this will be all that he will need at this point in time. As long as he is doing well and likes the orthotics I'll see him back on a p.r.n. basis."

Exhibit J contains records of Dr. Robert Levene of Heartland Complementary and Endocrative Medicine. These include Dr. Levene's note dated June 14, 2006. Claimant had a chief complaint of hypertension, hyperlipidemia and GERD. He had been having muscle and joint pain, plantar fasciitis, upper leg pain, and shoulder arm pain. Medications included Lortab 10/50 mg. Dr. Levene's June 14, 2006 note states that Claimant's current medications included Lortab 10/500 mg 1 p.o. every 6 to 8 hours for chronic back pain and DJD, and alprazolam 0.5 mg PRN for anxiety. Dr. Levene's impressions were: "1. Muscle and joint pain. 2. Hypertension. 3. Hyperlipidemia. 4. DJD. 5. Anxiety."

*Dr. P. Brent Koprivica Evaluation*

Dr. P. Brent Koprivica evaluated Claimant on July 14, 2006. Dr. Koprivica's deposition taken on November 14, 2011 was admitted as Exhibit L, with his Curriculum Vitae (Deposition Exhibit 1) and his report dated July 14, 2006 (Deposition Exhibit 2). Dr. Koprivica is Board Certified in emergency medicine and occupational medicine. (Koprivica deposition, page 4). He is a Medical Doctor. (Koprivica deposition, page 3). His Curriculum Vitae notes that he is licensed in Missouri and Kansas.

Dr. Koprivica identified his July 14, 2006 report. (Koprivica deposition, page 5). He evaluated Claimant on that date. Dr. Koprivica noted Claimant had a specific injury on or about May 10, 2005 when he was lifting cable to put it on a cable hook, and the weight of that and the forces in that resulted in a specific injury to his low back. (Koprivica deposition, page 17). Dr. Koprivica stated that the May 10, 2005 injury resulted in "a new motion segment annular injury at L4-5 where he developed a radiculopathy following that specific injury from discs bulging from the annular injury." (Koprivica deposition, page 17).

Dr. Koprivica stated that Claimant's original back injury in the 1980s was at L5-S1. (Koprivica deposition, page 18). The motion segment injury from May 2005 was at L4-L5. (Koprivica deposition, page 18). Dr. Koprivica noted that an MRI done in around May 2005 when Claimant went to Dr. Blachar showed bulging at the L4-L5 level. (Koprivica deposition, page 19). Dr. Blachar diagnosed a L4-L5 left paracentral disc

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bulge with a left lumbar radiculopathy on May 13, 2005. (Koprivica deposition, page 19). Claimant then required new treatment in the form of medications that Dr. Blachar was providing. (Koprivica deposition, page 20).

Dr. Koprivica understood that the actual event occurred on May 10, though the claim was dated May 11. (Koprivica deposition, page 22). He noted the event occurred on the date that Claimant was lifting the cable in the pit.

Dr. Koprivica reviewed medical records that are described in pages six and seven of his report. He conducted a physical examination of Claimant. (Koprivica deposition, page 22). Dr. Koprivica noted Claimant was appropriate in all five categories of Waddell's criteria that looked for exaggerated or inappropriate pain behaviors. (Koprivica deposition, page 23). He noted Claimant fulfilled a validity criterion on the motion testing of the low back. (Koprivica deposition, page 23).

Dr. Koprivica testified Claimant had grip strength loss in both hands. Normal is between 45-48 kilograms on a dominant hand. Claimant demonstrated 31 kilograms on the right, the dominant side, and 27 kilograms on the left. He noted, "neurologically, in his upper extremities, he [Claimant] was intact." (Koprivica deposition, page 26). Claimant had a loss of muscle mass in both shoulder girdles, and had arthrotomy scars on both shoulder girdles. (Koprivica deposition, page 26). He had some pain in both shoulders with motion testing. (Koprivica deposition, page 27). There was some greater motion deficit on the left compared to the right shoulder. Claimant had a healed lumbar surgical scar.

Dr. Koprivica noted Claimant had very significant low back pain, and associated with that low back pain, losses of lumbar motion. (Koprivica deposition, page 27). Claimant's loss of lumbar function was moderate—between 30-60%, compared to the norm. (Koprivica deposition, page 28). Claimant's true lumbar flexion was 35 degrees, and the norm is 60 degrees. (Koprivica deposition, page 28). Claimant had moderate deficit in true lumbar extension. His lateral function was preserved. (Koprivica deposition, page 30).

Dr. Koprivica identified pre-existing medical conditions that were disabling and were not disabling. When he said "industrial disability," he used the term to note "objective ongoing permanent impairment, meaning it is permanent in nature, its ongoing prior to the work injury and continues, that he had vocational impact or he was hindered or limited in his work and/or it would represent a significant obstacle to reemployment." (Koprivica deposition, page 31).

Dr. Koprivica stated that he did not see anything on the workup that supported that Claimant had a significant disability in cardiovascular disease. Claimant had a heart catheterization in May 2000 which had normal coronary arteries. He had another heart

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catheterization in July of 2005, and had normal coronary arteries and normal left ventricular function. Dr. Koprivica did not believe “that there was any evidence objectively within a reasonable degree of medical certainty that there was industrial disability based on cardiovascular disease.” (Koprivica deposition, page 33).

Dr. Koprivica noted Claimant had a medial meniscectomy of the right knee done by Dr. Brennan in October of 2000. Dr. Koprivica stated at Koprivica deposition, page 34:

I did not believe that there was any evidence that there was significant functional impact where he would be hindered or limited in the performance of work. You know, he was working in awkward postures in terms of his knees, really wasn't symptomatic in reference to his knees. Whereas with his back he was symptomatic, but with his knees he wasn't.

Dr. Koprivica noted Claimant described recovering from the right knee condition without any restrictions, not requiring any ongoing treatment. Dr. Koprivica did not believe the right knee condition was industrially disabling. (Koprivica deposition, page 34-35).

Dr. Koprivica noted Claimant had mild cubital tunnel syndrome. Dr. Koprivica did not believe that condition was at a level of significance that it would have been an obstacle in Claimant doing any kind of work of significance using his hands on a permanent ongoing basis. (Koprivica deposition, page 35).

Dr. Koprivica noted Claimant had surgery on both shoulders by Dr. Brennan. He had subacromial decompression done on the right shoulder in January 1995 and a labral repair and subacromial decompression on the left shoulder in 1997.

Dr. Koprivica testified at Koprivica deposition, pages 36-38:

And he [Claimant] said that he was limited in his tolerances to repetitive or sustained activities especially above shoulder level. That's very consistent with the nature of the structural changes in his shoulder from those types of surgery, that he would have an obstacle of doing that kind of work.

I thought both of his shoulders were such that they were industrial disabilities, whereas I didn't think the hand or right upper extremity complaints were; I didn't think the knee was; I didn't believe the cardiovascular disease was.

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The other problem he had was with his low back. In 1983, he had a left L5-S1 hemilaminectomy and discectomy. Following that he had ongoing limitations or intolerances to sitting. He could sit less than 45 minutes.

