

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

Injury No. 09-004245

Employee: Samuel Marciante  
Employer: Charles E. Jarrell Contracting Company (Settled)  
Insurer: Travelers Insurance Company (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.<sup>1</sup> We have read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision reversing the October 2, 2014, award and decision of the administrative law judge.

**Introduction**

The parties asked the administrative law judge to determine the sole issue of Second Injury Fund liability. The parties stipulated that on or about January 16, 2009, employee was employed by Charles Jarrell Contracting and sustained an accident which arose out of and in the course of his employment. The parties further stipulated that employee's wages was sufficient for the following disability rates: \$764.94 for temporary total disability and permanent total disability, and \$404.66 for permanent partial disability.

The administrative law judge (ALJ) concluded that the Second Injury Fund is not liable for permanent partial or permanent partial disability benefits. Employee filed a timely Application for Review with the Commission. For the reasons set forth herein, we reverse the award of the administrative law judge.

**Findings of Fact**

Employee was 52 years of age at the time of the primary injury on January 16, 2009. He is a high school graduate, and completed a heating and cooling night course at North County Technical School. He began work as a sheet metal worker at the age of 20, and has worked exclusively in that field for approximately 35 years.

*Preexisting Conditions*

Employee injured his back while lifting a furnace on May 9, 1988. Dr. Sheehan surgically repaired a herniated disc at L4-5. As a result of this injury, claimant missed work for three or four months. After the surgery employee continued to have back pain after strenuous activity, and was slowed down at work by decreased leg stability and numbness in the right leg. Claimant settled the case with his employer for 25% PPD of the low back.

On November 30, 1992, employee had another low back injury. Employee missed time from work following the accident, and surgery was performed at L3-4. After the surgery,

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<sup>1</sup> All statutory references are to the Revised Statutes of Missouri (2013), unless otherwise indicated.

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claimant continued to have numbness in both legs, low back pain and would have to seek help from coworkers when lifting or climbing at work. Employee settled the case with employer for 12.5% PPD of the low back.

On August 30, 2001, employee injured his low back when he tripped and fell while walking up steps. Surgery was performed to repair employee's back at L5-S1, and claimant missed work after the surgery. Employee settled the case with employer for 22.5% of the back, and settled with the Second Injury Fund on this same basis. Employee returned to work, but had residual back pain, right leg numbness, and limited range of motion. Employee had difficulty climbing ladders, lifting, and bending, and on breaks he would lie on stacks of drywall and apply ice to his back to relieve pain. He used a staff for support when hunting, fishing, or walking on rough terrain.

We find that, prior to and as of January 16, 2009, employee had sustained a 30% permanent partial disability of the body as a whole referable to the low back which constituted a hindrance to employment.

Primary injury

On January 16, 2009, claimant bent to "pop a line" at work and felt a stabbing pain in his low back. He had surgery at the L2-3 level on May 12, 2009, followed by a surgery on the L3-4 level in January of 2010. Employee missed time from work. He returned to work in April of 2010 with restrictions, which employer accommodated by letting him work in the duct shop where he could obtain assistance from other employees. Claimant worked until March 15, 2012, when employer discharged him, along with other employees, for economic reasons.

Employee testified that after the January 2009 accident, he had increased problems walking, sitting, lying down, bending, lifting, squatting, climbing, and long distance driving. He began to take narcotic medication after the January 2009 injury. Since his last surgery, his left leg gives out a couple of times per week, where only his right leg gave out before. He does continue to work on his farm and rides ATVs, and hunts twice a year.

Dr. Thomas F. Musich, M.D., examined claimant on September 25, 2012, reviewed medical records not in evidence, wrote a report, and testified on behalf of employee. For the primary injury, Dr. Musich diagnosed a massive herniated disc at L2-3 and concluded the January 16, 2009, work injury was the prevailing factor in the development of the acute low back and discogenic pain, and lower extremity radiculopathy, and a symptomatic neurogenic bladder.

