This workers’ compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, we find that the award of the administrative law judge (ALJ) denying 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.

Preliminaries
On November 10, 2016, an administrative law judge (ALJ) issued an award with respect to the employee’s claim against the Second Injury Fund (SIF) in Injury No. 10-114063. The employee settled his claim against the employer/insurer in this matter in a Stipulation for Compromise Settlement approved on December 22, 2014.¹

The parties asked the ALJ to determine the following issues:

- Occupational Disease
- Notice
- Statute of Limitations
- Medical Causation
- Liability of the SIF for permanent partial disability or permanent total disability.

The ALJ denied all compensation finding that the employee failed to satisfy his burden of proving by competent medical evidence a direct medical causal connection between any alleged repetitive occupational exposure and his bilateral carpal tunnel syndrome condition. Based on the ALJ’s ruling on the issue of occupational disease and medical causation, he found the issues of notice, statute of limitations, and liability of the SIF moot.

Having reviewed the evidence, read the briefs, heard the parties’ arguments, and considered the whole record, we find the award of the administrative law judge supported by competent and substantial evidence and made in accordance with the

¹ Employee’s Exhibit 17, Transcript, 734.
Missouri Workers’ Compensation Law. Pursuant to § 286.090 RSMo, we affirm the ALJ’s award and decision with this supplemental opinion.

Discussion
The employee separately filed two other claims against the employer/insurer: Injury No. 09-108576, alleged an injury on September 23, 2009, in which railroad ties crushed the employee’s left leg; Injury No. 10-55756, alleged a neck injury sustained on June 28, 2010, while the employee was throwing a cable overhead. On December 22, 2014, the employee settled both claims with employer/insurer.\(^2\)

On August 8, 2016, the ALJ conducted a consolidated hearing to take evidence relating to the employee’s three remaining claims against the SIF. On November 10, 2016, the ALJ issued separate awards resolving the employee’s claims against the SIF with respect to Injury No. 09-108576, Injury No. 10-055756, and Injury No. 10-114063. The ALJ combined his three separate awards in a single document titled “Final Award” issued November 10, 2016. We take administrative notice of Division records showing that the Division individually mailed three separate copies of the ALJ’s November 10, 2016, Award to the parties, each accompanied by a cover letter that referenced only one of the three injury numbers. (See attached)

The employee’s application for review, filed on November 18, 2016, references only Injury No. 10-114063 and Date of Injury 08-31-10. The application alleges the ALJ erred in finding that the employee is not permanently and totally disabled. However, the ALJ’s award in Injury No. 10-114063 included no findings related to the nature and extent of the employee’s disability. Rather, the ALJ specifically found in his award in Injury No. 10-114063 that the issue of the SIF’s liability was moot.

We find, as a factual matter, that the employee failed to appeal the ALJ’s award in either Injury No. 09-108576 or Injury No. 10-055756.\(^3\) Employee’s attorney’s brief and oral argument attempt to raise arguments relating to the nature and extent of the employee’s disability that are not included in any findings in the award now before us for review.

Conclusions of Law

Section 287.480 RSMo states, in pertinent part:

If an application for review is made to the commission within twenty days from the date of the award, the full commission, if the first hearing was not held before the full commission, shall review the evidence. . .and shall make an award and file it in like manner as specified in section 287.470 (emphasis added).

\(^2\) Transcript, 727, 730.

\(^3\) We note the ALJ’s awards in both Injury No. 09-108576 and Injury No. 10-055756 included an assessment of permanent partial disability against the SIF.
A fundamental principle of all administrative law cases is that an administrative tribunal is a creature of statute and exercises only that authority invested by legislative enactment. *Farmer v. Barlow Truck Lines*, 979 S.W. 2d 169 (Mo. banc 1998).

Our authority extends only to issues decided by the award that is subject of the employee's application for review. By this award, we affirm the ALJ's award denying all compensation based on a lack of competent and substantial evidence on the issues of occupational disease and medical causation. We lack jurisdiction to address the issue of the SIF's liability for permanent disability in the context of separate awards not referenced in the employee's application for review.

**Decision**

We affirm the ALJ's award denying all compensation. We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Lawrence C. Kasten, issued November 10, 2016, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 13th day of June 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

Reid K. Forrester, Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Curtis E. Chick, Jr., Member

Secretary

---

4 See *Stonecipher v. Poplar Bluff R1 Sch. Dist*, 205 S.W.3d 326 (Mo App. 2006).
DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole records. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers’ Compensation Law, I disagree with the majority’s denial of compensation in this case.

As noted in the majority’s opinion, the employee filed three separate claims against the same employer/insurer, designated by the Division as Injury Nos. 09-108576, 10-055756, and 10-114063. On December 22, 2014, the employee settled all three claims with the employer/insurer.

The ALJ jointly heard the employee’s remaining claims against the Second Injury Fund in a hearing held on August 8, 2016. At the inception of the August 8, 2016, hearing, the ALJ announced, “I will be issuing one award in the cases (emphasis added).” Transcript, 6. On November 10, 2016, the ALJ issued a single “Final Award.”

The employee’s application for review, filed November 18, 2016, cites injury number 10-114063 and lists 10-31-10 as the date of injury. It further includes the following statement as the basis for employee’s appeal:

The ALJ decision is incorrect for the reason that the Award states that the opinions of the vocational expert, Donna Abrams, and one of the treating physicians, Dr. Yingling, support the notion that the Employee is not permanently and totally disabled.

The above statement clearly demonstrates the employee’s intent to appeal findings in the ALJ’s November 10, 2016, Final Award relating to the nature and extent of the employee’s permanent disability in connection with Injury Nos. 09-108576 and 10-055756. See Donald Payne v. Treasurer of the Second Injury Fund, 417 S.W.3d 834 (Mo. App. 2014).

The SIF made no objection to the form of employee’s application for review. SIF’s counsel addressed the ALJ’s finding relating to Injury Nos. 09-108576 and 10-055756 both in her brief and at oral argument. SIF’s counsel raised no issues relating to the Commission’s jurisdiction or authority to review findings in the ALJ’s Final Award relating to all three injury claims until after oral argument, and only then in response to the Commission’s invitation to do so.

“Due process, in Missouri workers’ compensation cases and elsewhere, contemplates the opportunity to be heard at a meaningful time and in a meaningful manner.” Id. citing Nolan v. Degussa Admixtures, Inc., 246 S.W.3d 1, 5 (Mo. App. 2008). The SIF clearly understood that the employee intended to raise the issue of the nature and extent of permanent disability sustained in Injury Nos. 09-108576 and 10-055756, in his application for review. The parties have fully briefed and argued this issue. The Commission’s review of the issue on appeal violates no party’s due process rights.
Our state’s appellate courts have instructed:

In Workers’ Compensation proceedings, substantial compliance with the provisions of the Compensation Act is ordinarily sufficient. ‘Procedural rights are considered as subsidiary and substantial rights are to be enforced at the sacrifice of procedural formality. Thus the claim or application for hearing contemplated by the workers’ compensation act does not have to contain the usual elements of a petition in the civil action.’ Loyd v. Ozark Elec. C-Op., Inc., 4 S.W.3d 579, 586 (Mo. App. 1999) citing Groce v. Pyle, 315 S.W.2d 482,492 (Mo. App. 1958).

The employee complied with the provisions of § 287.480 that require an application for review to be made to the commission “within twenty days from the date of the award” (emphasis added).” I respectfully disagree with the majority’s refusal to review all findings included in the ALJ’s November 10, 2016, Final Award relevant to the issue of whether the employee is permanently and totally disabled.

Curtis E. Chick, Jr., Member
NOVEMBER 10, 2016

09-108576

Injury No: 09-108576
Injury Date: 09-23-2009
Insurance No: XI090687

Employee: EUGENE A PEACOCK
102 CO HWY 305
SCOTT CITY, MO 63780

Employee Attorney: CHRIS N WEISS
2480 E MAIN ST STE E
JACKSON, MO 63755

Asst Atty General: ATTY GENERAL CHRIS KOSTER
2860 KAGE RD
CAPE GIRARDEAU, MO 63701

# Denotes that the Division sent a copy of the Award by electronic mail to the email address that the party provided. The Certificate of Service for this document is maintained in the Division’s records.

Enclosed is a copy of the Award on Hearing made in the above case.

Under the provisions of the Missouri Workers’ Compensation Law, an Application for Review of the decision of the Administrative Law Judge may be made to the Missouri Labor and Industrial Relations Commission within twenty (20) days of the above date. If you wish to request a review by the Commission, application may be made by completing an Application for Review Form (MOIC-2567). The Application for Review should be sent directly to the Commission at the following address:

Labor and Industrial Relations Commission
PO Box 599
Jefferson City, MO 65102-0599

If an Application for Review (MOIC-2567) is not postmarked or received within twenty (20) days of the above date, the enclosed award becomes final and no appeal may be made to the Commission or to the courts.

Please reference the above Injury Number in any correspondence with the Division or Commission.

DINISION OF WORKERS’ COMPENSATION

MISSOURI DEPARTMENT OF LABOR & INDUSTRIAL RELATIONS

Missouri Division of Workers' Compensation is an equal opportunity employer/program.
Auxiliary aids and services are available upon request to individuals with disabilities.
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DIVISION OF WORKERS' COMPENSATION

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RECEIVED
SEP 01, 2017

MISSOURI
DEPARTMENT OF LABOR
& INDUSTRIAL RELATIONS

Missouri Division of Workers' Compensation is an equal opportunity employer/program.
Auxiliary aids and services are available upon request to individuals with disabilities.
NOVEMBER 10, 2016

10-114063

Scan Copy

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Injury No : 10-114063
Injury Date : 08-31-2010
Insurance No : 

#Employee . . . : EUGENE A PEACOCK
102 CO HWY 305
SCOTT CITY, MO 63780

#Employee Attorney: CHRIS N WEISS
2460 E MAIN ST STE E
JACKSON, MO 63755

#Asst Atty General: ATTY GENERAL CHRIS KOSTER
2860 KAGE RD
CAPE GIRARDEAU, MO 63701

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DIVISION OF WORKERS’ COMPENSATION

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DIVISION OF WORKERS’ COMPENSATION
ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Eugene A. Peacock
Injury No. 09-108576; 10-055756; 10-114063

Dependents: N/A

Employer: North American Tie & Timber (settled)

Additional Party: The Second Injury Fund

Insurer: National American Insurance Co. (settled)

Appearances: Chris Weiss, attorney for the employee.
Crystal Williams, attorney for the Second Injury Fund.

Hearing Date: August 8, 2016
Checked by: LCK/kg

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes in Injury Number 09-108576 and Injury Number 10-055756. No in Injury Number 10-114063.

2. Was the injury or occupational disease compensable under Chapter 287? Yes in Injury Number 09-108576 and Injury Number 10-055756. No in Injury Number 10-114063.

3. Was there an accident or incident of occupational disease under the Law? Yes in Injury Number 09-108576 and Injury Number 10-055756. No in Injury Number 10-114063.


5. State location where accident occurred or occupational disease contracted: Scott County, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

Employee: Eugene A. Peacock

8. Did accident or occupational disease arise out of and in the course of the employment? Yes in Injury Number 09-108576 and Injury Number 10-055756. No in Injury Number 10-114063.

9. Was claim for compensation filed within time required by law? Yes in Injury Number 09-108576 and Injury Number 10-055756. Undetermined in Injury Number 10-114063.

10. Was the employer insured by above insurer? Yes.

11. Describe work the employee was doing and how accident happened or occupational disease contracted: In Injury Number 09-108576 the employee's left leg was crushed by railroad ties. In Injury Number 10-055756 the employee injured his neck throwing a cable overhead. N/A in Injury Number 10-114063.

12. Did accident or occupational disease cause death? No.

13. Parts of body injured by accident or occupational disease: Left lower leg in Injury Number 09-108576. Body as a whole referable to the cervical spine in Injury Number 10-055756. N/A in Injury Number 10-114063.

14. Nature and extent of any permanent disability: 10% of the left lower leg at the 160 week level in Injury Number 09-108576. 20% of the body as whole referable to the cervical spine in Injury Number 10-055756. N/A in Injury Number 10-114063.

15. Compensation paid to date for temporary total disability: $853.64 in Injury Number 09-108576. $4,176.00 in Injury Number 10-055756. $0 in Injury Number 10-114063.

16. Value necessary medical aid paid to date by the employer-insurer: $3,369.16 in Injury Number 09-108576. $16,403.86 in Injury Number 10-055756. $0 in Injury Number 10-114063.