In his actual work he would self-accommodate for those kinds of limitations because he would move. But work where you have to sit and you can't get up, he couldn't do that with his back as it existed following that 1983 surgery, even before he had the further injury to his back from his ongoing work, and then the specific injury that occurred in May 2005.

It was recorded in the records that he was having progressive symptoms in his back in 2002, and that was recorded by Dr. Miller. And by 2002 he had kind of stabilized his chronic back condition.

So I felt that his surgery, as far back as '83 and what followed that, was industrial [*sic*] disabling before he suffered any further aggravating injury from his ongoing work.

Dr. Koprivica was asked the following questions and gave the following answers at Koprivica deposition, pages 41-42:

Q. Now, it appears from your report that you had assessed a percentage of disability regarding your opinions about the prior low-back complaints and disability that he had. Is that true?

A. Yes.

Q. And what was that?

A. I assigned a 20 percent permanent partial disability to the body as a whole for his prior lumbar surgery and the residuals from that lumbar surgery.

Q. And that's all prior to the April 12, 2005, injury?

A. For that claim date.

Q. For that claim, yes.

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A. When you say 'injury,' it make [sic] me think of a one-time event and I don't want there to be any confusion, because I think that actually occurred over years.

Q. Okay. And with regards to April 12, 2005, did you arrive at any opinion regarding the extent of disability that he had suffered as a result of that claim date?

A. I did.

Q. And what was your opinion?

A. For that I apportioned a 10 percent permanent partial disability to the body as a whole in isolation.

Dr. Koprivica was asked the following questions and gave the following answers at Koprivica deposition, pages 43-47:

Q. Now, were you – in arriving at that conclusion, were you using the statutory guidelines with regards to the minimum percentages that need to be utilized to have Second Injury Fund liability and permanent partial disabilities?

A. Yes.

Q. Now, looking at paragraph 5 on page 12, can you explain what you're stating in regards to that first paragraph?

A. Yes. In paragraph 5 - - well, let me talk about paragraph 5 just in general and I'll explain the first paragraph.

In general, Line Item No. 5 was meant to address the issue of industrial disability that I felt existed immediately prior to the May 11<sup>th</sup>, 2005, claim. And I thought that there were three preexistent industrial disabilities.

The first is the lumbar disability. And that lumbar disability is going to be the sum of the disability that I have assigned that predated April 12<sup>th</sup>, 2005, plus the disability that I've apportioned for the April 12<sup>th</sup>, 2005, injury.

So 30 percent permanent partial disability to the body as a whole, I'm assigning for his lumbar disability before he was injured May 11<sup>th</sup> - - the May 11<sup>th</sup>, 2005, claim.

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The other two disabilities related to the shoulders. He had had open procedures on both shoulders with ongoing residuals where, objectively, I've identified atrophy, ongoing weakness and limitations vocationally and activities above shoulder level or repetitive use activities.

For that I assigned a 20 percent permanent partial disability of the right upper extremity at the level of the shoulder at the 232-week level and 20 percent permanent partial disability of the left upper extremity at the level of the shoulder at the 232-week level.

All of those disabilities predated the May 11<sup>th</sup>, 2005, injury.

Q. Now, with regards to paragraph 6, can you explain your opinion in that regard?

A. Yes. I thought that there was a significant new injury in the specific event in May of 2005 where he was lifting the cable. And I've used the term - - because it was prior to August of 2005, I understood that the statutory language for - - the definition for compensable accident would be that it was a "substantial factor."

I thought it was the prevailing factor in terms of the pathology at the L4-5 motion segment level. And I feel like using the term "prevailing factor" implies something that is of greater significance in terms of the threshold for it being compensable.

But I did believe it was a new compensable event in May of 2005 and that it had led to the annular injury with left-sided disk bulge and the lumbar radiculopathy arising from the L4-5 motion segment level.

Q. And did you arrive at an opinion with regards to the extent of permanent partial disability that Mr. Lawrence had suffered as a result of the May 11, 2005, accident?

A. I did.

Q. And what was your opinion?

A. My opinion was that that injury in isolation represented a 15 percent permanent partial disability to the body as a whole. I did not

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believe it was a totally disabling type of injury. And so what I assigned or apportioned was 15 percent for that injury alone.

Q. Now, with regards to the May 11, 2005 injury, did you believe that there was any Second Injury Fund liability in consideration of any of his preexisting medical conditions?

A. I did.

Q. And what was your opinion in that record?

A. Well, my opinion was that there was a synergistic effect when you combine those disabilities. And I pointed out that my belief was that as an occupational physician that he was potentially employable with restrictions that I would place.

Now, that is as a physician. And there may be vocational factors and a vocational profile that I wasn't considering about him being totally disabled. But I didn't - - I could not conclude that he was totally disabled based on that synergistic effect.

I did state that if the vocational expert were to find that he was permanently and totally disabled, I would defer to them.

If they'd found he was not permanently and totally disabled, I thought there was unusual synergism and that he had profound disability when I looked at that combined synergistic effect and that that synergism would be represented by a 20 percent enhancement factor above the simple arithmetic sum of the separate disabilities.

Dr. Koprivica testified at Koprivica deposition, page 48: "Again, my belief was that he was potentially employable from what I could see." Dr. Koprivica continued at Koprivica deposition, page 49: "And I put in my report that hypothetically if the vocational expert found that he was totally disabled, I didn't believe the primary work injuries were totally disabling in isolation. And I thought it would be from the synergism of combining those disabilities."

Dr. Koprivica testified that the restrictions set forth at page 14 of his report were the result of Claimant's overall medical conditions, and he had no reason to change those restrictions. (Koprivica deposition, page 49).

Dr. Koprivica saw Claimant in July 2006 at the request of Claimant's attorney. He had not seen any medical records from that point forward. (Koprivica deposition, page

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51). The last treatment records he had seen were August 8, 2005. He had not seen Claimant's deposition. (Koprivica deposition, page 52). He did not believe Claimant was permanently and totally disabled as of the date he saw him. (Koprivica deposition, page 53).

Dr. Koprivica was aware that Claimant had had surgery at L4-L5-S, excision of disc, and had had ongoing treatment by way of prescription narcotic medication. (Koprivica deposition, page 55). Dr. Koprivica was aware that the records of Dr. Miller indicated that in May of 2003, Claimant reported a history of waking up at night screaming in pain as a result of his low back problems. (Koprivica deposition, page 56).

Claimant did not provide Dr. Koprivica any history of having been diagnosed with Raynaud's phenomenon and having problems with numbness and tingling in the hands and feet. (Koprivica deposition, page 65). He did not provide Dr. Koprivica any history of having problems with pain and loss of sensation in the hands and feet that affected his ability to perform his job duties on an ongoing permanent basis. (Koprivica deposition, page 65).

Dr. Koprivica had not seen the report of Michael Dreiling. (Koprivica deposition, page 65).