Dr. Musich further opined that the low back issues before the January 2009 accident had resulted in a 60% PPD of the body as whole.<sup>2</sup> Dr. Musich concluded that the sum of employee's past and present disabilities are greater than their simple sum, and are hindrance or obstacle to his daily activities of life. Dr. Musich did not provide a percentage of disability from the last back injury, but noted that employee "was awarded a 35%

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<sup>2</sup> This appears to be the sum of the settlements from the previous injuries. In his brief, employee states "Dr. Musich also assumed that it 'was determined by workers' compensation that [employee] suffered a permanent partial disability of 60% of the man as a whole referable to lumbosacral pathology prior to January, 2009.'"

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permanent partial disability of the body as a whole.” Dr. Musich also testified that since the last injury, employee had continuing complaints of left leg pain, numbness, burning, and tingling where he had no symptoms in his left leg before; had bladder dysfunction that was not present before the 2009 injury; and was taking Vicodin where employee took no narcotics prior to the 2009 injury.

Dr. Musich continued employee’s restrictions, and added that employee should avoid prolonged positions of the spine, not drive a commercial vehicle, not work above or below floor level, and should lie down as needed. During his deposition, Dr. Musich testified that employee is “totally and permanently disabled as a result of the combination of all of his injuries between 1988 and 2009.”

Mr. England, a rehabilitation counselor, interviewed claimant on December 10, 2012, reviewed medical records not in evidence, reviewed Dr. Musich’s report, administered tests, and wrote a report at the request of employee. Mr. England concluded employee’s academic development was sufficient for a number of entry level positions. Mr. England testified that employee had worked as a sheet metal worker his entire career and could not return to that work after the last surgery. Mr. England concluded employee was unable to compete for work or sustain work in the open labor market because of a combination of his primary and preexisting disabilities.

The Second Injury Fund did not advance a contrary medical or vocational opinion, but contended that claimant is not permanently and totally disabled, and/or that if he is, it is due to the last injury alone. Additionally, the Second Injury Fund contended that claimant did not prove the extent of disability he suffered from his last injury alone, thus failing to meet his burden to show that if he was permanently disabled, it was not due to his last injury alone.

The administrative law judge found employee credible, and that “[t]here is no doubt Claimant sustained a serious injury.” However, the ALJ found that while Dr. Musich’s opinion was sufficient to demonstrate and certify that employee had a disability from the last injury, it was insufficient to show the percentage of disability he sustained from that injury. Thus the ALJ concluded it was “impossible to determine the extent or percentage of disability that claimant sustained from the last back injury separate from earlier back injuries.” The ALJ also found that employee did not meet his burden to show he was permanently and totally disabled, noting that “[c]laimant testified he worked until employer terminated him for economic reasons 23 months after Dr. Rutz released him.” The ALJ accordingly denied all benefits, citing and relying on *Goleman v. MCI Transporters*, 844 S.W.2d 463 (Mo. App. 1992).

## **Conclusions of Law**

### **Nature and extent of permanent disability**

When seeking disability benefits with respect to a work-related injury, the claimant has the burden of proof to show that a disability resulted and the extent of such disability.” *Zimmerman v. City of Richmond Heights*, 194 S.W.3d 875, 878 (Mo. App. 2006)(internal citations omitted). The claimant needs to prove “the nature and extent of any disability by a reasonable degree of certainty.” *Id.*

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Proof of the extent of disability is not required to be made with mathematical exactness, nor is the Industrial Commission bound by the percentage estimates or other testimony of medical experts. *Hall v. Spot Martin, Inc.*, 304 S.W.2d 844, 854 (Mo. 1957). It is the duty and special province of the Commission to weigh all the evidence and reach its own conclusion as to the percentage of disability suffered. *Haggard v. Synder Constr. Co.*, 479 S.W.2d 142, 145 (Mo. App. 1972); *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo. App. 2007).

The administrative law judge found that while Dr. Musich's opinion was sufficient to demonstrate and certify that employee had a disability from the last injury, it was insufficient to show the percentage of disability and that it was "impossible to determine the extent or percentage of disability that claimant sustained from the last back injury separate from earlier back injuries." We disagree.