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

18. Employee's average weekly wage: $640.29


20. Method wages computation: By agreement.

21. Amount of compensation payable: $4,483.48 in Injury Number 09-108576. $9,834.05 in Injury Number 10-055756. $0 in Injury Number 10-114063.
Employee: Eugene A. Peacock

Injury No. 09-108576; 10-055756; 10-114063

22. Second Injury Fund liability: $4,483.48 in Injury Number 09-108576. $9,834.05 in Injury Number 10-055756. $0 in Injury Number 10-114063.

23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded shall be subject to a lien in the amount of 25% of all payments hereunder in favor of attorney Chris Weiss for necessary legal services rendered to the employee.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On August 8, 2016, the employee, Eugene Peacock, appeared in person and with his attorney, Chris Weiss for a hearing for a final award. The Second Injury Fund was represented by Assistant Attorney General Crystal Williams. The parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues in each case together with a statement of the findings of fact and rulings of law, are set forth below as follows:

Injury Number 09-108576:

UNDISPUTED FACTS:

1. North American Tie & Timber was operating under and subject to the provisions of the Missouri Workers’ Compensation Act, and its liability was fully insured by National American Insurance Co.
2. On or about September 23, 2009, Eugene Peacock was an employee of North American Tie & Timber and was working under the Workers’ Compensation Act.
3. On or about September 23, 2009, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee’s accident.
5. The employee’s claim was filed within the time allowed by law.
6. The employee’s average weekly wage was $640.29. The rate of compensation for temporary total disability is $426.86; and for permanent partial disability is $422.97.
7. The employee’s injury was medically causally related to the accident.
8. The employer-insurer paid $3,369.16 in medical aid.
9. The employer-insurer paid $853.64 in temporary disability benefits for two weeks of compensation.

ISSUE:

1. Liability of the Second Injury Fund for permanent partial disability.
Injury Number 10-055756:

UNDISPUTED FACTS:

1. North American Tie & Timber was operating under and subject to the provisions of the Missouri Workers’ Compensation Act, and its liability was fully insured by National American Insurance Co.
2. On or about June 28, 2010, Eugene Peacock was an employee of North American Tie & Timber and was working under the Workers’ Compensation Act.
3. On or about June 28, 2010, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee’s accident.
5. The employee’s claim was filed within the time allowed by law.
6. The employee’s average weekly wage was $640.29. The rate of compensation for temporary total disability and permanent total disability is $426.86; and for permanent partial disability is $422.97.
7. The employer-insurer paid $16,403.86 in medical aid.
8. The employer-insurer paid $4,176.00 in temporary disability benefits. The time period paid was 12 weeks from August 4, 2010 through October 26, 2010.

ISSUES:

1. Medical Causation
2. Liability of the Second Injury Fund for permanent partial disability or permanent total disability.

Injury Number 10-114063:

UNDISPUTED FACTS:

1. North American Tie & Timber was operating under and subject to the provisions of the Missouri Workers’ Compensation Act, and its liability was fully insured by National American Insurance Co.
2. On or about August 31, 2010, Eugene Peacock was an employee of North American Tie & Timber and was working under the Workers’ Compensation Act.
3. The employee’s average weekly wage was $640.29. The rate of compensation for temporary total disability and permanent total disability is $426.86; and for permanent partial disability is $422.97.
4. The employer-insurer paid no medical aid.
5. The employer-insurer paid no temporary disability benefits.
Employee: Eugene A. Peacock

ISSUES:

1. Occupational Disease
2. Notice
3. Statute of Limitations
4. Medical Causation
5. Liability of the Second Injury Fund for permanent partial disability or permanent total disability.

EXHIBITS:

Employee Exhibits:

Exhibit 1: Medical records of Dr. Dodson
Exhibit 2: Medical records of St. Francis Medical Center
Exhibit 3: Medical records of St. Francis Medical Center
Exhibit 4: Medical records of Dr. Stahly
Exhibit 5: Medical records of Dr. Cooper
Exhibit 6: Medical records of Dr. Straubinger
Exhibit 7: Medical records of Dr. Yingling
Exhibit 8: Medical records of Dr. Coyle
Exhibit 9: Deposition of Dr. Yingling including his C.V. and various medical records
Exhibit 10: Deposition of Dr. Straubinger
Exhibit 11: Deposition of Dr. Stahly including his C.V. and various medical records
Exhibit 12: Temporary Award in Injury Number 10-055756
Exhibit 13: Deposition of Dr. Berkin including his C.V. and report
Exhibit 14: Deposition of Timothy Lalk including his C.V. and report
Exhibit 15: Stipulation for Compromise Settlement in Injury Number 09-108576
Exhibit 16: Stipulation for Compromise Settlement in Injury Number 10-055756
Exhibit 17: Stipulation for Compromise Settlement in Injury Number 10-114063

Second Injury Fund Exhibits:

Exhibit A: Deposition of Donna Abram including her C.V. and report
Exhibit B: Deposition of Eugene Peacock taken on November 28, 2011.

Note: The undersigned Administrative Law Judge did not mark any of the exhibits admitted into evidence.

Judicial Notice of the contents of the Division’s files for the employee was taken.

WITNESSES:

Eugene Peacock and Martha Peacock
PROPOSED AWARDS:

The employee and the Second Injury Fund submitted their proposed Awards on September 23, 2016.

STATEMENT OF THE FINDINGS OF FACT:

The employee testified that he was born in 1953 and is 63 years old. He has been married to Martha Peacock for 18 years and lives in Scott City. He was born in Michigan and went to high school there through his 11th year. He dropped out when he was 17 years old and joined the Marine Corps due to not getting much out of school and problems with his father. He was in the Marine Corps for 2 years, attained the rank of Private First Class and was honorably discharged. He was on the aircraft carrier USS Ticonderoga for about 9 months and was responsible for the security of nuclear weapons. While in the military, he had instructor experience in nuclear weapons security.

The employee testified that in the Marines he took classes in electronic repair; and RF and light communications which are broadcast stations with transmitters and two way radio communications which are used by police. He also took juvenile/child psychology courses. He took the classes through San Diego State and correspondence classes from Georgia Tech. It was discovered that he had not graduated from high school. In his deposition taken in November of 2011, the employee stated that he thought he had a GED, but after the deposition he checked and he had not completed a GED.

The employee testified that while in the Marine Corps a shell accidentally discharged and his right ear drum was ruptured. Since then he cannot hear out of his right ear. He receives $130.00 a month from VA for tinnitus. In his deposition, he was asked if he had any problems with his sight or hearing, he said he could hear everything. He meant as long as he was not talking he can hear anything going on. If there is noise in the foreground he does not hear so well. After being discharged from the Marines, his hearing loss affected his ability when he worked as a police dispatcher. He had problems with talking and listening at the same time and had to turn the radio volume up. When he worked as a radio DJ, he had trouble interviewing people and had to watch the meters to make sure they were talking loud enough.

In his deposition, the employee testified in Michigan he worked for Motorola and Cook Communications for 3-4 years. He had his own electronic repair company for 4-5 years. He subcontracted to other radio stations to put up their towers to maintain their equipment, repaired inside the studio and transmitters and other things. He moved to Missouri 25 years ago. In Missouri, he worked as an electronics technician. In the mid 1980s he performed contract work for CBS and ABC setting up radio stations and performing repair work for about 2 years.

The employee testified that after he left the Marines, he installed radio towers for 2 years and then did that off and on for the next 8-10 years. He worked at A1 in Bonne Terre and did two way radio repairs. In the 1980's he worked at KEHB/KEJR which were AM and FM gospel radio stations in Desoto. He started out repairing transmitters. He was asked to stay on
Employee: Eugene A. Peacock

Injury No. 09-108576; 10-055756; 10-114063

performing engineering and some DJ work. Within a short time of starting, the General Manager stole from the station and left a large debt. He was made the new General Manager and helped turn the station around within a couple of months. The owners sold it; and it was turned into a rock and roll station. He lost his job when that happened.

The employee testified that he worked for the Scott City Police Department for 2 years as a dispatcher, then at the Miner Police Department for one year. He worked for Miner since they needed dispatchers and paid more money. He returned to Scott City for an additional 3 years. As dispatcher he had problems when there were people talking. The Chief of Police made a rule that the door was closed and no one else was to be in the dispatcher room when he was working. The employee also turned the volume up. He left Scott City when the Chief of Police retired. He disagreed with how the new Chief handled law enforcement.

The employee testified that he worked at Dittronics, a two way radio company where he serviced radios at fire and police departments. He did repair and installation; and one tower repair. He then was a yard manager for a car liquidation company dealing with wrecked cars and insurance companies. The company picked up the wrecked cars, and then processed and inventoried them. He wrote detailed damage reports and would sell the cars. He left that company to open his own business doing the same type of work. The company grew and when he could not get enough land to lease he closed the business.

On April 6, 1999, the employee had a lumbosacral spine X-ray due to a fall. The impression was extensive degenerative changes at the L5-S1 disc; endplates with central vacuum disc phenomenon; narrowing of disc height; sclerotic changes of the endplates; and associated degenerative changes of the facet joints. There was no evidence of fracture or dislocation.

The employee testified that he had surgery on his right ear in 2004. Dr. Seabaugh took a large tumor out of the inner ear. His family doctor was Dr. Dodson.

The employee had blood work with Dr. Dodson beginning March 31, 2005, and that continued through July 21, 2009. The testing included cholesterol and blood sugar.

The employee testified he developed a heart condition. He had shortness of breath and dizziness when climbing up radio towers. He had to stop to rest when climbing the towers. The shortness of breath and the dizziness affected his ability to climb the towers. Once he got up to the top he had to sit 5-10 minutes before he did the work. He then started doing easier work including repairing radios, juke boxes and radio circuit boards. He had an angioplasty and three blockages were found. He had heart surgery in August of 2007 and had two bypasses and a stent on the third blockage. He was diagnosed with diabetes.

On August 29, 2007, Dr. Holcomb performed a cardiac cauterization. The results were severe multi-vessel disease involving the LAD, second diagonal branch and ramus intermediacy and elevated left ventricular pressures. The employee had diabetes and multiple cardiac risk factors. He was admitted to the hospital for bypass surgery. On August 30, Dr. Bender performed a cardiopulmonary bypass and coronary artery bypass grafting times two; with the left
internal mammary artery to the left anterior descending, and saphenous vein graft to ramus intermedius for a diagnosis of coronary artery disease. The surgery was for unstable angina; 70 to 80% left anterior descending stenosis; 90% diagonal branch stenosis which was a small diffuse diseased vessel; and 79% ramus intermedius stenosis also a relatively small vessel.

The employee testified at his deposition that his low back was absolutely fine from when he saw Dr. Givens, a chiropractor, in December of 2001 until November of 2007 when he saw Dr. Stahly for leg weakness. His cardiologist changed his blood thinning medication and the weakness in his legs went away.

The employee testified that in November of 2007 he went to Dr. Stahly, a neurologist, due to weakness in his legs. Over the years he had gone to Dr. Givens, a chiropractor, due to the sciatic nerve which had shooting pain down his leg on the outside. He would get one or two adjustments and pain was taken care of for a time. He was told by a new chiropractor that he had ALS and went to Dr. Stahly. He had numbness and tingling in his feet and problems with going down stairs. Dr. Stahly diagnosed cervical stenosis and diabetic neuropathy. Dr. Stahly recommended at some point to have neck surgery for compression due to stenosis; and encouraged him not to do construction type labor. Dr. Stahly thought he would need neck surgery at some point but it would probably be in 20-30 years.

The employee saw Dr. Stahly on November 7, 2007, for lower extremity weakness and gait disorder. The employee had double coronary bypass 43 days ago. The last two weeks he had the onset of difficulty descending stairs, trouble rising from a low chair and a sense of numbness and tingling in his feet. The physical exam revealed asymmetric loss of deep tendon reflexes with relatively symmetric sensory loss in the lower extremities associated with bilateral iliopsoas weakness, right greater than the left, and subtle right quadriceps weakness. Dr. Stahly was suspicious of diabetic polyneuropathy with an early lumbar plexopathy. He scheduled EMG and nerve conduction studies of the lower extremities and an MRI of the pelvis and cervical spine to rule out occult cervical spinal stenosis/myelopathy masked by diabetic polyneuropathy. Dr. Stahly's impressions were diabetic sensory motor polyneuropathy with lumbar plexopathy.