Dr. Koprivica believed the disc bulge at L4-5 is attributable to the last traumatic event based on the history of radicular pain down the left leg, the contemporaneous treatment for that condition, and the objective work up identifying it following that event. (Koprivica deposition, page 68).

Dr. Koprivica agreed that Claimant had an issue with radicular pain in the left leg prior to May 2005. He noted Dr. Miller's records document that. (Koprivica deposition, page 68). Dr. Koprivica did not know how frequently Claimant had intermittent radicular problems or how long his episodes would last prior to May 2005. (Koprivica deposition, page 70).

Dr. Koprivica agreed Dr. Blachar's conclusion set forth in Dr. Blachar's report states, "there is a left paracentral broad-based disc bulge arising from the L4-5 disc space of no significance." Dr. Koprivica thought the disc bulge was significant in producing Claimant's radicular symptoms.

Dr. Koprivica agreed Claimant was taking the same type of medications on the date of Dr. Koprivica's examination as he had been taking prior to May 2005. (Koprivica deposition, page 73).

Dr. Koprivica stated Claimant was able to perform a full squat unassisted. He had normal sensory dermatomal exam. Babinski's was normal and patellar and Achilles'

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reflexes were symmetrical bilaterally. (Koprivica deposition, pages 73-74). Claimant was able to walk without the use of any assistive devices. Dr. Koprivica did not see any indication Claimant was wearing any kind of back brace or knee brace. (Koprivica deposition, page 74).

Claimant did not volunteer any history of having to lie down throughout the day to alleviate his back complaints at the time Dr. Koprivica saw Claimant. (Koprivica deposition, page 75).

Dr. Koprivica did not see any formal written restrictions pertaining to Claimant's shoulders. (Koprivica deposition, page 77). He did not review any written records indicating Claimant had any ongoing treatment on either shoulder after MMI release. (Koprivica deposition, pages 77-78). Claimant told Dr. Koprivica that no specific restrictions were imposed on his work at MMI with regard to the prior L5-S1 hemilaminectomy and discectomy. (Koprivica deposition, page 78).

Dr. Koprivica's July 14, 2006 report, Koprivica deposition exhibit 2, notes that at that point Claimant had decided not to pursue epidural steroid injections. His report notes that since the May 2005 injury, Claimant has "had a severe increase in back pain. His sitting tolerance is less than an hour. His standing tolerance is less than 45 minutes. He has reduced walking tolerance." (Koprivica report, page 7). The report also states: "He self limits to less than 25 pounds on lifting and carrying as recommended by Dr. Miller." (Koprivica report, page 7).

Dr. Koprivica's July 14, 2006 report states at page 6 that Claimant "had a specific injury on or about May 10, 2005 (listed date of injury May 11, 2005), when he was bent over lifting on cable to put on a cable hook. He was helping a co-worker." Dr. Koprivica's report states at page 14 that "The May 10, 2005 (listed date of injury May 11, 2005), injury represents not only a substantial factor, but the prevailing factor leading to further aggravating injury to the lumbar spine with the development of the identified left-sided disk bulge and ongoing radicular symptoms."

Dr. Koprivica's July 14, 2006 report states in part:

1. In my opinion, Mr. Lawrence's work tasks as described by Dr. Miller, in terms of the sustained and awkward postures along with the pulling and pushing activities he performed, represent a substantial factor in the development of aggravation and acceleration of the underlying degenerative disease unrelated to his employment following the surgery that was performed in 1983 at the L5-S1 level. In my opinion, that was symptomatic and disabling as well.

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Therefore, I believe that an injury date for repetitive injury up through April 12, 2005, when he went to Dr. Miller and ongoing, separate from the May 10, 2005 (listed date of injury May 11, 2005), injury date would be appropriate.

.....

3. Attributable to his prior lumbar surgery, I would apportion a twenty (20) percent permanent partial disability to the body as a whole.

For the aggravating injury from repetitive up through April 2005, I would separately apportion a ten (10) percent permanent partial disability to the body as a whole.

.....

11. When one combines the permanent partial disabilities I have outlined, I would be in agreement that Mr. Lawrence is totally occupationally disabled as a capable splicer.

12. As an occupational physician, I believe that there would be potential jobs which Mr. Lawrence could perform in the open labor market based on his overall presentation regarding the permanent partial disabilities I have outlined. There may be vocational issues that I am not considering in looking at the issue of permanent and total disability. Those issues would best be addressed by a vocational expert.

14: Dr. Koprivica's report sets forth the following restrictions in paragraph 13 at page

13. I would restrict Mr. Lawrence from repetitive or sustained activities above shoulder girdle level based on his presentation. He should do no climbing types of activities. He should avoid repetitive, forceful pushing and pulling types of activities at chest level.

I would recommend that he avoid frequent or constant bending at the waist, pushing, pulling or twisting. He should avoid sustained or awkward postures of the lumbar spine.

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Posturally, Mr. Lawrence should have the ability to change between sitting, standing and walking. As a general guideline, standing and walking intervals should be limited to less than one hour. Captive sitting intervals should be limited to less than one hour. Ideally, he would have the flexibility to change more frequently if necessary.

I would recommend he avoid frequent or constant squatting, crawling or kneeling.

I would recommend that he avoid frequent or constant lifting or carrying. He can occasionally lift or carry up to 25 pounds as a general recommendation.

Dr. Koprivica's report states that his opinions "have all been given within a reasonable degree of reasonable certainty unless otherwise expressed."

*Vocational Evidence—Evaluation of Michael Dreiling*

Michael Dreiling's deposition taken on November 16, 2011 was admitted as Exhibit M. Mr. Dreiling's profession is Vocational Rehabilitation. He has been engaged in that profession for thirty-six years. (Dreiling deposition, page 4). For the past 10 years, he has primarily done vocational assessments and evaluations. (Dreiling deposition, page 5) He has been doing Missouri Workers' Compensation evaluations for approximately twenty-five years. (Dreiling deposition, page 6).

Mr. Dreiling identified his Curriculum Vitae and his November 7, 2006 report pertaining to his evaluation of Claimant. He reviewed records and reports and interviewed Claimant. (Dreiling deposition, page 8). He looks at medical records with emphasis on records and reports that identify the actual functional restrictions or limitations that may be placed upon the individual. (Dreiling deposition, page 9)

Mr. Dreiling administered the Wonderlic Personnel Test to Claimant. The test results revealed that Claimant "did have the ability to acquire new skills." (Dreiling deposition, page 21). Mr. Dreiling did not feel that Claimant would really be a candidate for formal training and was "probably more suited for technical-vocational training, but that typically requires better physical functioning abilities than what—what he was functioning at." (Dreiling deposition, pages 21-22).

It is Mr. Dreiling's opinion that "No employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ him [Claimant] in his existing physical condition." (Dreiling deposition, page 23).

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It is Mr. Dreiling's opinion that Claimant is not able to be gainfully employed. He testified that is due to a combination of various medical disabilities and various medical restrictions, including pre-existing problems and problems related to the more recent work injury in 2005. (Dreiling deposition, pages 25-26). The pre-existing conditions include Claimant's back, both shoulders, right knee, and hands. (Dreiling deposition, page 26). Mr. Dreiling's opinions are with a reasonable degree of certainty in his area of expertise. (Dreiling deposition, page 26).