Dr. Musich noted that employee "was awarded a 35% permanent partial disability of the body as a whole" and the record also shows employee settled his claim with employer for 35% permanent partial disability of the body as a whole. The Second Injury Fund was not a party to these settlements, and remained free to litigate issues conceded by employer. *Hoven v. Second Injury Fund*, 414 S.W.3d 676, 680 (Mo. App. 2013). The settlement agreement is, however, relevant evidence that the Commission may consider regarding percentage of disability. *Id.*, citing *Conley v. Treasurer of Missouri*, 999 S.W.2d 269 (Mo. App. 1999).

Dr. Musich testified that since the last injury, employee had continuing complaints of left leg pain, numbness, burning, and tingling where he had no symptoms in his left leg before; had bladder dysfunction that was not present before the 2009 injury; and was taking Vicodin where employee took no narcotics prior to the 2009 injury. Dr. Musich in his report of September 25, 2012, also identified the January 16, 2009, injury as the prevailing factor in the development of acute low back pain, discogenic pain, lower extremity radiculopathy, and a symptomatic neurogenic bladder. Additionally, employee credibly testified that after the January 2009 accident, he had increased problems walking, sitting, lying down, bending, lifting, squatting, climbing, and long distance driving.

Because proof of permanent disability need not be established with mathematical precision, because we are in no way constrained by medical testimony expressed with such precision, and (applying strict construction) absent any statutory language that requires disability be expressed in mathematical terms, we conclude it is not necessary that physicians certify permanent disability in mathematical terms. Rather, we believe the burden of proof of permanent disability can be sustained by providing competent and convincing medical evidence establishing the nature and extent of permanent symptoms, restrictions and/or limitations, and identifying the medical cause(s) thereof.<sup>3</sup>

Based on the credible evidence and testimony before us, we find employee suffered a 15% permanent partial disability of the body as a whole as a result of the January 2009 work injury.

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<sup>3</sup> Proof of causation of alleged work-related injuries and disabilities must, of course, meet the requirement of § 287.020.3(1).

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We agree with the administrative law judge's conclusion regarding permanent total disability. Employee testified he was cleared to return to work in April of 2010, and worked in employer's duct shop until March 15, 2012, when employer discharged him. Thus, employee worked for nearly two years after returning to work from the January 2009, injury. While employee testified that coworkers were available to assist him in the duct shop, he provided no other evidence regarding the nature of this work or how much assistance was actually needed or provided. Mr. England, though he ultimately came to a different conclusion, noted that claimant's functional capacity evaluation indicated that claimant had "some function in the Medium work demand level." Employee also testified that he continues to ride an ATV and hunt twice a year. We conclude from this evidence that employee did not suffer a permanent total disability.

### Second Injury Fund liability

Section 287.220.1 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

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

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

We have found that employee suffered from a 30% permanent partial disability of the body as a whole referable to his lower back injuries at the time of the primary injury. We are convinced that this condition was serious enough to constitute a hindrance or obstacle to employment. This is because we are convinced employee's preexisting lower back condition had the potential to combine with a future work injury to result in greater disability than would have resulted in the absence of the condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Particularly in view of the credible evidence that, subsequent to and as a result of the January 16, 2009, work injury employee has experienced an onset of symptoms referable to his left leg in addition to prior symptoms referable to his right leg, we credit Dr. Musich's testimony that employee's work related and pre-existing disabilities referable to his low back combine synergistically such that his overall disability exceeds their simple sum to the extent of 10% thereof. We therefore conclude that the Second Injury Fund is liable for permanent partial disability benefits. We calculate Second Injury Fund liability as follows.

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Employee's primary injury resulted in 15% permanent partial disability of the body as a whole, or 60 weeks of permanent partial disability. Employee's preexisting 30% permanent partially disabling condition amounts to 120 weeks of permanent partial disability. The sum of preexisting and primary permanent partial disability is 180 weeks. When we multiply this sum by a 10% load factor to account for the synergistic interaction between the conditions, the result is 18 weeks.