The November 15 lumbar MRI showed disc bulges at L3-4, L4-5 and L5-S1. A right cyst within the ventral aspect of the right L4-5 facet contributed to marked right lateral recess stenosis and mass effect upon the right L4 nerve root. There was foraminal stenosis which was mild to moderate at L3-4; mild to moderate at L4-5 and mild bilateral at L5-S1.

The November 15 nerve conduction study showed moderate sensorimotor polyneuropathy and the EMG was unremarkable. The November 16 MRI of the brachial plexus showed no brachial plexus or impingement detected to the level of the glenohumeral joint bilaterally; cervical spondylosis; multilevel disc disease; moderate size left pleural effusion; and no neck mass.

The November 16, 2007 cervical MRI showed multi-level central stenosis mild at C4-5; moderate/marked at C5-6; and moderate at C6-7. There was anterior cord flattening and mild
cord edema versus myelomalacia at C5-6 and C6-7; and multilevel foraminal stenosis most marked at C6-7.

The November 16 MRI of the pelvis showed marked spondylosis and degenerative disc disease at L5-S1; L4-5 and L5-S1 facet arthropathy with facet effusions; and minimal left gluteus medius tendinopathy.

On December 5, 2007, Dr. Stahly stated that the employee had moderate sensory motor polyneuropathy but no evidence of an obvious lumbar plexopathy. The cervical MRI documented rather significant cervical spine stenosis at C5-6 and C6-7 with no signs of cervical myelopathy. Dr. Stahly thought he might have some intermittent cervical myelopathic symptoms masked by diabetic neuropathy. Dr. Stahly anticipated that the employee would need cervical decompression surgery at some point due to the degree of cervical spinal stenosis.

The employee testified that he started working at KMHM, a gospel radio station in Marble Hill. His duties were to play music and run a 4 hour program at first once a week; then he went to three times a week for 4 hours. He earned $67.00 a week and loved doing it.

The employee testified at his deposition that when he was hired by American Tie & Timber in April of 2009, he did not have any numbness in the fingers of his right hand.

The employee testified that he was hired in 2009 at North American Tie & Timber in Scott City as a yard manager. His duties were to maintain the yards; assign jobs to the employees; perform inventory of incoming and outgoing railroad ties; and prepare reports. He managed six other employees. The company bought green ties and dried and cured them. The green ties are processed with divets which is to puncture the tie to prevent warping and splitting. The ties are from 8-11 feet long. Ash ties weigh 200-250 pounds while oak and hickory ties weigh 300-350 pounds. The ties are primarily moved by crane or forklift. They are diveted and stacked a certain way for the air to circulate. After the curing process, they are bundled and shipped. The ties are moved by a track-like conveyor belt but some of the work has to be done physically. The ties had to occasionally be picked up by hand when they slipped off the track. After a year of employment, another yard manager was hired to take care of most of the paperwork. After that the employee managed the yard and equipment; scheduled the employees; and ran the machine for the divet process. About 5% of his job was paperwork, and the remaining 95% he was running machines or performing physical work. His job was very hand and arm intensive. While operating the divet machine, only 1 or 2 of the ties would feed into the divet machine without having to be rolled by hand.

The employee testified that in September of 2009 he injured his left leg. He was getting a rack of ties ready to go through assembly. He cut the bands and the first two rows of ties fell on him. His left leg got pinned and other employees helped get the ties off him. He went to the emergency room. His leg was not fractured but his muscles were smashed.

On September 23, 2009 the employee went to the emergency room due to an injury to his left leg. X-rays of the left leg after trauma showed no fracture or subluxation. The diagnosis was
lower leg contusion. Percocet was prescribed. The employee was to be non weight bearing and to use crutches.

The employee was seen by Dr. Cooper at St. Francis Occupational Medicine on September 25, 2009. His left leg was caught between two railroad ties. X-rays did not show any fracture. Diagnosed was contusion sprain injury of the left lower leg and calf, contusion to the fibular head of the left knee, and contusion to the lateral calf. He was put on restricted modified duty. On September 30, the employee was prescribed therapy and to use a crutch. On October 14, the employee was to discontinue the crutch and to use a cane and remained on restrictions. On October 21, the employee had finished 6 visits to therapy. He was using a cane, had a lot of left calf pain, and was taking Oxycodone for pain. He was to wean and discontinue the cane as soon as possible and continued on work restrictions. On October 28, Dr. Cooper noted that the contusion to the distal Achilles tendon of the left calf was much improved but had continued weakness and soreness. He was to return in 10 days.

The employee testified that after the accident he had more heart problems and had a stent put in due to chest pain.

On November 5, 2009, Dr. Holcomb performed stenting of the mid to right coronary artery which reduced the 99% stenosis.

On December 17, 2009, Dr. Cooper released the employee from care to full unrestricted duty without permanency of injury. He still had some soreness in his calf. The contusion to the distal Achilles tendon to the left calf had resolved. Since he last saw him at the end of October, the employee had an unrelated medical problem which required hospitalization.

The employee testified that after his 2009 leg injury, he missed 2 weeks of work, and then returned to work with restrictions which were never lifted. Dr. Cooper put him on restrictions of not lifting anything more than 15 - 20 pounds; not to walk on uneven ground; no work above ground level; and no climbing ladders, steps or into forklifts. Dr. Cooper did not like him working on the platform to run the machine. After the accident, the employer leveled the ground; allowed him to drive a truck to the shop; put hand rails on the two steps to the platform; gave him a rubber mat to stand on; and gave him a stool to lean against.

The employee testified that when he returned to work his duties were affected, which included not lifting or climbing on railcars or forklifts. After the heart surgery he continued to lift but watched how he did it, including picking up the heavy railroad ties differently. He continued to have constant pain of 5 out of 10 from his knee to his ankle. His leg is aggravated by sitting or standing too long. Due to his leg problems he stopped getting on top of the stacks. He stopped running forklifts due to inability to climb into them. If he was the only one there he would occasionally run a forklift but he could not run it for very long due to having to use his left leg for brakes.

The employee saw Dr. Dodson on May 11, 2010, for his chronic medical conditions. His main complaint was persistent leg discomfort, and the left leg burned especially at night. The
impression was ASH s/p CABG plus RCA stent, dyslipidemia, HTN, type I diabetes, left leg crush injury from September of 2009, and morbid obesity. His medications were adjusted and Gabapentin was added.

The employee testified at his deposition that prior to the June of 2010 injury he could bend, twist, kneel and stoop without difficulty; he did not have any trouble walking distances or standing; and had to stand at his job for 10 hours. He went to the chiropractor several times a year when his sciatic nerve acted up. From 2001 until 2007 he did not have any chiropractic treatment. He had treatment in 2009 for his sciatic nerve. He had trouble sleeping prior to June of 2010 due to his leg pain. He had no physical problems doing his job.

The employee testified that prior to June 28, 2010, he could get his job completed but had to do things differently. He continued to lift the heavy ties but only 3-4 times in an hour each day. On June 28, 2010, he had injured his neck at work. He was throwing iron and steel cables that weighed 5-10 pounds over head. When he was throwing one up, his glove got caught on a burr on the cable and it jerked him and he felt a pop.

The employee testified at his deposition that when he was throwing the cable he felt tightness or tenderness across the back of both shoulders. He recalled having numbness in the fingers of his right hand but it was not similar to the numbness in his right hand and fingers in 2007. His hand went totally numb where he could not feel anything. In 2007 he had numbness in the right little finger and index finger. After the 2010 injury he had numbness in the right thumb and index finger.

On July 8, 2010 the employee saw Dr. Straubinger at the St. Francis Occupational Medicine due to an injury throwing a cable with a metal plate over a load of railroad ties. The employee felt pain in his right shoulder area which went into the low back. He had numbness in his right hand, sleep disturbance due to pain between the shoulder blades and low back area, and low back pain radiating into his left side and leg. He did not have any neck complaints. He was taking Gabapentin for neuropathic pain due to a crush injury to the left lower extremity. X-rays of the right shoulder, neck, mid back and low back were taken. The lumbar X-ray showed a new finding compared to the November of 2007 MRI which was a Grade I anterolisthesis at L4-5. The thoracic x-ray showed three minimal mid-thoracic anterior wedge compression deformities of indeterminate age at T6, T7 and T8.

On July 15, Dr. Straubinger diagnosed the employee with a strain to the cervical spine, radicular features to the right upper extremity predominately at C5-6 distribution, a low back strain with radicular features to the left and a possible brachioplexus involvement on the right side. The employee had underlying degenerative disc disease and degenerative joint disease of the neck and low back. He was put on restrictions of maximum lifting, pushing and pulling of 10 pounds and tasks beneath shoulder level on both the left and right. Therapy was started.

The employee saw Dr. Straubinger on July 26, 2010. Dr. Straubinger compared a new MRI with an MRI dated November 6, 2007. He had a new finding of grade 1 anterolisthesis at L4-L5. Dr. Straubinger noted that the employee had significant findings dating back to 2007,
prior to the June 28, 2010 injury and had aggravation of the underlying non work-related conditions. The employee had significant pain and compromise of function; and probably did not meet the physical demands of his job. Dr. Straubinger requested information from Dr. Stahly to determine which complaints were new and which complaints were old. The diagnosis was a throw/twist injury with cervical strain superimposed upon aggravation of underlying degeneration with radicular features to the left and uncontrolled pain. He ordered new MRIs of the lumbar and cervical spine to compare to the 2007 studies. Therapy was continued. He put restrictions of no lifting pushing or pulling over 10 pounds on right and left; ground work only; and to alternate sit, stand, move and stretch.

The August 2, 2010 cervical MRI was compared to the 2007 cervical MRI and showed further loss of disc height at C5-6 and C6-7 and an increase in the left paracentral disc protrusion at C5-6 with further cord progression. At C4-5 there was a small central disc protrusion without cord compression. At C5-6 there was a moderate left paracentral disc protrusion compressing the left side of the cord without edema. At C6-7 there was a broad based disc protrusion with chronic cord compression. There was multilevel spondylosis most severe at C5-6.

The August 2, 2010, lumbar MRI showed no significant change compared to the November of 2007 study. At L3-4 there was diffuse bulging annulus and small foraminal disc protrusion slightly larger on the left. At L4-5 there was moderate diffuse disc protrusion with canal stenosis.

On August 4, 2010, Dr. Straubinger stated that the employee’s pain was uncontrolled. He was unable to complete his work shift the day before and was sent home due to low back pain. He was getting weak in his left leg and still having intermittent numbness in his hands. He diagnosed a cervical strain with radiculopathy stable and improved; underlying long standing cervical disc and facet disease which are not work related; low back pain with radiculopathy to the left; uncontrolled pain at multiple levels; and long standing degenerative disc and facet disease that was not work related. Dr. Straubinger continued work restrictions and referred the employee to the pain center. On August 11, Dr. Straubinger stated the employee had neck and low back pain with radiculopathy and uncontrolled pain primarily in the low back. The employee was not working. The numbness in his hands was now constant.

On August 17, 2010, the employee saw Dr. Steele at the Pain Clinic for low back pain radiating down his left lower extremity to the level of his ankle. He had neck pain and pain down his right arm to elbow; bilateral hand numbness; and at times an unsteady gait. Dr. Steele’s impression was cervical spinal stenosis secondary to cervical disc disease and spondylosis resulting in radicular and myelopathic symptoms; and lumbar spinal stenosis resulting from lumbar disc disease possibly contributing to lower extremity radicular symptoms. He recommended a referral to a neurosurgeon.

On August 20, 2010, the employee saw Dr. Straubinger for his neck and low back. He was not working due to his restrictions. He reported burning across his shoulders, numbness in the right hand and low back pain radiating into the left lower extremity. Dr. Straubinger felt that he may need surgical decompression but did not feel it was related to the June 28, 2010
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injury. He thought it was from the preceding underlying degenerative disease. Dr. Straubinger stated that the employee was at or close to his baseline. He continued modified duties of no lifting, pushing or pulling over 15 pounds; use crutches; and no repetitive bending or twisting of the back or neck.

The employee testified that he worked on restricted duty in July and August.

On September 10, 2010, the employee saw Dr. Straubinger for complaints to his neck, upper extremities, and lower extremities with radiculopathy. The employee had not seen a private neurosurgeon for possible back and neck surgery due to significant underlying degenerative disease. Dr. Straubinger would not release the employee from care or put him at maximum medical improvement until he got input from a neurologist.