Mr. Dreiling was provided with the restrictions of Dr. Koprivica and Dr. Koprivica's report dated July 14, 2006. Mr. Dreiling stated Claimant had transferrable skills related to reading blueprints, diagrams, and schematics, and working with small hand tools as a result of his employment with Employer. (Dreiling deposition, page 31).

Mr. Dreiling was asked the following question and gave the following answer at Dreiling deposition, page 34:

Q. And when we look at that individual, age 52, with his education, his transferable skills, the limitations – functional limitations on the utilization of his upper extremities and his back, what kind of jobs are available for that individual in the open labor market?

A. Well, at the point you're probably looking at more of the very sedentary-type work activities.

Mr. Dreiling was asked the following questions and gave the following answers at Dreiling deposition, page 35:

Q. And did he provide you with any history of complaints or problems as a result of that knee surgery?

A. Yes.

Q. As you understood it, did he continue to have problems subsequent to the surgery on the knee with decreased strength in the leg, a loose feeling in the knee joint, difficulty climbing stairs, and just an overall sense of he didn't trust the knee?

A. Correct.

Q. When we throw that on top of everything else we've talked about – educational background, transferable skills, age, shoulders and back – does that further limit his ability to compete in the open labor market outside of Southwestern Bell?

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A. Yes.

Q. Assuming those factors, prior to May of 2005, had he left Southwestern Bell, would this guy have had – would he have been able to compete in the open labor market?

A. He certainly would have had a very significant degree of difficulty with competing for work.

Claimant told Mr. Dreiling that he had not applied for jobs as of the date of the assessment. (Dreiling deposition, page 40). The only restrictions Mr. Dreiling relied upon in this case were those rendered by Dr. Koprivica. (Dreiling deposition, page 41).

Mr. Dreiling agreed that before this work injury, Claimant was working without any formal restrictions. (Dreiling deposition, page 42). He understood that Claimant's Employer did not make any special accommodations for Claimant, but that Claimant was self accommodating. (Dreiling deposition, pages 42-43).

Mr. Dreiling stated that based upon Dr. Koprivica's restrictions, Claimant was restricted from a vocational standpoint to light work. (Dreiling deposition, page 43). Light work includes work in manufacturing jobs where people might be doing some packing, or some inspecting. It includes some light janitorial type jobs, some light fast-food type jobs, and in retail stores, some light jobs in terms of clerk and light cashier jobs. (Dreiling deposition, pages 43-44). Claimant would be capable of performing packing, inspecting, janitorial, fast-food, retail store clerk, or cashier jobs intellectually. (Dreiling deposition, page 44). Mr. Dreiling could not really decipher which of Claimant's restrictions were based on the primary injury. (Dreiling deposition, page 45).

Mr. Dreiling testified that he did not think that it was reasonable that Claimant would be able to perform jobs like janitorial, cashier, store clerk and so forth. (Dreiling deposition, page 46).

Mr. Dreiling did not know whether it would be reasonable that Claimant would be able to perform the janitorial jobs and things like that even prior to the primary injury, considering Claimant's pre-existing problems. (Dreiling deposition, page 47).

Mr. Dreiling's November 7, 2006 report states in part:

Realistically, this individual would not be a candidate for formal rehabilitation training, although he academically would have the necessary abilities to pursue a more formalized training program.

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CONCLUSIONS:

This individual's vocational profile is represented by an individual who is 53-years of age; is a high-school graduate; had one year of college approximately 35 years ago; has a work background of basically performing work that was learned through on-the-job training; has always performed more physically oriented type work in the labor market; does not possess any significant transferable skills; has various medical restrictions limiting the type of work that he could perform in the labor market; has worked for the same employer for approximately 31 years prior to taking an early retirement, due to medical issues; describes significant pain issues; and is currently pursuing Social Security disability benefits.

When looking at the presentation that this individual would make to prospective employers in the current labor market, it becomes apparent that he would have difficulty with acquiring employment in the labor market given his age, educational background, work experience, medical difficulties, lack of marketable clerical skills or computer skills, along with his description of his level of functioning, including problems with prolonged sitting, standing, or walking, and basically the need to alternate sitting and standing.

Furthermore, this individual is taking medication for his pain, and although the medication does help somewhat with the pain, he still describes significant pain issues on a day in, day out basis.

.....

It does appear that from a vocational perspective, this individual's ability to actively compete for and obtain employment in the open labor market would be based upon a combination of vocational factors including the various medical problems that he has been experiencing over his lifetime.

It is apparent that this individual does describe having issues to deal with while continuing to work up until 2005, although he still continued to work for the same employer.

This individual's medical difficulties appear to be a combination of his most recent work injury, along with prior medical difficulties.

The need to frequently change between sitting, standing, and walking will have a significant vocational impact for this individual, especially

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taking into account his vocational profile including his educational background, and his lack of computer and clerical experience.

His capacity for formal vocational rehabilitation is suspect, although he does have the academic abilities to acquire further knowledge and skills, it does not appear realistic for this individual to pursue a formal academic training program at this point in his career.

A review of the labor market for this individual would indicate jobs that would indeed require him to exceed his physical functioning capabilities, or require him to have more academic education and training that he possesses.

Finally, based upon the presentation that this individual would make to prospective employers in his local labor market, it is my vocational opinion that no employer in the usual course of business, seeking persons to perform duties of employment in the usual and customary way, would reasonably be expected to employ this individual in his existing physical condition.

His vocational difficulties appear to be a combination of factors including educational background, work experience, and various medical difficulties that he has been experiencing over his lifetime.

*Other Exhibits*

The Stipulation for Compromise Settlement of Claimant's claim against Employer, Exhibit A, notes in part that the settlement is for "permanent partial disability of approximately 15% of the body as a whole."

**Rulings of Law**

Based on a comprehensive review of the substantial and competent evidence, the stipulations of the parties, and the application of the Workers' Compensation Law, I make the following Rulings of Law:

1. *Did Claimant sustain an injury by accident arising out of and in the course of his employment on or about May 11, 2005?*

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Section 287.020.2, RSMo<sup>1</sup> requires that the injury be "clearly work related" for it to be compensable. Section 287.020, RSMo provides:

2. The word 'accident' as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

3. (1) In this chapter the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and

(b) It can be seen to have followed as a natural incident of the work; and

(c) It can be fairly traced to the employment as a proximate cause; and

(d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The employee must establish a causal connection between the accident and the claimed injuries. *Thorsen v. Sachs Electric Company*, 52 S.W.3d 611, 618 (Mo.App.

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<sup>1</sup> All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted. See *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007) where the Eastern District Court of Appeals held that the 2005 amendments to Sections 287.020, RSMo and 287.067, RSMo do not apply retroactively. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000).