The Second Injury Fund is liable for 18 weeks of permanent partial disability benefits at the stipulated rate of \$404.66, for a total of \$7,283.88

**Conclusion**

The Second Injury Fund is liable for permanent partial disability benefits in the amount of \$7,283.88

The award and decision of Administrative Law Judge Suzette Carlisle, issued October 2, 2014, is attached solely for reference and is not incorporated by this decision.

This award is subject to a lien in favor of Thomas Liese, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

Given at Jefferson City, State of Missouri, this   1<sup>st</sup>   day of April 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Samuel Marciante Injury No.: 09-004245  
Dependents: N/A Before the  
Employer: Charles E. Jarrell Contracting Company (Settled) **Division of Workers'**  
**Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri  
Additional Party: Second Injury Fund (Denied)  
Insurer: Travelers Insurance Company (Settled)  
Hearing Date: July 8, 2014 Checked by: SC

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: January 16, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? 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:  
While working, Claimant bent to pop a line and felt a stabbing pain in his low back.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 35% permanent partial disability of the body for the low back (Settled)
15. Compensation paid to-date for temporary disability: \$18,795.69
16. Value necessary medical aid paid to date by employer/insurer? \$153,500.23

Issued by DIVISION OF WORKERS' COMPENSATION

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for the rates listed in number 19 below.
- 19. Weekly compensation rate: \$764.94/\$404.66
- 20. Method of wages computation: Stipulated

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: Denied
- TOTAL: None
- 23. Future requirements awarded: None

Said payments to begin 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Thomas Liese

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Samuel Marciante	Injury No.: 09-004245
Dependents:	N/A	Before the
Employer:	Charles E. Jarrell Contracting Company (Settled)	<b>Division of Workers' Compensation</b>
Additional Party:	Second Injury Fund (Denied)	Department of Labor and Industrial Relations of Missouri
Insurer:	Travelers Insurance Company (Settled)	Jefferson City, Missouri
Hearing Date:	July 8, 2014	

**PRELIMINARIES**

The parties listed below appeared before the undersigned administrative law judge on July 8, 2014, for a hearing for a final award at the request of Samuel Marciante (“Claimant”) to determine the liability of the Second Injury Fund (“SIF”) for permanent partial (“PPD”) or permanent total disability (PTD”) benefits.

Claimant appeared and was represented by Attorney Thomas Liese. Charles E. Jarrell Contracting Company, insured through Travelers Insurance Company, settled with Claimant before the hearing for 35% permanent partial disability (“PPD”) of the lumbar spine and did not participate in the hearing. SIF appeared represented by Assistant Attorney General Jane Sportiello. The court reporter was Maria Krawat. The record closed after presentation of all the evidence on July 8, 2014.

**STIPULATIONS**

At the hearing the parties stipulated to the following:

1. On January 16, 2009, Claimant was employed by Employer and sustained an accident in St. Louis County,<sup>1</sup>
2. The accident arose out of and in the course of his employment,
3. Employer and Claimant operated under the Missouri Workers’ Compensation Law,<sup>2</sup>
4. Employer’s liability was fully self-insured,
5. Employer received proper notice of an injury,
6. A claim for compensation was timely filed,

<sup>1</sup> References in this award to the Employer also refer to the Insurer unless otherwise stated.

<sup>2</sup> Statutory references in this award are to Chapter 287 of the Revised Statutes of Missouri (2005) unless otherwise stated.

7. Claimant's average weekly wage was sufficient for the following disability rates: \$764.94 for temporary total disability ("TTD") and PTD benefits and \$404.66 for PPD benefits,
8. Employer paid TTD benefits totaling \$18,795.69, and medical benefits totaling \$153,500.23,
9. Claimant reached maximum medical improvement ("MMI") on April 29, 2010, and
10. Claimant's last day at work was March 15, 2012.