The employee saw Dr. Stahly on October 7, 2010, for persistent low back pain and bilateral hip pain. The employee had been in a state of relatively stable neurologic health until June 28, 2010, when he was throwing a 10 to 15 pound steel cable with metal plate over the end of a railroad car and experienced a whiplash-type injury to his head and neck. He experienced a rather severe popping sensation in the lower thoracic spine and continued to do some more of those throws until his shoulders felt as if they were on fire and he had severe back pain. Since then he has had lower thoracic and lumbosacral back pain with bilateral hip discomfort. He has been unable to walk or stand for long periods of time due to exacerbation of the symptoms. Dr. Stahly reviewed the November of 2007 MRIs and found rather significant degenerative disc and spondylitic disease at L4-5 and L5-1. Dr. Stahly’s impression was posttraumatic work-related exacerbation of degenerative spondylosis and disc disease at L4-5 and L5-S1; degenerative spondylisis and degenerative disc disease with early cervical spinal stenosis at C5-6 and diabetic sensorimotor polyneuropathy. He recommended weight loss, low back mobility and strengthening, physical therapy and a trial of lumbar epidural steroids at L4-5 and L5-S1. He recommended that the employee follow up with Dr. Straubinger.

On October 20, 2010, Dr. Straubinger conferred with Dr. Stahly by telephone and noted they both agreed that the acute strain mechanism of throwing the metal hook and line had resolved and that the continued pain and compromise of function was primarily due to his underlying degenerative disease. Dr. Straubinger stated that the employee was probably unfit for physical labor and specifically those job tasks that he had at North American Tie & Timber. Dr. Stahly concurred and felt that the employee needed to lose weight and be in an occupation that did not put excessive demands on his body architecture. Dr. Straubinger felt that the employee was at maximum medical improvement and that any restrictions on him were for protection due to his underlying architectural disease and not related to the injury of June 28, 2010.

The employee testified that after the June of 2010 injury at work, the company policy changed. North America Tie & Timber never told him that he was fired but was told they had no light-duty jobs; and if he could not perform his full job he could not work there. He was sent home and told to come back when he got better.
On November 3, 2010 Dr. Straubinger stated that the employee should see a neurosurgeon.

The employee testified that he was referred to Dr. Yingling who wanted to perform surgery. His arms were numb and he was having a lot of back pain. He had trouble sitting for a long time and got relief by lying down.

The employee was seen by Dr. Yingling on January 6, 2011, for a neurosurgical consultation. The employee was injured on June 28, 2010, throwing cables over a load of railroad ties, and developed pain in his neck, shoulders and upper back. He has low back pain and numbness and tingling in his arms; some numbness and tingling and posterior calf pain on the right; and numbness and tingling in a patchy area in the left leg which was present since a crush injury to that leg a year before the current accident. Dr. Yingling reviewed the cervical MRI which showed a disc/osteophyte protrusion at C5-6 which was causing severe stenosis with obliteration of the subarachnoid space. There was a broad bulging disc at C6-7 causing moderate severe stenosis but not as bad as C5-6. An MRI of the low back showed degenerative disc disease at the lower three levels. There was bulging of the L3-4 and L4-5 discs and severe narrowing of the L5-S1 disc. There was an annular tear at L3-4, and broad bulging of the disc at L4-5 with moderately severe canal narrowing. Dr. Yingling stated that the severe pain in his neck and upper back may be due to a severe strain or sprain of the neck and back but could be due to his disc protrusion with stenosis at C5-6 and C6-7. He may have a thoracic spine problem but this was not identified because he did not have a thoracic MRI. Dr. Yingling identified degenerative changes in the low back with stenosis at L4-5 and an annular tear at L3-4 on the left which could have been exacerbated by the injury. The most severe symptoms were in his neck and upper back. He recommended an MRI of the thoracic spine and prescribed therapy to the neck and upper back. He noted the employee may need C5-6 and C6-7 surgery for the protrusions with stenosis.

On February 22, 2011, Dr. Yingling stated that he had reviewed the records of Dr. Straubinger and Dr. Stahly as well as his own physical examination. It was his opinion that the June 28, 2010 work accident was the prevailing factor in causing and aggravating the subjective symptoms and objective conditions and diagnoses.

Dr. Yingling's deposition was taken on June 2, 2011. It was Dr. Yingling’s opinion that the June 28, 2010 injury was the prevailing factor in causing most or all of his symptomology. Some of the conditions seen on the scan were degenerative and had been there prior to the injury. It was his opinion that the June of 2010 work accident did not cause the compression or stenosis condition in the neck. He thought that the June of 2010 work accident may have exacerbated the compression condition but he cannot be positive. It most likely caused some sprain of the adjacent ligaments around the joints that increased his neck and upper back pain which would also be relieved by the surgery. The accident could have strained his lower back. The surgery would address the stenosis; the compression of the spinal cord; and the ligament strain and sprains.
With regard to the July 2010 lumbar x-rays, Dr. Yingling did not know if the grade one anterolisthesis of L4 on L5 was caused by the work accident. It was unlikely that the mild loss of disc height at L4-5 and L5-S1 was caused by the work accident. The L4-5 and L5-S1 hypertrophic facet arthropathy and the spondylosis at L5-S1 with endplate irregularity were not caused by the work accident. With regard to the July of 2010 cervical spine X-rays, the reversal of the usual cervical lordosis could have been caused by the work accident. He did not know if the retrolisthesis of C5 on C6 was caused by the work accident. The moderate loss of disc height at C5-6 and C6-7 with spondylosis, the mild multi-level hypertrophy, and the facet and ankylosis at C2-3 was not caused by the work accident. With regard to the July of 2010 thoracic X-rays, he did not know if the minor anterior wedge configurations at T6, T7, and T8; and the slight mild thoracic kyphosis were caused by the work accident.

Dr. Yingling reviewed the August of 2010 cervical MRI report. It was his opinion that the multi-level spondylosis, most severe at C5-6, was not caused by the work accident. The radiologist report stated that the 2010 MRI compared to the 2007 MRI showed further loss of disc height at C5-6 and C6-7. Dr. Yingling could not directly attribute that loss of disc height to the work accident. It was certainly possible that the increased size of the left paracentral disc protrusion at C5-6 was due to the work accident.

With regard to the lumbar MRI in August of 2010, Dr. Yingling thought there was an annular tear at L3-4 but the radiologist did not mention it. The June of 2010 twisting injury could have caused an annular tear but he cannot definitely state that it was caused by the accident. The multi-level degenerative changes most prominent at L5 were not caused by the work accident. Dr. Yingling was not aware of the lumbar MRI in November of 2007.

It was Dr. Yingling’s opinion that the work accident was the prevailing factor in causing and aggravating the subjective symptoms and objective conditions/diagnoses. Dr. Yingling stated that he would not need to review the 2007 cervical and lumbar MRIs to arrive at an opinion in terms of subjective symptoms. In terms of objective conditions, it was his opinion that after having seen the reports, he thought they had probably worsened. The reports confirm that the objective conditions had probably worsened due to the increased protrusion of the cervical discs and the annular tear that was not mentioned before. Dr. Yingling stated that he would not be able to say within a reasonable degree of medical certainty that the worsening from the 2007 MRIs to the 2010 MRIs was a direct result of the work accident.

It was Dr. Yingling’s opinion that the neck and upper back pain and the numbness and tingling in his arms and hands were a result of the June of 2010 accident. Dr. Yingling did not know if the low back pain and numbness and tingling in both legs, including the patchy area of the left leg, were a result of the June of 2010 accident. It was his opinion that the posterior right calf pain was probably not related to the work accident. Dr. Yingling did not note in his report whether the employee had those subjective symptoms prior to the work accident. It was his opinion that the numbness and tingling in his arms and hands was most likely related to the muscle strain and spasms than diabetic polyneuropathy. It his opinion that the lower back and leg symptoms were more likely chronic.
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Dr. Yingling reviewed the November 16, 2007 cervical MRI and stated that it showed stenosis and some core compression. Dr. Yingling stated that the cervical surgery that he was recommending was for stenosis and some compression of the spinal cord. Dr. Stahly's December 5, 2007 record that the employee may need cervical decompression did not affect his opinions.

It was Dr. Yingling’s opinion that the June 28, 2010 work accident was the prevailing factor in aggravating the subjective symptoms and objective conditions and diagnoses. Aggravated meant that it changed the pathology or structure of his body and exacerbated subjective symptoms. It was his opinion that the pain in the neck and upper back; and tingling in his arms was caused or aggravated by the accident. Dr. Yingling disagreed with Dr. Straubinger’s report of October 20, 2010, that any residual symptoms were primarily due to the underlying degenerative disease because the employee was still having symptoms that he stated were made worse by the accident. It was his opinion that all the problems with the employee’s neck and arms were worsening of conditions caused by his degenerative disease and resulted from his work accident. It was his continued opinion that after reviewing the 2007 MRIs and X-rays that the June 28, 2010 accident was the prevailing factor in causing the need for treatment.

The deposition of Dr. Straubinger was taken on August 30, 2011. He was the treating physician for the June of 2010 injury. It was his opinion that the June of 2010 accident caused a sprain or strain to the mid-back, low back with radicular features to the lower extremity and brachial plexus on the right side. He did not diagnose a neck strain or sprain when he first saw him. He diagnosed degenerative disc disease, degenerative disease of the vertebrae and spondylolisthesis of the low back.

It was Dr. Straubinger’s opinion that the employee aggravated the underlying disease in the cervical spine and lumbar spine. Aggravated meant that it resulted in producing subjective symptoms in the cervical spine and that the work injury produced objective, anatomical pathological changes in the spine. The anatomical changes may not be visible but they still exist relatively on a microscopic level and there was tissue damage. The definition of a strain is microscopic tears, for example of muscle fibers, which would not be evidenced on any type of imaging. He thought that the strain/sprain would resolve. It was Dr. Straubinger’s opinion that the further loss of disc height at C5-6 and C6-7 between the 2007 cervical MRI and the 2010 cervical MRI was more degenerative as opposed to an acute change. Radiographically there were changes but he could not directly relate those to the 2010 work accident as opposed to developmental changes.

With regard to the lumbar MRIs of 2007 and 2010, it was his opinion that there were no acute changes in the lumbar spine that could be directly related to the work accident. When he saw the employee on August 20, 2010, he thought the injury was not the prevailing cause of his current complaints and that the employee was nearing his baseline. It was his opinion that the acute strain mechanism was over or almost over, and at that point what he was seeing was the ongoing underlying pre-existing degenerative processes. It was his opinion that on October 20, 2010, the employee was at maximum medical improvement with regard to the June 28, 2010 work-related accident. It was Dr. Straubinger’s opinion that the treatment recommended by Dr.
Yingling was due to his underlying condition and not predominately due to the June 28, 2010 injury.

Dr. Straubinger testified that his September 10, 2010 restrictions were limited to sedentary tasks. Dr. Straubinger thought the employee was fit for sedentary tasks including working at a desk, bench, or a table with positional changes. He could drive a private vehicle, work at ground level only, with no walking or standing more than 15 minutes per hour per shift, no walking on uneven ground, and no lifting, pushing, pulling over 15 pounds. He was assigned to limited duty with those restrictions. Those restrictions would be ongoing until he had treatment or had been seen by another physician. On his last visit of September 10, 2010, his primary limiting factor was his low back pain and not his neck or upper extremities.

The deposition of Dr. Stahly was taken on August 31, 2011. His first saw the employee on November 7, 2007. On examination the employee had weakness of the right iliopsoas on the right more than the left which meant the muscle power in the hip flexors were mildly weak. There were diminished knee jerks on the left with an absent knee jerk on the right; absent ankle jerks; and poor sensory perceptions and proprioceptive perception in the lower extremities which all would suggest polyneuropathy. The employee had moderately limited retroflexion which is a very common finding in middle-aged men and is a sign of cervical spondylosis which limits cervical range of motion. Dr. Stahly believed that in November 2007 the employee had diabetic sensor motor polyneuropathy and maybe even plexopathy. Plexopathy means that the branches from the lumbar plexus that form the peripheral nerves may have been affected and that was causing some of the weakness in the legs. The November of 2007 cervical MRI showed rather significant cervical spinal stenosis or narrowing at C5-6 and C6-7. The employee did not have any clinical signs that the mild cord compression was causing a problem. The EMG of the lower extremities showed moderate sensory motor polyneuropathy.