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2001), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo.banc 2003)<sup>2</sup>; *Williams v. DePaul Ctr.*, 996 S.W.2d 619, 625 (Mo.App. 1999); *Fisher v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo.App 1990). Section 287.020.2, RSMo requires that the injury be "clearly work related" for it to be compensable. An injury is clearly work related, "if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor." *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. 1999). Injuries that are triggered or precipitated by work may nevertheless be compensable if the work is found to be a "substantial factor" in causing the injury. *Kasl*, 984 S.W.2d at 853; *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App 1998). A substantial factor does not have to be the primary or most significant causative factor. *Bloss v. Plastic Enterprises*, 32 S.W.3d 666, 671 (Mo.App 2000). An accident may be both a triggering event and a substantial factor in causing an injury. *Bloss*, 32 S.W.3d at 671. Further, there is no "bright-line test or minimum percentage set out in the Workers' Compensation Law defining 'substantial factor.'" *Cahall*, 963 S.W.2d at 372. The claimant in a workers' compensation case has the burden to prove all essential elements of his or her claim, *Royal v. Advantica Restaurant Group, Inc.*, 194 S.W. 3d 371, 376 (Mo.App 2006), (citing *Cook v. St. Mary's Hosp.*, 939 S.W.2d 934, 940 (Mo.App. 1997)); *Fischer v. Arch Diocese of St. Louis-Cardinal Ritter Inst.*, 793 S.W.2d 195, 198 (Mo.App. 1990); *Griggs vs. A.B. Chance Co.*, 503 S.W.2d 697, 705 (Mo.App. 1973), including "a causal connection between the injury and the job." *Royal*, 194 S.W. 3d at 376, (citing *Williams v. DePaul Health Ctr.*, 996 S.W.2d 619, 631 (Mo.App. 1999)).

Prior to August 28, 2005, Section 287.800, RSMo provided in part: "Law to be liberally construed.—All of the provisions of this chapter shall be liberally construed with a view to the public welfare. . . ." The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted with a view to the public interest, and is intended to extend its benefits to the largest possible class. Any doubt as to the right of an employee to compensation should be resolved in favor of the injured employee. *West v. Posten Const. Co.* 804 S.W.2d 743, 745-46 (Mo. 1991). Although all doubts should be resolved in favor of the employee and coverage in a workers' compensation proceeding, if an essential element of the claim is lacking, it must fail. *Thorsen*, 52 S.W.3d at 618; *White v. Henderson Implement Co.*, 879 S.W.2d 575, 579 (Mo.App. 1994).

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<sup>2</sup> Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id.* at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

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The claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 912 (Mo.App. 2008); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997). The quantum of proof is reasonable probability. *Thorsen*, 52 S.W.3d at 618; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Fischer*, 793 S.W.2d at 199. "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Fischer*, 793 S.W.2d at 198. Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992). "Medical causation of injuries which are not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004). The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

The court in *Seifner v. Treasurer of State-Custodian of Second Injury Fund*, 362 S.W.3d 59, 2012 WL 1034237 (Mo.App. 2012), states at 66:

“the commission may not substitute an administrative law judge's personal opinion on the question of medical causation of an injury for

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the uncontradicted testimony of a qualified medical expert.” *Angus v. Second Injury Fund*, 328 S.W.3d 294, 300, 2010 WL 3955449 (Mo.App. 2010), (quoting *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994)). When expert medical testimony is provided, “an ALJ's personal views of the evidence cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony.” *Id.* (quoting *Van Winkle v. Lewellens Profl Cleaning, Inc.*, 258 S.W.3d 889, 898 (Mo.App. W.D.2008)).

The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

Claimant testified he injured his low back on May 11, 2005 while working for Employer when he was helping place cable on a rack. While he was lifting a cable about chest high, he slipped and went down. I find this testimony to be credible and true. Claimant continued to have back and leg pain and he treated with Dr. Miller and Dr. Blachar as described in detail earlier in this award.

Dr. Miller's May 13, 2005 record notes Claimant's back and leg pain began three days ago, “which would have been 5/10 when he was bent over pulling on a cable. Coincidentally, this similar position that he was in several years ago resulted in him ending up with back surgery. He felt a pop and pulling and the pain almost immediately went down his leg.” This record supports the conclusion that Claimant sustained an injury by accident at work on about May 11, 2005.

Dr. Koprivica's July 14, 2006 report states at page 6 that Claimant “had a specific injury on or about May 10, 2005 (listed date of injury May 11, 2005), when he was bent over lifting on cable to put on a cable hook. He was helping a co-worker.” Dr. Koprivica's report states at page 14: “The May 10, 2005 (listed date of injury May 11, 2005), injury represents not only a substantial factor, but the prevailing factor leading to further aggravating injury to the lumbar spine with the development of the identified left-sided disk bulge and ongoing radicular symptoms.” I find this opinion to be credible.

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Based on the competent and substantial evidence and the application of The Missouri Workers' Compensation Law, I find that Claimant has met his burden to prove that he sustained an injury by accident that was clearly work related, and that his work for Employer was a substantial factor in causing injury to his low back, and resulting disability. I find that Claimant sustained a compensable accident on May 11, 2005 that resulted in injury to his low back, and the need for medical treatment, and permanent partial disability.

2. *What is the liability of the Second Injury Fund for permanent disability benefits?*

a. *What is the nature and extent of Claimant's permanent disability sustained in the May 11, 2005 injury?*

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 908 (Mo.App. 2008); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989). While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo. App. 1985); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968).

The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Cardwell*, 249 S.W.3d at 908; *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Cardwell*, 249 S.W.3d at 908; *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission "is free to find a disability rating higher or lower than that expressed in medical testimony." *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990);

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*Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that “[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, ‘the impact of that injury upon the employee’s ability to work involves considerations which are not exclusively medical in nature.’” *Sellers*, 776 S.W.2d at 505. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

“The evaluation of medical testimony concerning a claimant’s disability is within the peculiar expertise of the Commission, and, as such, the Commission is free to disbelieve the testimony of the claimant’s medical expert.” *Tombaugh v. Treasurer of State*, 347 S.W.3d 670, 675 (Mo.App. 2011).

The Commission may not arbitrarily disregard and ignore competent, substantial, and undisputed evidence of witnesses who are not shown by the record to have been impeached and the Commission may not base its findings upon conjecture or its own mere personal opinion unsupported by sufficient and competent evidence. *Cardwell*, 249 S.W.3d at 907, citing *Copeland v. Thurman Stout, Inc.*, 204 S.W.3d 737, 743 (Mo.App. 2006).

Section 287.020.7, RSMo provides: “The term ‘total disability’ as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident.” The phrase “inability to return to any employment” has been interpreted as “the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment.” *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. *Knisley*, 211 S.W.3d at 635; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001); *Reiner v. Treasurer of the State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.1992); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 792 (Mo.App. 1992).

Total disability means the “inability to return to any reasonable or normal employment.” *Lawrence*, 834 S.W.2d at 792; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990); *Kowalski*, 631 S.W.2d at 992. An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Brown*, 795 S.W.2d at 483. The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Knisley*, 211 S.W.3d at 635; *Brown*, 795 S.W.2d at 483; *Reiner*, 837

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S.W.2d at 367; *Kowalski*, 631 S.W.2d at 922. See also *Thornton v. Hass Bakery*, 858 S.W. 2d 831, 834 (Mo.App. 1993).