### **ISSUES**

At the hearing, the parties identified one issue for disposition: The nature and extent of SIF liability for PPD or PTD benefits, if any.

### **EXHIBITS**

Claimant's Exhibits A through D were offered and received into evidence with no objections from SIF. SIF Exhibits I through III were offered and received into evidence without objections from Claimant. Any notations contained in the exhibits were present when admitted, and were not placed there by the undersigned administrative law judge. Any objections contained in the depositions or made during the hearing, but not ruled on during the hearing or in this award, are now overruled.

### **FINDINGS OF FACT**

All evidence was reviewed but only evidence that supports this award is discussed below.

#### **Claimant's testimony**

##### ***Background***

At the time of the hearing, Claimant was 58 years old and married with one minor child. Claimant graduated from Ritenour High School. After high school, Claimant completed a night course at North County Technical School.

Claimant began his career as a sheet metal worker at age 20 and worked continuously until March 15, 2012. During Claimant's career, he completed numerous courses through the union hall for Local 36 - Sheet Metal Workers.

As a sheet metal worker, Claimant worked on residential and commercial properties, lifted heavy objects, worked on furnaces and duct work, removed old cast-iron systems, climbed ladders and used duct hoists.

### *Claimant's preexisting low back injuries*

While lifting a furnace on May 9, 1988 for Alro Heating, Claimant fell backward and injured his back. In August 1988, Dr. Sheehan surgically repaired a herniated disc at L4-5. After the accident, Claimant missed work for three or four months. Claimant settled the case with his employer for 25% PPD of the low back. Claimant continued to have back pain with strenuous activity. After work, Claimant would lie down and apply ice to relieve pain. The injury caused Claimant to move more slowly because of pain and bilateral leg numbness and instability.

While working for MRV Associates on November 30, 1992, Claimant had another low back injury and surgery was performed at L3-4. Following the accident, Claimant missed time from work. Claimant settled the case with his employer for 12.5% PPD of the low back. Residual complaints included low-back pain and leg numbness. At work Claimant sought help from coworkers when lifting or climbing.

While working for Employer on August 30, 2001, Claimant injured his low back when he tripped and fell walking up steps. In October 2001, Dr. Robson surgically repaired Claimant's low back at L5-S1, and Claimant missed work after surgery. Claimant settled the case with his employer for 22.5% PPD of the back, and he settled with SIF for 22.5% PPD of the low back.

Claimant returned to work as a foreman, and had difficulty climbing ladders, lifting, and bending. Claimant bent his knees to avoid bending his back. Claimant had residual back pain, right leg numbness, and limited range of motion. During work breaks, Claimant lay on stacks of drywall and applied ice to his back to relieve pain. Claimant took at least eight ibuprofen pills per day and used a staff for support when he hunted, fished or walked on rough terrain. Claimant took breaks from sitting to relieve pain.

### *The primary injury*

Employer hired Claimant in 1996. While working on January 16, 2009, Claimant bent to pop a line and felt a stabbing pain in his low back. Claimant underwent three surgeries. After surgery, Claimant missed time from work. Employer settled the case with Claimant for 35% PPD of the body.

Claimant returned to work in late April 2010 with restrictions. He was assigned to the duct work area where co-employees assisted him as needed. Claimant worked until March 15, 2012, when Employer terminated Claimant due to a work slowdown. Other co-employees were also terminated. The week before Claimant's termination, his supervisor suggested he apply for disability benefits.

After Claimant's termination, he sought work through the union but could not find a job to accommodate his restrictions. Claimant has not sought work in any other industry.

After the January 2009 accident, Claimant began to stumble and fall, use his staff to walk at the store, had more discomfort with lying down, sleeping and driving, inability to bend at the waist or squat, and problems with both legs giving out. Sitting became more difficult. Claimant began to take narcotic medication after the January 2009 work injury.

Once a month Claimant drives 2 ½ hours to his Macon farm and stops to rest along the way. On the farm he rides an ATV, and hunts twice a year. Claimant has archery and rifle licenses but does not use them.