In December of 2007, Dr. Stahly thought at some point the employee would need cervical decompression surgery but did not know when, but at that point the stenosis was not symptomatic. The stenosis would progress but the time frame was unknown and could be years and years especially with a sedentary type person. He thought it was getting to the critical point where it would start impinging on the cord and he would develop signs of cervical myelopathy. It was his opinion that the stenosis in his neck would progressively degenerate even without a subsequent traumatic acute event, but probably at a slower rate. The expected symptoms from the stenosis as it progressed included lower extremity ataxia and weakness; and although it was more of lower extremity syndrome, if there was encroachment in the neural foramen he could develop sensory or motor problems in the arms.

Although he was supposed to see him every 6-12 months unless he had symptoms, the employee did not return to Dr. Stahly until October of 2010. At that point the he was having difficulty in standing or walking for long periods of time due to mid, low back and hip discomfort. On examination, the employee had limited neck motion and some trophic skin changes in the lower extremities which were common with polyneuropathy. The loss of neck motion was the same finding as in November of 2007. In October of 2010 he recommended weight loss, low back mobility strengthening, physical therapy and a trial of lumbar epidural
steroids at L4-5 and L5-S1 to relieve the effects of his injury and his degenerative back condition. The mechanism of injury could have aggravated the protrusion at C5-6 which has increased in size. Clinically it did not really exacerbate the neck condition.

It was his opinion that the June of 2010 accident was the prevailing factor in exacerbating the pre-existing degenerative condition of the low back. It did not cause all of the changes but the reason he was having so much discomfort was that trauma from the accident was superimposed on an already at-risk lumbar spine. It was his opinion that the work accident was essentially a sprain/strain type of injury. He did not find any evidence either clinically or radiographically that objectively confirmed that the employee had an acute traumatic injury and change in pathology to the cervical spine as a result of the work accident. In October of 2010, he did not feel that the employee was a candidate for neck surgery since he had not had any progression clinically.

The employee’s deposition was taken on November 28, 2011. At that time he was taking Gabapentin being prescribed by Dr. Dodson for left leg pain due to the 2009 crush injury. He was taking Cyclobenzaprine for upper back pain across his shoulders, and hydrocodone for upper and mid back pain. He was taking Tylenol for back pain. He used ice packs across his shoulders. He lies down 3-4 times a day for 30-45 minutes at a time during daylight hours to relieve the pain in the back across the shoulders. He did not have to lie down due to pain prior to June of 2010. At the time of the deposition, every now and then he was having difficulty sleeping due to the pain between his shoulders and in his leg. The pain he had in 2001 was to his lower back and at the time of his deposition the pain was in his mid to upper back across his shoulders.

The employee testified in his November of 2011 deposition that he had been working at KMHN radio station in Marble Hill for about 4-5 years. He does an evening program on the weekends and Sunday morning. He was working at the radio station on weekends during the same period he worked at North American. He stopped working at the radio station for awhile due to his inability to drive the 75 mile round trip, but went back to the weekend work for the last year and a half or two years. He sits and plays music; reads the news and plays requests. He was working from 7:00 to 11:00 p.m. on Thursday and Friday evenings and from 6:00 a.m. to 12 noon on Sunday. He is the producer, engineer, and DJ for the 12 hours he is working each week. He writes commercials, prepares the news, and does the preparation work for the three radio shows. He has had some physical problems in the last year and a half to two years doing his job. During his shifts, he moves from his chair to a stool and back to chair, and will walk around. Due to his back pain, he sometimes cannot get to Marble Hill if he does not have someone available to help him drive there. When that happens he does not go on the air; and the station will go on satellite feed to play music. During the last year and a half to two years, he missed 6-8 shifts due to back pain. In his present physical condition it would be tough to work at a radio station for 40 hours a week due to having to sit for a long time. If his condition was repaired, he thought he would be able do a full-time job. Since he last worked at North America, he has not worked anywhere else other than the radio station, has not applied for any part-time jobs, and had not applied for unemployment.
On December 8, 2011, the employee had a temporary hearing in front of the Honorable Maureen Tilley in Injury Number 10-055756, which is the June 28, 2010 injury. The issues included whether the employee’s injury was medically causally related to the accident and whether additional medical care and treatment was necessary as a result of the accident. Judge Tilley issue a temporary award on March 5, 2012 ruling that the employee failed to sustain his burden of proof that the June 28, 2010 work accident was the prevailing factor in the causing his current cervical condition; and that the medical care requested “flows from the accident.” The employee’s request for additional medical care was denied.

The employee testified that after the temporary hearing he was taking up to 12 pain pills a day and something had to be done. He eventually had surgery by Dr. Yingling which was covered by his wife’s health insurance.

The employee was sent to Dr. Coyle on May 9, 2012, by his attorney. The employee had pain in his neck and upper back with pain radiating into the right arm. He had some low back pain but stated that he did not injure his low back throwing the cable. Dr. Coyle’s impression was cervical spondylosis and stenosis at C5-6 and C6-7 with upper extremity radiculopathy. It was Dr. Coyle’s opinion that the predominate symptoms are referable to the pathology at C5-6 and C6-7 and that it appears that the work incident of June 2010 was an aggravating factor in causing the cervical stenosis to become more symptomatic. He was in agreement with Dr. Yingling that surgery was reasonable and appropriate.

In a letter dated June 1, 2012, it was Dr. Coyle’s opinion that the work incident of June 28, 2010, was not the prevailing factor in causing his current symptoms. The prevailing factor was the longstanding cervical spondylitic stenosis. If the employee had not sustained the incident on June 28, 2010 he would still need the surgery. Therefore the surgery was not necessary to cure and relieve the effects of the June 28, 2010 injury but was necessary to decompress a stenotic spinal cord which predated the work injury.

The employee returned to Dr. Yingling on July 31, 2012, with continued pain in the neck and shoulders which occasionally go into the arms. He has occasional numbness of the fingers of both hands, mostly in the thumb and index fingers; and pain in the upper back and lower back and some occasional pain in the anterior left shin. Dr. Yingling reviewed the August 2010 cervical and lumbar MRIs. Dr. Yingling stated that the cervical stenosis was fairly severe and may put him at some risk for spinal cord contusion if he was involved in any trauma. Dr. Yingling ordered repeat cervical and lumbar MRIs, a thoracic MRI and EMG/NCV testing of the upper extremities; and prescribed therapy.

On August 30, 2012, Dr. Yingling stated that the nerve conduction testing revealed moderately severe carpal tunnel syndrome in both wrists and ulnar nerve entrapment in the left elbow. In the cervical spine there was a disc/osteophyte protrusion posteriorly at C5-6 that abuts the spinal cord causing moderate stenosis. At C6-7 there was a degenerative disc disease with broad bulging causing moderate stenosis to a lesser degree. The thoracic MRI showed degenerative disc disease. The lumbar MRI showed mild broad disc bulging at I4-5 with severe facet arthropathy with widening of the joint space and mild lateral recess narrowing. Dr.
Yingling diagnosed pain in his upper back and cervical stenosis; numbness and tingling in his hands, carpal tunnel syndrome worse on the right; and cubital tunnel syndrome on the left. Dr. Yingling recommended a discectomy/fusion at C5-6 and C6-7 and right carpal tunnel release.

Dr. Yingling performed an anterior C5-6 and C6-7 discectomy with fusion and right carpal tunnel release on September 17, 2012. The post operative diagnosis was C5-6 and C6-7 stenosis and right carpal tunnel syndrome. The employee was discharged from the hospital on September 18. On October 30, Dr. Yingling prescribed physical therapy. On November 27, the employee reported no neck pain and the numbness in the fingers of the right hand was almost entirely gone. Dr. Yingling stated that the employee was doing well after his two level anterior cervical fusion and right carpal tunnel release. The employee was to see him on an as-needed basis.

The employee testified that the September of 2012 neck fusion surgery really helped his condition and symptoms. He no longer has upper and middle back pain but continues to have numbness. The right-sided carpal tunnel syndrome surgery had to be redone.

On June 4, 2013, the employee returned to Dr. Yingling with suspected recurrent carpal tunnel syndrome. Neurontin was prescribed and EMG and NCV studies were ordered. On June 20 Dr. Yingling diagnosed recurrent right carpal tunnel syndrome; and recommended a redo right carpal tunnel release.

The employee was evaluated by Dr. Berkin on August 28, 2013 and his report was dated November 25, 2013. Dr. Berkin’s deposition was taken on May 6, 2015. On examination, the employee had loss of normal cervical lordosis. Palpation revealed tenderness over the paraspinal muscles of the neck from C3 to C7. Spurling test was negative for cervical or radicular pain. There was limited cervical range of motion in flexion, extension, right and left rotation; and right lateral and left lateral flexion. The right hand had tenderness to palpation over the volar surface of the wrist and a positive Tinel’s sign and Phalen’s test. On the left hand there was a positive Tinel’s sign and Phalen’s test. Palpation of the left leg revealed tenderness over the lateral surface of the knee over the head of the fibula. There was a loss of sensation over the medial service of the left lower leg and pain upon squatting. It was Dr. Berkin’s opinion that when his left leg was crushed the cutaneous sensory nerves were injured and never regenerated.

With regard to the September 23, 2009 injury, Dr. Berkin diagnosed a crush injury/contusion to the left lower leg. It was his opinion that the employee sustained a 20% permanent partial disability of the lower left extremity at the level of the knee.

With regard to the June 18, 2010 accident, Dr. Berkin diagnosed a cervical strain with right-sided radiculopathy; a herniated disc at C5-6 and C6-7; and was status post anterior cervical discectomy and fusion. It was Dr. Berkin’s opinion that the June of 2010 accident was the prevailing factor in causing the cervical strain and right-sided radiculopathy associated with herniated discs at C5-6 and C6-7. Dr. Berkin stated that although the employee was diagnosed with cervical and lumbar disc pathology in 2007, the records indicate his symptoms improved and there were no records documenting that he required ongoing treatment of his neck or back or
radicular symptoms. He worked at a very labor intensive job for three years until his 2010 injury, and all indications were he was having no symptoms in his neck or back until the June of 2010 injury when strapping down a load of railroad ties. It was his opinion that the employee sustained a 40% permanent partial disability of the body as a whole at the level of the cervical spine.

It was Dr. Berkin's opinion that prior to September 23, 2009 and June 28, 2010, the employee had pre-existing hypertension; high cholesterol; diabetes mellitus with diabetic neuropathy; coronary artery disease with coronary bypass graft times two in 2007 and percutaneous coronary intervention in 2009 for stent insertion of the right coronary artery; sleep apnea; bilateral carpal tunnel syndrome; degenerative arthritis of the cervical spine with facet arthropathy; central spinal stenosis; and degenerative arthritis of the lumbar spine with spinal stenosis and facet arthropathy.

It was his opinion that the carpal tunnel was a result of the work he did over a period of years, or it could have been in addition to the work due to his diabetes that he has had for years. It was his opinion that either the work or his diabetes is the source of his carpal tunnel syndrome. It was his opinion that due to the severity in 2012, he had developed the carpal tunnel syndrome prior to 2010. The employee did not state when he started having symptoms. It was Dr. Berkin's opinion that although there were no records prior to 2010 regarding his carpal tunnel syndrome or problems with his hands, the employee had it for a long period of time. Based on the kinds of activities he did over the years, he thought it had been there for awhile. The nerve tests in 2012 revealed severe disease which develops gradually over time.

It was Dr. Berkin understanding that after the 2009 injury up to the 2010 injury the employee was working full duty without any restrictions.

It was Dr. Berkin's opinion that with respect to the history of degenerative disc disease involving the neck and low back there was a 20% permanent partial disability of the body as a whole. Due to the history of coronary artery disease requiring surgery for a two vessel coronary artery and bypass graft and stenting of the right coronary artery, it was his opinion that the employee had a 20% permanent partial disability of the body as a whole. It was his opinion that due to the bilateral carpal tunnel syndrome that the employee had a 30% permanent partial disability of each upper extremity at the level of the wrist.

It was his opinion that these pre-existing conditions and disabilities were a hindrance and obstacle to his employment or re-employment at the time of the September 2009 and June 2010 injuries. It was his opinion that the combination of his disabilities was significantly greater than their simple sum and a loading factor should be applied.