The court in *Lewis v. Kansas University Medical Center*, 356 S.W.3d 796 (Mo.App. 2011) stated at 800:

In a claim for permanent total disability, '[t]he Second Injury Fund compensates injured workers who are permanently and totally disabled by a combination of past disabilities and a primary work injury.' *Concepcion v. Lear Corp.*, 173 S.W.3d 368, 371 (Mo.App.2005). Section 287.020.6, RSMo Cum Supp.2010, defines the term 'total disability' as the 'inability to return to any employment and not merely [an] inability to return to the employment in which the employee was engaged at the time of the accident.' The test for permanent total disability is whether the worker is able to compete in the open labor market. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 48 (Mo.App.2007). 'Total disability means the inability to return to any reasonable or normal employment, it does not require that the employee be completely inactive or inert.' *Brown v. Treas. of Mo.*, 795 S.W.2d 479, 483 (Mo.App.1990). " 'Any employment' means any reasonable or normal employment or occupation." *Mell v. Biebel Bros., Inc.*, 247 S.W.3d 26, 29 (Mo.App.2008). 'The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.' *ABB Power*, 236 S.W.3d at 48; *see also Molder v. Mo. State Treas.*, 342 S.W.3d 406, 411 (Mo.App.2011). Lewis has the burden to establish permanent total disability by introducing evidence to prove her claim. *Clark v. Harts Auto Repair*, 274 S.W.3d 612, 616 (Mo.App.2009).

Section 287.220.1, RSMo provides in part:

1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has 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, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to

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the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the 'Second Injury Fund' hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141.

In deciding whether the Second Injury Fund has any liability, the first determination is the degree of disability from the last injury considered alone. *Landman*

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*v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003); *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself renders the employee permanently and totally disabled, then the fund has no liability and the employer is responsible for the entire amount of compensation. *Landman*, 107 S.W.3d at 248; *Hughey*, 34 S.W.3d at 847.

The court in *Vaught v. Vaughts, Inc./Southern Mo. Const.*, 938 S.W.2d 931 (Mo.App. 1997) stated at 939:

As explained in *Stewart, id.* at 854, § 287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury “may be at least equal to that provided for permanent total disability.” Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id.* The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is *less* than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1

The Court in *Garibay v. Treasurer of Missouri*, 930 S.W.2d 57 (Mo. App. 1996) stated at 60:

In order to maintain the purpose of the Second Injury Fund and initiate the changes as directed by the legislature, the Commission's inquiry into prior injuries should focus on the *potential* that the preexisting injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there were no such prior condition. *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo.App. E.D.1995). If a cautious employer could reasonably foresee that there is the potential for the preexisting injuries to combine with a work related injury and that combination would have a greater degree of disability than without the prior condition, then the preexisting injury would constitute “a hindrance or obstacle to employment or reemployment if the

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employee became unemployed.” *Id.* We “expect that any preexisting injury which could be considered a hindrance to an employee's competing for employment in the open labor market should trigger second injury fund liability.” *Leutzinger*, 895 S.W.2d at 593.

“For Second Injury Fund liability, a preexisting disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the preexisting disability combined with the disability from the subsequent injury to create permanent total disability.” *Uhler v. Farmer*, 94 S.W.3d 441, 444 (Mo.App. 2003).

In determining the extent of disability, the Commission may reject the uncontradicted opinion of a vocational expert. *Carkeek v. Treasurer of State-Custodian of Second Injury Fund*, 352 S.W.3d 604, 610 (Mo.App. 2011)

Based on the competent and substantial evidence and the application of the Workers’ Compensation Law, I find and conclude that Claimant’s last injury on May 11, 2005 in and of itself did not render Claimant permanently and totally disabled.

Several factors support the conclusion that Claimant is not permanently and totally disabled, either because of the May 11, 2005 injury considered alone in isolation, or in combination with preexisting disabilities. Claimant has not had back surgery since the May 11, 2005 injury, and back surgery has not been recommended since the injury. Claimant is not receiving physical therapy. There is no evidence that he received epidural injections in his low back after the May 2005 injury.

The MRI Lumbar report dated May 16, 2005 states there was no recurrent disk herniation and a left paracentral broad-based bulge arising from the L4-5 disk space was of no significance.

Claimant offered no medical records documenting that he received treatment for his back after 2006. Dr. Blachar’s records in evidence contain no entries after August 8, 2005. The last medical treatment record in evidence is dated June 14, 2006. Claimant offered no medical or pharmacy records documenting the medications he has taken since 2006, or the dates of purchase, or the dosages.

Claimant graduated from high school. There is no evidence that Claimant has a learning disability. There is no evidence that Claimant has a particularly low IQ or is unable to read and write.

Claimant can sit comfortably for thirty to forty minutes. Claimant feels that he can lift ten to twelve pounds. He is able to kneel. He helps with the laundry. He is able

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to walk, and he walks without a cane or other assistive device. He is able to drive, and he drives daily. He has no limitations with hands.

Claimant receives Social Security disability benefits. He also receives \$1,200.00 per month from a retirement investment.

Claimant did not attempt to find work after he retired from Employer in 2005.

I find that Claimant does not need to lie down during the day as a result of his low back condition. Claimant does not lie down to sleep during the day. He only lies down occasionally and briefly if he has a spasm.

Claimant did not volunteer any history of having to lie down throughout the day to alleviate his back complaints at the time Dr. Koprivica saw Claimant. Dr. Koprivica did not provide any restriction that Claimant lie down during the day.

There is not a restriction from Dr. Miller, Dr. Blachar, Dr. Koprivica, or any other doctor that Claimant lie down during the day because of pain. The medical and vocational reports do not note that Claimant lay down during the examinations because of pain. The evidence does not convincingly demonstrate that Claimant suffers from constant debilitating pain. I find Claimant was not in constant and debilitating pain after the May 2005 injury.

The records and reports of Claimant's treating doctors, Dr. Miller and Dr. Blachar, do not conclude that Claimant is permanently and totally disabled.

Dr. Miller's September 27, 2005 note does not state Claimant is unable to perform any work. Dr. Miller did not see how Claimant could go back to his job "because of bending, squatting, and climbing he has had to do and because of his low back problems."

Dr. Koprivica noted that Claimant reported sitting tolerance of less than an hour, standing tolerance of less than 45 minutes, reduced walking tolerance, and that Claimant "self limits to less than 25 pounds on lifting and carrying as recommended by Dr. Miller."

Dr. Koprivica thought the disc bulge was significant in producing Claimant's radicular symptoms, but he did not credibly explain the significance of the bulge.

When Claimant saw Dr. Koprivica, Claimant was able to walk without the use of any assistive devices. Dr. Koprivica did not see any indication Claimant was wearing any kind of back brace or knee brace.