### *Medical treatment – primary injury<sup>3</sup>*

For the primary injury, according to Dr. Musich, Dr. Mirkin diagnosed a massive herniated disc at L2-3. On May 12, 2009, Dr. Mirkin performed bilateral laminectomies and fusion at L2-3. Two weeks later, an abscess at the surgical site required the L2-3 fusion to be drained and revised.

Later in 2009, according to Dr. Musich, a lumbar CT and myelogram and postmyelogram CT revealed nonunion of the L2-3 fusion. On January 8, 2010, Kevin Rutz, M.D. performed laminectomies and foraminotomies at L3-4, according to Dr. Musich.

A Functional Capacity Evaluation (“FCE”) dated April 26, 2010 revealed Claimant exhibited valid effort during testing and could work in the medium demand level absent a formal job description.

Dr. Rutz opined Claimant had reached MMI on April 29, 2010, released him from care, and imposed permanent restrictions of occasional lifting to 50 pounds, regular lifting to 20 pounds and no ladder climbing.

### *Expert medical evidence*

Thomas F. Musich, M.D., examined Claimant on September 25, 2012, reviewed medical records that are not in evidence, wrote a report, and testified on behalf of Claimant at the request of Claimant’s attorney.

Examination revealed abnormal sensation in both legs from the lumbar spine, consistent with foraminal stenosis bilaterally.

For the primary injury, Dr. Musich diagnosed a massive herniated disc at L2-3, and concluded the January 16, 2009 work injury was the prevailing factor in the development of acute low back and discogenic pain, and lower extremity radiculopathy and a symptomatic neurogenic bladder.<sup>4</sup>

He further opined Claimant suffered disability to his low back before January 16, 2009 that required surgical treatment at L3-4, L4-5, and L5-S1, and resulted in 60% PPD of the body as a whole for the low back.

Dr. Musich further concluded the sum of Claimant’s past and present disabilities are greater than their simple sum, and are a hindrance or obstacle to his daily activities of life.

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<sup>3</sup> Claimant’s treatment records from the primary injury are not in evidence, except for the Functional Capacity Evaluation and the release from Dr. Rutz. Dr. Musich and Mr. England refer to the medical records in their reports. Most discussion of medical treatment in this award is taken from their reports in an effort to gain some insight into the extent of Claimant’s work injury.

<sup>4</sup> Dr. Musich testified he mistakenly referred to the date of injury as January 19, 2009.

Dr. Musich continued Dr. Rutz's restrictions, and added Claimant should avoid prolonged positions of the spine, should not drive a commercial vehicle or work above or below floor level, and lie down as needed.

Dr. Musich's report recommended vocational rehabilitation to determine Claimant's ability to compete in the open labor market. If vocational rehabilitation determined Claimant could not compete, Dr. Musich testified he would adopt that position based on Claimant's present and past disabilities.

During deposition Dr. Musich found Claimant to be "totally and permanently disabled as a result of the combination of all of his injuries between 1988 and 2009."

### *Expert vocational evidence*

Mr. James M. England Jr., a rehabilitation counselor, interviewed Claimant on December 10, 2012, reviewed medical records and reports that are not in evidence, administered tests, and wrote a report at the request of Claimant's attorney.

Mr. England administered the Wide Range Achievement Test, and Claimant scored beginning high school level in reading and sixth grade in math. Mr. England concluded Claimant's academic development was sufficient for a number of entry-level positions.

Mr. England testified that Claimant worked as a sheet metal worker his entire career and could not return to that work after the last surgery.

Based in part on Claimant's hypothetical question that Claimant could not work because of pain, Mr. England concluded Claimant was unable to compete for work or sustain work in the open labor market because of a combination of his primary and preexisting disabilities.<sup>5</sup>

Mr. England testified Claimant had no physician-imposed restriction to lie down before the 2009 work accident.<sup>6</sup> Therefore, Mr. England opined Claimant's need to lie down alone made him unemployable in the open labor market.