It was Dr. Berkin's opinion that the employee should use analgesics and muscle relaxants for control of the neck and left leg pain but should avoid non-steroidal anti-inflammatory medication due to the history of coronary artery disease. He recommended participation in a home exercise program to strengthen and improve the mobility, flexibility and stability to the neck and left leg. The employee should avoid rapid and extreme movements of the neck and
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avoid maintaining his neck in a fixed position for extended periods of time. He recommended the lifting should be limited to 40-45 pounds on an occasional basis, and 25 pounds on a frequent basis. He should avoid lifting with his arm extended from his body and should avoid excessive lifting or working with his arms above shoulder level. With respect to the left leg, the employee should avoid excessive squatting, kneeling, stooping, turning, twisting, lifting and climbing. He should avoid standing for long periods of time or walking for long distances. The employee should be cautious when climbing ladders and stairs, working heights above ground level or walking on uneven surfaces. With regard to the bilateral carpal tunnel syndrome he should avoid forceful gripping, squeezing, pinching, pulling, twisting or reaching with his hands for extended periods of time. He should avoid torque-like or high impact stresses to his hands and should limit his exposure to operating power tools or vibratory equipment. With regard to the coronary artery disease, the employee should maintain an ideal body weight and adopt a positive lifestyle to minimize cardiac risk factors. He should maintain good control of his blood and glucose levels, keep his blood pressure under control and maintain a favorable lipid profile by using a statin if he can tolerate it. The employee should remain as active as possible but pace himself and take frequent breaks to avoid exacerbation of the symptoms or further injury to his neck and left leg.

Dr. Berkin would defer to a vocational expert with regard to the employee's employability in the open labor market.

On November 6, 2013, Dr. Yingling performed a redo right carpal tunnel release for recurrent right carpal tunnel syndrome. On December 19, Dr. Yingling prescribed therapy. The employee saw Dr. Yingling on January 16, 2014, and was improving. He continued to have some numbness of the lateral digits of his right hand, his grip was stronger but had weakness in opposing his thumb and little finger. He continued to have decreased sensation to light touch of the distal half of the lateral three digits. Physical therapy was continued.

The employee filed a Claim for Compensation for bilateral carpal tunnel syndrome on February 3, 2014. It stated that the employee developed carpal tunnel syndrome in both wrists as a result of his handling railroad ties at his employer. The date listed was August of 2010. The Second Injury Fund raised the Statue of Limitations in its Answer. The employer-insurer in its Answer denied actual notice of the alleged injury and raised the Statute of Limitations.

On February 11, 2014, the employee saw Dr. Yingling and was doing well with continued improvement of the hand. He had a very slight amount of numbness and tingling in the lateral digits but was much better than his last appointment. There was no tenderness in the incisional area; full hand strength; and mild hypesthesia and paresthesia to light touch in the lateral three digits. The employee was to return on an as-needed basis and was to resume normal activities.

The employee settled his Claim in Injury Number 09-108576 on December 22, 2014 for the September 23, 2009 accident for 10% of the left knee.

The employee settled his Claim in Injury Number 10-055756 with a date of injury of June 28, 2010 for 10% of the body as a whole for the neck and back on December 22, 2014.
The employee settled his Claim in Injury Number 10-114063 with a date of injury of August 31, 2010 for 1% of each upper extremity at the wrist. The employer-insurer disputed accident, notice, and statute of limitations. The employer-insurer paid no medical or temporary total disability.

The employee testified that he usually does not sleep through the night due to pain in his legs and back. It is his understanding that his injured left leg is causing the pain due to the nerve endings being disarrayed with scar tissue and a constant pinch on the nerves. He has had problems with his legs since the ties crushed him. He usually sleeps for 35-40 minutes and then has to get up and move around. He goes from the bed to the floor, the floor to couch, and then back to the bed. He gets up 6-7 times a night or maybe more. He gets up in the morning around 6 or 7 a.m. if he had a decent night, but if not then it might be 11 a.m. to 12 noon. When he gets up, he makes coffee and sometimes breakfast. He will read the paper and watch the news. He tries to pick up and clean the house. At times he will try to clean out his shop. He will get on the riding lawn mower and mow the front yard and then take a break before doing the back. It takes him 4-5 hours with 3-4 breaks to finish the lawn. He does laundry which is in the basement; and going up and down stairs affects him. He does the dishes, runs the vacuum cleaner, takes the dog out, and takes the trash out. Driving the 75 miles round trip to the radio station caused him problems. His wife goes to a doctor in Herrin, Illinois, which is about an hour drive. He can drive there without a break but sometimes she drives back. During that drive his legs and feet feel like they are on fire; and his arms and hands go numb if they are in one position. During an average day he lies on the floor or in his bed 3-5 times for 35-40 minutes and sometimes up to an hour each time due to pain in his back, leg and arms. The need to lie down during the day started after the June of 2010 injury. He can sit up to 25-30 minutes without moving around. On a bad day it is only 10 minutes before he has to move around. He gets short of breath a lot. He is now diabetic, and at the time of his deposition he was borderline. He has been able to manage diabetes with pills.

Martha Jane Peacock testified that she has been married to the employee for 18 years. She was a postmaster for 26 years, most of the time in Kelso. She retired in 2012 and since then is with her husband a lot. Since the neck injury he is no longer able to do what he did before. He used to work a lot in his shop and took care of things around the house. Since the neck injury he stopped doing things including cutting wood. With regard to his chores, it takes quite a while to get anything done because he can only do a little bit at a time. He will try to mow or work in his shop; he lasts 30-45 minutes. It now takes him longer to mow because he has to go back 2-3 times to finish the lawn. He used to do home repairs but gets someone else to do a lot of the repairs. He has a wood burning fireplace and cuts a little fire wood for about 30 minutes before he has to stop. He cannot split wood and has someone else use his power splitter. His lower back and legs cause problems with cutting, he gets short of breath and his hands go numb. He sometimes does a load of laundry. The washer and dryer are in the basement and it sometimes hurts his legs to go downstairs. He has trouble sitting for a long period of time, and has to get up and walk around. If he sits down to watch the news or ballgame he has to change positions after about 30 minutes. He cannot lie down very long due to his leg hurting. They attend church but he does not go as much due to problems sitting in the pew, and he has not sat for the hour long service since the neck injury.
Ms. Peacock testified that the employee was very limited after the 2010 neck injury but after his surgery his neck was better. He has a bad heart condition and the 2007 heart surgery slowed him down. He has shortness of breath and his blood pressure fluctuates. After his 2009 left leg injury there was a definite difference. It is her opinion that the combination of his neck, arms, legs and heart keeps the employee from doing things like he used to; and his limitations have been pretty much since the June of 2010 neck injury.

The employee testified that he attempted to work as a shuttle driver for the railroad. He drove to St. Louis to pick up train crews to take them to locations in Missouri and Arkansas. He only lasted two days because he could not handle the driving and traveling. He worked at Casey's Pizza for a week but could not stand the 8 hours it required. The manager was very sympathetic but it was company policy for no one to be sitting so he had to quit. He enjoyed working and he has not found any other employment.

The employee testified at his deposition that the physical problems he has that he relates to the accident on June 28, 2010 is constant pain in his upper back around his shoulder and his hands going numb. It is complete numbness from the wrist down to the tips of his fingers. The only constant numbness is his index finger and thumb of each hand. The complete numbness in both hands and all fingers happen 2-3 times a day and lasts for a few minutes.

The employee testified that since his neck surgery, the severe neck pain is gone. He has loss of motion from side to side and up and down. He has numbness left over from surgery and has loss of strength. He takes metformin for diabetes; several medications for heart condition and high blood pressure; and Gabapentin for neuropathy pain and numbness in his legs. He has problems with his memory including where he put things or dates.

The employee testified that he has had a wide variety of jobs including being a material handler, over-the-road truck driver, electronics technician, tower installer, and radio dispatcher. He owned a liquidation business and a two way radio repair business. He worked at several different radio stations in various capacities.

The employee testified that with electronic repair he used a lot of tools including micro needle nose, solder irons, small screw drivers, hot glue gun, sockets, and a mini grinder. He can no longer do electronic repair because he cannot pick up small items due to loss of sense of touch. He was able to perform repairs at the time of his November of 2011 deposition. He stopped being able to perform repairs about 8-9 months before the hearing. He has converted vinyl records to digital form but does not do that as often because it takes him a lot more time due to his inability to sit. While he is in his shop, he sweeps, sorts tools, and looks at radio parts.

The employee testified he enjoys working and loved working at the radio station. Being on the radio was a happy time. He loves gospel music and working with different artists. He enjoys Bible history and did a lot of research while being a DJ. He enjoys going back in time to the events in the Bible. He works a lot on the internet and using a concordance. He is very familiar with using a computer. When he was younger he could type 72 words a minute but now is down to 32-34 words a minute.
The employee testified that he does not know of a job that he has done in the past that he can do on a full time basis. He cannot dispatch because he has to wear a headset which he cannot do due to loss of hearing in his right ear. He would also have trouble sitting for 8 hours a day as a dispatcher.

The employee testified he worked at the Marble Hill radio station off and on for quite a few years. After the June of 2010 injury, he worked there the same 12 hours a week. He was able to perform the DJ job except for the problems with his hearing. While working at the radio station he could move up and down and did not have to sit or stand in one place. He would lie down on the couch due to pain in his arm and legs. If he laid down 20-30 minutes flat he could alleviate the pain. During his regular broadcast he was not sitting constantly. He was alternating sitting and standing. It was a challenge if he was doing an interview with an artist in the studio. At the end of his live broadcast shift he would switch over the satellite programming and lie down for 20-30 minutes. He was fired in 2013 when he was told by the new General Manager that he was too Christian and did not like it when he prayed for someone on the air. The only reason he left was due to a dispute with the new manager. He wants to go back to work but could not do any past jobs except for maybe being a radio DJ, but gospel radio stations are few and far between without a lot of openings. When asked about getting into a different genre of music, he said the only music was gospel. He does not like contemporary Christian music.

The employee saw Timothy Lalk for a vocational rehabilitation evaluation on January 16, 2015. His report was dated February 19, 2015 and his deposition was taken on April 22, 2015. Mr. Lalk stated that the employee limped favoring his left leg and needed to stand up and move about several times during the interview. It was Mr. Lalk's impression that he was having some difficulty and discomfort while on his feet. Initially the employee told Mr. Lalk that he had no medical condition which limited his activity; and emphasized that he had been able to lift 300 to 400 pounds of weight until his last work injury. There was nothing else limiting his activity prior to the injury. Later in the interview he confirmed that in 2009 some railroad ties fell on his left leg which crushed muscles and nerves. When he returned to work he would place weight on his right leg when standing and would lean on a stool. He could only stand for about an hour at a time without assistance. When he used the stool, he was able to stand through his full 10 hour shift. He was told not to walk on uneven terrain and could not climb. He could not feel the ground under his left foot and his left leg was not as strong as it had been before. Eventually the left leg became worse and he was experiencing increased pain and cramping in the left leg and decreased strength. He could no longer rise from a squatting position without using his arm to assist him. Prior to June 2010 the employee was experiencing bilateral carpal tunnel syndrome and was having difficulty using pliers, screwdrivers and wrenches. He thought he started having problems about 6 months after starting to work at the employer. The cervical surgery by Dr. Yingling resolved his neck and upper back pain; and the subsequent physical therapy also helped.

With regard to physical capabilities, he sometimes is unable to feel objects completely when he grabs them. There is cramping when use uses hand tools after several minutes. His left hand seems better than his right. He has decreased strength in his right arm. He could stand for an hour to an hour and a half until his leg symptoms would force him to take weight off of his
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Leg. He can increase that to about two hours if he does not lean back and sits on the edge of a chair. If he sits too long he has to stand to relieve left leg symptoms.

The employee completed the eleventh grade at Romeo High School in Michigan; was in the Marines for several years and took some classes at San Diego State University while serving in the Marines. He had to stop because he did not have a high school diploma and he never obtained his GED. He has loss of hearing in his right ear due to being exposed to noise in the Marines. Mr. Lalk did not administer any tests due to his history of his age, work history and performing academic work. The employee’s ability to read and perform calculations is certainly sufficient to allow him to enter unskilled entry level positions. He did not believe that the employee would benefit from additional training to enter a new occupation based upon his age.

The employee told Mr. Lalk that he had no medical condition which limited his activity until the injury to his left leg in 2009. The symptoms in his hands became worse between January of 2010 and the spine injury spine in June of 2010.

Mr. Lalk stated that both Dr. Straubinger and Dr. Stahly agreed that the employee was unfit for physical labor and the duties at North American Tie & Timber. Mr. Lalk listed Dr. Berkin’s restrictions and stated that the employee described symptoms and limitations consistent with those restrictions.