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Dr. Koprivica felt there was a synergistic effect when you combined the disabilities. Dr. Koprivica could not conclude that Claimant was totally disabled based on that synergistic effect. He did not believe Claimant was permanently and totally disabled as of the date he saw him. It was Dr. Koprivica's belief that Claimant was potentially employable with restrictions that he would place. I find these opinions to be credible.

Dr. Koprivica stated that if the vocational expert were to find that he was permanently and totally disabled, he would defer to them. I find this opinion is not credible. Dr. Koprivica did not review Mr. Dreiling's report or deposition. He did not know the basis for Mr. Dreiling's conclusions.

It is Mr. Dreiling's opinion that no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ Claimant in his existing physical condition, and that Claimant is not able to be gainfully employed. I find these opinions are not credible. These opinions are not consistent with Dr. Koprivica's restrictions.

Mr. Dreiling agreed that based upon Dr. Koprivica's restrictions, Claimant was restricted from a vocational standpoint to light work. He stated light work includes work in manufacturing jobs where people might be doing some packing, or some inspecting, some light janitorial type jobs, some light fast-food type jobs, and in retail stores, some light jobs in terms of clerk and light cashier jobs. He stated Claimant would be capable of performing packing, inspecting, janitorial, fast-food, retail store clerk or cashier jobs intellectually. Mr. Dreiling testified that he did not think that it was reasonable that Claimant would be able to perform jobs like janitorial, cashier, store clerk and so forth, but he did not credibly explain why not.

The evidence demonstrates, and I find, that Claimant is capable of working within Dr. Koprivica's restrictions. I find Dr. Koprivica's restrictions do not foreclose Claimant from all work activities. I find Claimant's restrictions do not completely prevent him from being able to use his upper extremities. The restrictions recommended by Dr. Koprivica are not so limiting that Claimant should be found to be unable to perform any work. They should not prevent him from performing sedentary work and certain types of light work.

Further, Mr. Dreiling acknowledged that the Wunderlich Personnel Test results revealed that Claimant had the ability to acquire new skills. He stated Claimant had transferrable skills related to reading blueprints, diagrams, and schematics, and working with small hand tools as a result of his employment with Employer.

Mr. Dreiling did not convincingly explain why Claimant would not be a candidate for job retraining. I do not believe that Claimant is in constant debilitating pain that

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prevents him from retraining or performing sedentary work. I find Claimant is not in constant debilitating pain that prevents him from retraining or performing sedentary work.

I find Claimant's testimony regarding his current pain complaints is not credible. I find Claimant's testimony that he is unable to work is not credible.

I find that Claimant was not a credible and persuasive witness on the issue of permanent total disability. I find that Claimant's testimony concerning the impact his injuries have had on his daily ability to function do not support a finding of permanent total disability. I find that Claimant's testimony in this regard does not support a conclusion that he will be unable to compete in the open labor market.

In addition to his testimony, Claimant was observed for an extended period of time during the hearing. Claimant did not exhibit behavior or physical patterns which support a finding of permanent total disability. Claimant did not appear to be in pain during the hearing. He did not grimace or shift in his chair. He did not move and get up from his chair slowly. He did not frequently rub or hold his back, shoulders, or knees. He did not use any assistive device. He did not wear a back brace. He did not use a pillow to support his back while sitting. Based on these observations, it did not appear that he was suffering from a constant or significant level of pain and discomfort.

While I believe and find that Claimant is not able to return to his former employment for Employer, I also believe and find Claimant is able to work. I believe and find Claimant is competent to compete in the open labor market and is employable in the open labor market.

I find that Claimant's May 11, 2005 injury did not render Claimant permanently and totally disabled in isolation considered alone, or in combination with preexisting disability.

I find Claimant failed to prove that he is permanently and totally disabled. I find Claimant failed to prove that no employer in the usual course of business would be reasonably expected to hire Claimant in his present physical condition, reasonably expecting him to perform the work for which he is hired. I believe and find Claimant is able to work.

Claimant settled his claim with Employer in this case based upon "permanent partial disability of approximately 15% of permanent disability of the body as a whole," as noted by the Stipulation for Compromise Settlement in Exhibit A. Such an agreement to settle does not bind the Commission, but "does serve as relevant evidence of the nature and extent of the employee's permanent disability attributable to the primary injury."

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*Totten v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund*, 116 S.W.3d 624, 628 (Mo.App. 2003).

Dr. Koprivica did not believe the May 2005 injury was a totally disabling type of injury. I find this opinion to be credible.

Claimant had complaints of back and left leg pain following the May 2005 injury. He was prescribed pain medication in 2005 by Dr. Miller after the injury. He had physical therapy in 2005 following the injury, and worked light duty for Employer following the injury before his retirement from Employer on September 29, 2005.

Dr. Koprivica assigned a 15 percent permanent partial disability to the body as a whole for the May 2005 injury in isolation. I find this opinion is not credible.

I find and conclude, based on the competent and substantial evidence and the application of the Missouri Workers' Compensation Law, that as a result of Claimant's May 11, 2005 work injury, Claimant has sustained an additional permanent partial disability of 12.5% of the body as a whole at the 400 week level, which is 50 weeks.

*b. Liability of the Second Injury Fund for permanent partial disability.*

Did Claimant have preexisting permanent partial disability at the time the primary injury was sustained, and was the preexisting permanent partial disability a hindrance or obstacle to Claimant's employment or to obtaining reemployment if Claimant becomes unemployed, and whether the preexisting permanent partial disability equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities?

In order for a claimant to recover against the Second Injury Fund, he or she must prove that he or she sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1, RSMo. A claimant must also prove that he or she had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his or her employment or reemployment should he or she become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. 2008) (Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he or she must prove that the last injury, combined with his or her pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the

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disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004).

“When a claim is made against the Fund for permanent disability compensation, statutory language and case law make it mandatory that the Claimant provide evidence to support a finding, among other elements, that he had a preexisting permanent “disability.” (Omitting citations). The disability, whether known or unknown, must exist at the time the work-related injury was sustained, *and* be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed.” *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App. 1999); *Luetzinger v. Treasurer of Mo.*, 895 S.W.2d 591 (Mo.App. 1995) (emphasis added). “The nature and the extent of the permanent-partial preexisting condition must be proven by a reasonable degree of certainty. (Omitting citation). Expert opinion evidence is necessary to prove the extent of the preexisting disability.” *Messex*, 989 S.W.2d at 215.

Claimant must show that: (1) he or she has preexisting disability that reaches Second Injury Fund threshold, (2) he or she has additional disability from a compensable injury that qualifies for Second Injury Fund threshold, and (3) that his or her preexisting disability combines with his or her present injury to result in a greater degree of disability than the sum of either disabilities alone, “. . . that is, a synergistic enhancement in which the combined totality is greater than the sum of the independent parts.” *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo.App. 1995).