### **RULINGS OF LAW**

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, observation of Claimant during the hearing, and the applicable law of the State of Missouri, I make the following findings:

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<sup>5</sup> Claimant testified that after he was released from medical care in late April 2010 he worked until Employer terminated him nearly two years later in March 2012 due to an economic slowdown.

<sup>6</sup> At the hearing Claimant testified that prior to 2009 he lay down on stacks of drywall and applied ice to his back to relieve pain as needed during the work day.

***Claimant did not prove disability from the last injury***

Claimant asserts he is PTD from the combination of the 2009 work injury and preexisting disabilities. SIF contends Claimant is not PTD, but if he is, it is due to the last injury alone.

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including SIF liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). In deciding whether SIF has any liability, the first determination is the degree of disability from the last injury considered alone. Section 287.220.1, and *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App.2000). If the last injury rendered Claimant permanently and totally disabled, SIF has no liability and Employer is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo.2003).<sup>7</sup>

Prior to the hearing, Claimant settled the primary injury with Employer for 35% PPD of the body for the low back. However, SIF was not a party to the settlement, and is not bound by that agreement. *Totten v. Treasurer, of Missouri*, 116, S.W.3d 624 (Mo.App. 2003). For Claimant to prove he sustained disability, Section 287.190.6 (2) requires:

“Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty...”

A claimant must establish the extent, or percentage of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability. *Knisley v. Charleswood Corp.* 211 S.W.3d 629, 635 (Mo.App. 2007).

Here, Dr. Musich opined the combination of Claimant's disabilities to his spine, past and present, are greater than their simple sum, and cause a hindrance to his activities of daily living. I find Dr. Musich's opinion is sufficient to demonstrate and certify Claimant had disability from the last injury, but I find his opinion is insufficient to show the percentage of disability Claimant sustained from the last back injury.

When a pre-existing disability is present, the claimant is required to prove the extent of the pre-existing disability so that such percentage can be evaluated against the disability percentage existing after the compensable injury. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 465 (Mo.App. 1992) (Citations omitted).

In this case, Dr. Musich opined Claimant sustained 60% PPD from the preexisting low back injuries, but did not provide an opinion about either the total disability to Claimant's low back, or the amount of disability he sustained from the last back injury alone. When asked during cross-examination, Dr. Musich testified he tried to put every relevant point in the report. Without the total disability or disability from the last injury it is impossible to determine the extent or

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<sup>7</sup>Overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

percentage of disability that Claimant sustained from the last back injury, separate from earlier back injuries.

Case law does not limit a fact finder to the physician’s disability rating. But at a hearing, there is no legal support for the proposition that the fact finder may determine disability for the primary injury absent a medical opinion stating the percentage or amount of disability that resulted from that injury.

There is no doubt Claimant sustained a serious injury, and his current complaints are credible. However, based on the absence of a disability rating for the primary injury, or a total amount of disability, I find Claimant did not meet his burden to show the degree of disability he sustained from the January 16, 2009 work injury.

I further find Claimant did not meet his burden to show he is PTD. Dr. Musich and Mr. England based their PTD opinions on Claimant’s inability to work due to pain. However, Claimant testified he worked until Employer terminated him for economic reasons 23 months after Dr. Rutz released him.

In addition, the only medical records in evidence for the primary injury are the FCE report and Dr. Rutz’s MMI report; and both reports were offered by SIF. Both Dr. Musich and Mr. England referred to Claimant’s treatment records and diagnostic results but those records were not offered or admitted into evidence. Therefore, I find it is not possible to confirm the validity of the medical history provided by the experts hired for litigation.

Having found Claimant’s disability cannot be determined from the last injury, all other issues are moot.

**CONCLUSION**

The Second Injury Fund is not liable for permanent partial or permanent total benefits to Claimant. The Second Injury Fund case is denied.

Made by: \_\_\_\_\_  
 Suzette Carlisle  
*Administrative Law Judge*  
*Division of Workers' Compensation*