Mr. Lalk stated that the employee described the need to rest repeatedly during the day even though he has full control of his level of activities. His efforts to simply paint a room which he could normally do in one day now takes a week. The employee experiences increased symptoms from even non-activity which forces him to lie down until the symptoms decrease. Those periods of rest can last from 45 minutes to 1 hour at a time. The employee tries to be active but he cannot do it on a regular basis. He developed symptoms from being on his feet and from sitting and from use using his right upper extremity. He cannot feel things that he grabs or develops cramping handling items.

The employee attempted to find employment at a convenience store but discovered he could not tolerate standing and walking. He was not allowed to use a stool to sit on during the day. The employee was able to control his level of activities as a DJ but there is limited availability of that type of work. Another position was a dispatcher which the employee has experience. Due to the fact the employee is deaf in one ear, he would not be able to perform the functions that require using a headset and telephone at the same time.

It was Mr. Lalk’s opinion that based upon Dr. Berkin’s restrictions, his review of the medical records, and the symptoms and limitations reported by the employee, the employee was not able to secure and maintain employment in the open labor market and is not able to compete for any position. Mr. Lalk stated it was not reasonable to conclude that the employee would be able to compete for any position based upon his multiple complaints affecting multiple body parts which are exacerbated by everyday activities such as simply positioning himself or using his upper extremities. Mr. Lalk did not believe that the employee would be able to relieve himself or control his symptoms in any occupation based upon his experience and training.
It was Mr. Lalk's opinion that the symptoms contained in the 2007 medical records would have been a hindrance to his employment. At his last job, he started out as a general manager and then became a yard manager and his work involved heavy physical activity. From his description of what he was doing and after reviewing the medical records, it became obvious to Mr. Lalk that the employee should have never taken that job and that the routines of the job were placing him at a risk for further exacerbation of his condition even though he did not have any specific restrictions. Based upon his ongoing complaints, it seemed obvious that he would have difficulty with his job. His jobs ranged from sedentary to heavy lifting.

After surgery Dr. Yingling stated that the employee did not have any restrictions with regard to his cervical spine and right hand. Dr. Straubinger and Dr. Stahly thought the employee had some restrictions or at least decreased capabilities and would be unfit for physical labor and the duties at North American Tie & Timber. Dr. Berkin had given him restrictions which were consistent with the limitations that the employee described to him. It was Mr. Lalk's opinion that based on his review of the medical records, the restrictions of Dr. Berkin and the symptoms and limitations, the employee is not able to secure and maintain employment in the open labor market and is not able to compete for any positions. It was his opinion that the employee is permanently and totally disabled if his symptoms continue permanently. He would defer to a doctor to make that pronouncement, but as long as his current symptoms continue he will not be able to work. He did not have any recommendation of what could be done from a vocational rehabilitation perspective unless his symptoms improved somewhat significantly before he could be able to find any type of competitive employment. Mr. Lalk stated that what was compelling was that the employee had complete control of his level of activity and is still not able to control his symptoms and has to rest repeatedly during the day. An employer is not going to be able to tolerate that and is not going to be able to accommodate those periods of rest; and the employee would not be able to effectively perform his duties and is unemployable in the open labor market based upon the multiple complaints affecting his multiple body parts.

Mr. Lalk did not see anything in the medical records that gave any permanent restrictions by any doctor prior to September of 2009. His job at North American was a pretty strenuous physical job.

Mr. Lalk testified that if he could find a position at a radio station, he thought he could perform the same duties at another radio station part time. Even if he was an active DJ, the job is still sedentary in nature. It was the really the repeated need to recline and rest that would really take him out of the workplace. It was Mr. Lalk's opinion that based upon Dr. Berkin's restrictions and if the employee did not need to take frequent breaks to avoid exacerbation of his symptoms, he thought the employee could work in some type of sedentary or near sedentary position.

Mr. Lalk stated that he had problems with multiple body parts but the primary problem was the left leg symptoms and then the cervical spine. He did not think the right and left hand symptoms were contributing anymore to his problems and inability to work. The hearing problems contributed in some manner, but the two areas that are primarily affecting his ability to
work were his neck and left leg. He would defer to a physician in regard to causation whether it was a combination or the last injury alone or just other factors afterwards.

The Second Injury Fund received a record review from Donna Abram, a vocational counselor and consultant. She issued her report on March 9, 2016. Her deposition was taken on May 12, 2016. She noted that the records show that the employee is well versed in using a computer including a home laptop; writing scripts for commercials; and setting up his time at radio stations. He told Mr. Lalk that he was proficient at typing with a previous average speed of 72 words per minutes. Now he can type about 45-50 words per minute which is still above average. He has very skilled hobbies including restoring music from cassettes, 8 tracks, albums and records; and restoring old radios, juke boxes and other electrical devices. He reads as a hobby, and is in charge of his church building sound system, and setting up and running a mock radio station with church youth.

Ms. Abram stated that the employee controlled his symptoms by icing his shoulders once to up to 3 times a day and spends his time lying down 3 to 4 times a day at least 30 to 45 minutes at a time. The employee's description was a very sedentary and disabled lifestyle. Ms. Abram reviewed the restrictions of Dr. Berkin and by Dr. Straubinger. Dr. Berkin's restrictions fall into part of the medium range of physical demand but not the entire category when the lifting restriction was used. Not being able to stand or walk for long periods of time also eliminates the majority of medium range positions. Ms. Abram only investigated jobs in the light range of physical demand. Research has demonstrated that Dr. Berkin's other restrictions can be met. Dr. Straubinger clearly stated in his deposition that the employee is limited to the sedentary range of physical demand. Jobs can be still considered sedentary if occasional standing and walking are required. Due to the employee's background, Ms. Abram focused on jobs in an office type of environment and job duties that are known to allow changes of position as needed.

Ms. Abram stated that to evaluate the ability to work in the open labor market she had to analyze "employability" and "placeability." With regard to employability the employee has very strong assets. Based upon the employee's variety of jobs and skills, Ms. Abram strongly believed that the employee was highly employable in the open labor market in a wide range of jobs. With regard to placeability in the open labor market there were mixed assets. Ms. Abram stated that the employee had a previous work history in sedentary and light range of work and had an extensive knowledge of electrical and electronics which would be highly marketable but his age could be a barrier. Since she was not able to meet with the employee, she could not address his presentation or demeanor. None of the records provided a prescription that led her to believe that he would not make a good first impression to a potential employer. Even after his work-related injury the employee continued to work at a radio station until a personality conflict between him and the new manager.

Ms. Abram noted that Dr. Cooper and Dr. Yingling stated that the leg and wrist conditions were not to the level that produced permanent restrictions. Under those opinions, the employee could go back to work to what he was doing or any other job he wanted. It was Ms. Abram’s opinion that the employee cannot return to North America Tie & Timber. Even with the employee's problems and the restrictions by Dr. Berkin and Dr. Straubinger the employee
was clearly employable in a wide range of jobs and industries. Whether or not he would be able to obtain and maintain a new job is not as clear due to several vocational issues that could be considered a barrier to employment.

The employee is of advanced age and has developed a very sedentary and disabled lifestyle. There was no doctor that stated he cannot be active throughout the day. Jobs allow workers to sit, stand and move about. The employee’s own requirement to lie down multiple times a day is an accommodation that is difficult to provide for most employers. It is possible it could be accommodated through a combination of breaks and lunch but Ms. Abram was unable to state definitively that the requirement to lie down would not be a barrier if job placement were to occur. She felt that this could be a possibility that this need could interfere with an employer being willing to hire him. The employee had been out of work for close to three years and that this gap was significant. The employee's disabled lifestyle would be very difficult to break after that length of time.

It was her professional vocational opinion that given all of the facts she has, the employee is still employable in a variety of job types and levels of responsibility. Based on the doctor’s opinions about his current level of functioning, the employee could locate a new job with a very diligent search, if he can convince himself that he can work. If the employee is unable to change his opinion of his situation, he will never been able to persuade a new employer to hire him. If the employee can show with a diligent effort, he could return to work. But with his disabled lifestyle, if he cannot be active during the day and he believes that he cannot return to work, then he is never going to return to work.

Ms. Abram stated that the need to lie down multiple times a day could be a huge barrier to employment if it cannot be accommodated through breaks and lunch. Break rooms are generally not equipped with a bed or cot. If in the doctors’ opinions about his current level of functioning none of them has said he needs to lie down or needs to be less than sedentary in terms of the disability lifestyle; then the employee could be employable and placeable.

If one looks at how he is living, his disabled lifestyle, and his apparent belief system, it was slim to none that he was going to get a job. At the time of the accidents he was 56 and 57, and the employee continued to work after his last accident in 2010 until 2013. He stopped working because he was fired due to a personality conflict and not because he physically could not do the job. If he attempted to go back to work back then or at time of his accident, his age would not have been as significant of a factor as it is now. Dr. Berkin had the most extensive list of restrictions which fell into light range of physical demand. Dr. Straubinger’s restrictions were sedentary. However neither indicated that the employee should be able to recline during the day as needed and neither of them stated that he should limit walking or standing.
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RULINGS OF LAW:

Rulings of Law in Injury Number 10-114063:

Issue 1. Occupational Disease; and Issue 4. Medical Causation

It was disputed that on or about August 31, 2010, the employee sustained an occupational disease arising out of and in the course of his employment and that the employee's injury to his upper extremities was medically causally related to the alleged occupational disease.

Under Section 287.020.3 (1) RSMo, "injury" is defined to be an injury which has arisen out of and in the course of employment. Under Section 287.067.2 and 287.067.3 RSMo, an injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. An injury due to repetitive motion is recognized as an occupational disease. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. In order to be a compensable injury under a repetitive motion occupational disease, the employee has the burden to prove that the occupational exposure was the prevailing factor in causing the resulting medical condition and disability.

The burden of proof is on the employee to prove all material elements of his claim. See Marcus v. Steel Constructors, Inc., 434 S.W.2d 475 (Mo. 1968) and Walsh v. Treasurer of the State of Missouri, 953 S.W.2d 632,637 (Mo. App. 1997). The employee has the burden to prove that his injuries arose out of and in the course of employment. See Smith v. Donco Construction, 182 S.W.3d 693, 699 (Mo. App. 2006). In order to prove a medical causal relationship, the employee in cases such as this one involving any significant medical complexity must offer competent medical testimony to satisfy his burden of proof. See Brundige v. Boehringer Ingelheim, 812 S.W.2d 200 (Mo. App. 1991) and Downs v. A.C.F. Industries, Inc., 460 S.W.2d 293 (Mo. App. 1973). The employee has the burden of proof that he suffered a work-related injury and the alleged occupational disease was the prevailing factor in causing both the resulting medical condition and disability. See Armstrong v. Tetra Pak, Inc., 391 S.W.3d (Mo. App. 2012) and Bond v. Site Line Surveying, 322 S.W.3d 165 (Mo. App. 2010). A work injury is compensable only if the alleged occupational disease was the prevailing factor in causing both the resulting medical condition and disability. See Gordon v. City of Ellisville, 268 S.W.3d 454 (Mo. App. 2008).

The employee testified at his November of 2011 deposition that the physical problems he relates to the accident on June 28, 2010 included numbness in his hands. The employee filed a Claim for Compensation for bilateral carpal tunnel syndrome on February 3, 2014 which alleged that in August of 2010 he developed carpal tunnel syndrome in both wrists as a result of handling railroad ties at his employer.
In August of 2010, the employee had constant numbness in both hands. It was Dr. Yingling's opinion that the numbness and tingling in his arms and hands was most likely related to the muscle strain and spasms from the June of 2010 accident rather than diabetic polyneuropathy. In July of 2012, Dr. Yingling ordered nerve tests of the upper extremities. In August of 2012, Dr. Yingling stated that the nerve conduction testing revealed moderately severe carpal tunnel syndrome in both wrists. In September of 2012, Dr. Yingling performed a right carpal tunnel release. In 2013, Dr. Yingling diagnosed recurrent right carpal tunnel syndrome and performed a redo right carpal tunnel release.

It was Dr. Berkin's opinion that prior to the September 23, 2009 and June 28, 2010 accidents the employee had pre-existing bilateral carpal tunnel syndrome. It was his opinion that the carpal tunnel was a result of the work he did over a period of years, or it could have been his diabetes that he has had for years. It was his opinion that either the work or his diabetes was the source of his carpal tunnel syndrome. It was his opinion that due to the severity of the condition in 2012, he had developed the carpal tunnel syndrome prior to 2010. The employee did not say when he started having symptoms. Although there were no records prior to 2010 regarding his carpal tunnel syndrome or problems with his hands, it was Dr. Berkin's opinion that the employee had it for a long period of time.