The Court in *Uhlir v. Farmer*, 94 S.W.3d 441 (Mo.App. 2003) stated at 444-45:

For Second Injury Fund liability, a preexisting disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the preexisting disability combined with the disability from the subsequent injury to create permanent total disability. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. E.D.1999), citing *Searcy*, 894 S.W.2d at 177-78. In the instant case, the Commission found the former. Appellant argues, however, that *Searcy* does not allow recovery from The Second Injury Fund when the injuries are to the same part of the body.

In *Searcy*, we stated that, as a general rule, where the first and second injuries are to the same part of the body, the second supplements the first rather than combining to create a greater disability than the sum of the two. 894 S.W.2d at 178. However, no such limitation is present within the text of Section 287.220 itself.

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Section 287.220 provides that when a worker's preexistent injury, in combination with the primary work injury;

is substantially greater than that which would have resulted from the last injury, considered alone and of itself, . . . the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as The Second Injury Fund. . . .

No same body part limitation is present within the statute.

*See also Treasurer of the State of Missouri-Custodian of the Second Injury Fund v. Witte et al.*, No.'s SC92834, SC92842, SC92850, and SC 92867 (Mo. banc November 12, 2013), in which the Missouri Supreme Court states:

This Court finds there must be a single preexisting permanent partial disability that meets the thresholds to trigger the fund's liability and there is no threshold requirement for the last injury. Additionally, all preexisting injuries must be considered in calculating the amount of compensation for which the fund is liable. These holdings must be applied to the fund's claims in each case.

The competent and substantial evidence convincingly demonstrates, and I find and conclude, that at the time Claimant sustained his May 11, 2005 injury, he had preexisting permanent partial disability and that his preexisting permanent partial disability was a hindrance and obstacle to his employment or to his obtaining reemployment if he became unemployed.

Claimant described preexisting cardiac, right knee, right hand and elbow, Raynaud's phenomenon, anxiety, and depression conditions. He continued to work full duty for Employer after those conditions arose. The evidence does not demonstrate that these conditions affected his ability to perform his job duties on an ongoing permanent basis or were an obstacle to doing any kind of work of significance on a permanent ongoing basis.

Dr. Koprivica did not believe there was any evidence objectively within a reasonable degree of medical certainty that there was industrial disability based on cardiovascular disease. Dr. Koprivica did not believe Claimant's right knee condition was industrial disabling. Claimant did not provide Dr. Koprivica any history of having been diagnosed with Raynaud's phenomenon and having problems with numbness and tingling in the hands and feet. Claimant did not provide Dr. Koprivica any history of

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having problems with pain and loss of sensation in the hands and feet that affected his ability to perform his job duties on an ongoing permanent basis. Dr. Koprivica did not believe Claimant's cubital tunnel condition was an obstacle in Claimant doing any kind of work of significance using his hands on a permanent ongoing basis. I find these opinions are credible.

No doctor concluded that Claimant had preexisting permanent partial disability due to anxiety or depression.

I find and conclude Claimant's preexisting cardiovascular disease, right knee condition, cubital tunnel condition, anxiety, and depression were not industrially disabling and did not constitute a hindrance or obstacle to his employment or reemployment. I find and conclude Claimant did not prove that he had permanent partial disability for his preexisting cardiovascular disease, right knee condition, cubital tunnel condition, anxiety, or depression prior to his May 11, 2005 injury.

Claimant had prior back and bilateral shoulder surgeries before his May 2005 work injury. He described ongoing complaints, limitations, and difficulties at work because of his low back and shoulders prior to the May 2005 work injury.

Dr. Koprivica noted Claimant had low back surgery in 1983 and after that he had ongoing limitations to sitting. Dr. Koprivica agreed that Claimant had an issue with radicular pain in the left leg prior to May 2005. He felt Claimant's back surgery and what followed was industrially disabling. I find this opinion is credible.

Dr. Koprivica assigned 30 percent permanent partial disability to the body as a whole for Claimant's lumbar disability before he was injured in May 2005. I find this opinion is not credible.

Dr. Koprivica noted Claimant had surgery to both shoulders prior to the May 2005 injury. He stated Claimant was limited in his tolerances to repetitive or sustained activities, especially above shoulder level, and that would be an obstacle of doing that kind of work. He felt Claimant's shoulders were such that they were industrial disabilities. I find this opinion is credible.

Dr. Koprivica assigned a 20 percent permanent partial disability of the right upper extremity at the level of the shoulder at the 232-week level and 20 percent permanent partial disability of the left upper extremity at the level of the shoulder at the 232-week level that predated the May 2005, injury. I find this opinion is not credible.

The Second Injury Fund did not offer any medical or vocational evidence regarding the issue of preexisting disability.

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Based on a comprehensive review of the substantial and competent evidence and the application of the Missouri Workers' Compensation Law, I find and conclude that at the time the May 11, 2005 injury was sustained, Claimant had preexisting permanent partial disability of 20% of the body as a whole at the 400 week level, which is 80 weeks, for a lumbar condition, and 17.5% of the right upper extremity at the shoulder at the 232 week level, which is 40.6 weeks, and 17.5% of the left upper extremity at the shoulder at the 232 week level, which is 40.6 weeks, for a total of 161.2 weeks of preexisting permanent partial disability. This preexisting low back and bilateral shoulder permanent partial disability is sufficient to meet the Second Injury Fund threshold required by section 287.220.1, RSMo. I also find and conclude that at the time the May 11, 2005 primary injury was sustained, Claimant's low back and bilateral shoulder preexisting permanent partial disability was of such seriousness as to constitute a hindrance or obstacle to Claimant's employment or to obtaining reemployment if Claimant becomes unemployed, as required by section 287.220.1, RSMo.

Dr. Koprivica considered the synergistic effect of combining the previous disabilities with the current disability to create a disability greater than the simple arithmetic sum of these disabilities. I find this opinion to be credible.

Based on the competent and substantial evidence, I find and conclude that Claimant's preexisting permanent partial disability combines with the work injury of May 11, 2005 to produce a synergistic effect to result in a greater degree of overall disability than the simple sum of those disabilities. Further, I find that the work injury of May 11, 2005 does not merely supplement the preexisting conditions.

Dr. Koprivica stated the combined synergistic effect would be represented by a 20 percent enhancement factor above the simple arithmetic sum of the separate disabilities. I find this opinion is not credible.

Based on the competent and substantial evidence, I find and conclude that the synergistic effect or load factor of combining the permanent partial disability from the primary injury and the preexisting permanent partial disability is 15% above the simple sum of the disabilities, or 31.68 weeks of compensation ( $50 + 161.2 \times .15 = 31.68$ ).

Based on the foregoing, I find and conclude that the Second Injury Fund is liable to Claimant for 31.68 weeks of compensation at the stipulated weekly compensation rate of \$354.05, which is \$11,216.30. I award the sum of \$11,216.30 in favor of Claimant against the Second Injury Fund.

### Attorney's Fees

Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award,

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including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). During the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of all benefits to be awarded. Claimant did not object to that request. I find Claimant's attorney is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant. 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 Claimant: David W. Whipple.

Made by: s/sROBERT B. MINER  
Robert B. Miner  
*Administrative Law Judge*  
*Division of Workers' Compensation*