I find that there was not competent medical evidence to satisfy the employee's burden of proof of a direct medical causal connection between any alleged repetitive occupational exposure and the bilateral carpal tunnel syndrome condition. I find that the employee has failed to meet his burden of proof that the bilateral carpal tunnel syndrome condition is medically causally related to the alleged repetitive occupational disease.

Based on a thorough review of all of the evidence, I find that the employee failed to satisfy his burden of proof on the issues of occupational disease and medical causation with regard to his bilateral carpal tunnel syndrome. I find that the employee did not meet his burden of proof that the alleged repetitive occupational exposure was the prevailing factor in causing both his medical condition of bilateral carpal tunnel syndrome and disability to his bilateral hands and wrists. I find that the alleged occupational exposure was not the prevailing factor in causing the bilateral carpal tunnel syndrome and therefore the bilateral carpal tunnel syndrome did not arise out of and in the course of the employment. I find that the employee's alleged repetitive occupational exposure was not the prevailing factor in causing both the resulting medical condition and disability to the bilateral hands and wrists. I further find that the employee did not sustain a compensable work-related occupational disease or injury to his bilateral hands and wrists that arose out of and in the course of his employment, and the employee's bilateral carpal tunnel syndrome condition, injury, disability, and need for medical treatment is not medically causally related to the alleged repetitive occupational disease.

Based on my ruling on the issues of occupational disease and medical causation, the employee's claim against the Second Injury Fund is denied. Based on the denial of the Claim, the issues of notice, statute of limitations, and the liability of the Second Injury Fund are moot and shall not be ruled upon.
Rulings of Law in Injury Number 09-108576:


Based on the evidence, I make the following rulings:

Primary Injury:

I find that the injury to the employee’s left calf due to the September 23, 2009 work accident resulted in a 10% permanent partial disability of the left lower extremity at the 160 week level for a total of 16 weeks of compensation.

Pre-Existing Heart Condition:

I find that the employee’s pre-existing heart condition of coronary artery disease with a double bypass was of such seriousness as to constitute a hindrance or obstacle to employment or obtaining re-employment. I find that his pre-existing heart condition resulted in a 12.5% permanent partial disability of the body as whole at the 400 week level for 50 weeks of compensation.

Pre-Existing Spine Condition:

I find that the employee’s pre-existing spine condition of degenerative disc disease involving the neck and low back was such seriousness as to constitute a hindrance or obstacle to employment or obtaining re-employment. I find that his pre-existing spine condition resulted in a 10% permanent partial disability of the body as a whole at the 400 week level for a total of 40 weeks of compensation.

Conclusion:

I find that the employee’s pre-existing spine and heart conditions and the primary injury to the left leg combined synergistically to create a total disability of 116.6 weeks. This total disability is based on a loading factor of 10%. After deducting the percent of disability that existed prior to the primary injury (90 weeks) and the disability resulting from the primary injury alone (16 weeks) from the total disability attributable to all injuries or conditions existing at the time of the last injury (116.6 weeks), the remaining balance to be paid by the Second Injury Fund is equal to 10.6 weeks. The Second Injury Fund is therefore ordered to pay to the employee the sum of $422.97 per week for 10.6 weeks for a total award of permanent partial disability of $4,483.48.
Rulings of Law in Injury Number 10-055756:

Issue 1. Medical Causation

The parties stipulated that on June 28, 2010, the employee sustained an accident arising out of and in the course of employment. The Second Injury Fund is disputing that the employee’s injury was medically causally related to the accident.

In November of 2007 the cervical MRI showed multi-level stenosis mild at C4-5; moderate/marked at C5-6; and moderate at C6-7; anterior cord flattening and mild cord edema at C5-6 and C6-7; and multilevel foraminal stenosis most marked at C6-7. In December of 2007, Dr. Stahly stated that the MRI documented rather significant cervical spine stenosis at C5-6 and C6-7 but no signs of cervical myelopathy. The employee did not have any clinical signs that the mild cord compression was causing a problem. Dr. Stahly thought at some point the employee would need cervical decompression surgery. At that time the stenosis was not symptomatic.

In May of 2010 the chronic medical condition noted by Dr. Dodson was persistent left leg discomfort and burning. There was no mention of any cervical problems.

The employee testified that on June 28, 2010, he injured his neck when he threw a cable over his head. His glove got caught on a burr which jerked him. He felt a pop and his right hand went totally numb. The physical problems that he related to the June 28, 2010 accident were pain in the neck and upper back around his shoulders and bilateral hand numbness.

In July of 2010, Dr. Straubinger diagnosed a cervical strain superimposed upon aggravation of underlying degeneration with radicular features to the right upper extremity predominately at C5-6. The August of 2010 cervical MRI was compared to the 2007 cervical MRI and it showed further loss of disc height at C5-6 and C6-7; an increase in the left paracentral disc protrusion at C5-6 with further cord progression; a small central disc protrusion without cord compression at C4-5; a moderate left paracentral disc protrusion compressing the left side of the cord without edema at C5-6; a broad based disc protrusion with chronic cord compression at C6-7; and multilevel spondylosis most severe at C5-6. Dr. Straubinger diagnosed a cervical strain with radiculopathy; and underlying long standing cervical degenerative disc and facet disease which were not work related. Dr. Straubinger thought the employee may need surgical decompression but it was his opinion that it was from the underlying degenerative disease and not the June 28, 2010 injury. In October of 2010, Dr. Straubinger thought the acute cervical strain had resolved and the continued pain and compromise of function was primarily due to his underlying degenerative disease.

It was Dr. Straubinger’s opinion that as a result of the work injury the employee aggravated the underlying disease in the cervical spine which produced subjective symptoms in and objective anatomical pathological changes in the cervical spine which may not be visible but exists. Radiographically there were changes but he could not directly relate those to the 2010 work accident. It was his opinion that on October 20, 2010, the employee was at maximum medical improvement with regard to the June 28, 2010 work-related accident. It was Dr.
Straubinger's opinion that the treatment recommended by Dr. Yingling was due to his underlying condition and not predominately due to the June 28, 2010 injury.

In October of 2010 Dr. Stahly stated that although the employee was supposed to see him every 6-12 months after December of 2007, the employee did not return until October of 2010. It was Dr. Stahly's opinion that the June of 28, 2010 mechanism of injury could have aggravated the protrusion at C5-6 which had increased in size but clinically it did not really exacerbate the neck condition. It was his opinion that the June of 2010 accident was a sprain/strain injury and there was not any evidence clinically or radiographically that objectively confirmed that there an acute traumatic injury and change in pathology to the cervical spine as a result of the work accident. Dr. Stahly did not recommend neck surgery due to lack of clinical progression.

In 2011, Dr. Yingling stated that the severe pain in the neck and upper back may be due to a severe strain or sprain of the neck and back but could be due to his disc protrusions with stenosis at C5-6 and C6-7; and he needed surgery at C5-6 and C6-7. It was his opinion that the June 28, 2010 work accident was the prevailing factor in causing and aggravating the subjective symptoms and objective conditions and diagnoses; and was the prevailing factor in causing most or all of his symptomology. It was his opinion that the June of 2010 work accident did not cause the compression or stenosis condition in the neck but may have exacerbated the compression condition. The work accident most likely caused some sprain of the adjacent ligaments around the joints that increased his neck and upper back pain which would be relieved by the surgery. The cervical surgery would address the stenosis; the compression of the spinal cord; and the ligament strain and sprains.

It was Dr. Yingling's opinion that the June 28, 2010 work accident was the prevailing factor in causing and aggravating the subjective symptoms and objective conditions and diagnoses. Aggravated meant that it changed the pathology or structure of his body and exacerbated subjective symptoms. It was his opinion that the objective conditions had probably worsened due to the increased protrusion of the cervical discs. It was Dr. Yingling's opinion that the neck and upper back pain and the numbness and tingling in his arms and hands were a result of the June of 2010 accident. It was his opinion that all the problems with the neck and arms were worsening of conditions caused by his degenerative disease and resulted from his work accident. It was his opinion that the June 28, 2010 accident was the prevailing factor in causing the need for treatment.

In 2012, Dr. Coyle's impression was cervical spondylosis and stenosis at C5-6 and C6-7 with upper extremity radiculopathy. It was Dr. Coyle's opinion that the predominate symptoms are referable to the pathology at C5-6 and C6-7 and that it appears that the work incident of June 2010 was an aggravating factor in causing the cervical stenosis to become more symptomatic. He was in agreement with Dr. Yingling that surgery was reasonable and appropriate. It was Dr. Coyle's subsequent opinion that the work incident of June 28, 2010, was not the prevailing factor in causing his current symptoms and that the prevailing factor was the longstanding cervical spondylitic stenosis. He stated that even without the accident the employee would need surgery; and therefore it was not necessary to cure and relieve the effects of the June 28, 2010 injury.
In 2012 Dr. Yingling ordered a repeat cervical MRI which showed a disc/osteophyte protrusion posteriorly at C5-6 that abutted the spinal cord causing moderate stenosis; and at C6-7 there was degenerative disc disease with broad bulging causing moderate stenosis to a lesser degree. Dr. Yingling performed an anterior C5-6 and C6-7 discectomy with fusion in September of 2012. The employee testified that the neck surgery really helped his condition and symptoms and he no longer has upper and middle back pain. Dr. Yingling’s records at the end of November of 2012 show that the employee reported no neck pain and the numbness in the fingers of the right hand were almost gone. Dr. Yingling stated that the employee was doing well after the fusion.

As a result of the June 28, 2010 accident, Dr. Berkin diagnosed a cervical strain with right-sided radiculopathy; a herniated disc at C5-6 and C6-7; and was status post anterior cervical discectomy and fusion. It was Dr. Berkin’s opinion that the June of 2010 accident was the prevailing factor in causing the cervical strain and right-sided radiculopathy associated with herniated discs at C5-6 and C6-7. Dr. Berkin stated that although the employee was diagnosed with cervical disc pathology in 2007, the records indicate his symptoms improved and there were no records documenting that he required ongoing treatment to his neck or radicular symptoms. He worked at a very labor intensive job for three years until his 2010 injury, and all indications was that he was having no symptoms in his neck until the June of 2010 injury.

Based on a review of all the evidence, I find that the opinions of Dr. Berkin and Dr. Yingling are very persuasive and are more persuasive than the opinions of Dr. Straubinger, Dr. Stahly, and Dr. Coyle on the issue of medical causation and whether the June 28, 2010 accident was the prevailing factor in causing the neck injury and need for treatment including the surgery.

I find that the employee’s June 28, 2010 work accident was the prevailing factor in causing the resulting neck injury, medical condition, disability and the need for treatment including surgery. I find that the medical care and treatment including the cervical surgery was reasonably required to cure and relieve the employee from the effects of the June 28, 2010 accident and injury. I further find that the medical care and treatment including the cervical surgery was medically causally related to the June 28, 2010 work accident and injury. I further find that the injury to the employee’s neck and the resulting medical condition and disability are medically causally related to the June 28, 2010 work accident.

Issue 2. Liability of the Second Injury Fund for permanent partial disability or permanent total disability.

The employee was released by Dr. Straubinger on October 20, 2010 and by Dr. Yingling on November 27, 2012. The parties agreed that the employee reached maximum medical improvement on one of those two dates and that I would make a ruling on when the employee reached maximum medical improvement. Based on the evidence and my ruling on medical causation, I find that the employee reached maximum medical improvement on November 27, 2012.
Employee: Eugene A. Peacock  
Injury No. 09-108576; 10-055756; 10-114063

Permanent Total Disability:

The employee has alleged that he is permanently and totally disabled. I find that the employee did not meet his burden of proof that he is permanently and totally disabled.


The employee's claim for permanent total disability is affected by the following:

1. *The employee has extensive training, education and experience that he received in the military.*

   The employee was responsible for security of nuclear weapons and had instructor experience in nuclear weapon security. He received training and education in electronics repair and in communications involving broadcast stations with transmitters and two way radio communications.

2. *The employee has extensive vocational experience in technical and skilled job classifications and managerial experience.*

   The employee worked for various companies in electronic repairs; installation, service, maintenance and repair of radio equipment including transmitters; installing and repairing radio towers; and radio engineering. He worked for 5 years as a police dispatcher. He was a manager of a car liquidation company and started and operated his own car liquidation company. At North American Tie & Timber he was a manager of 6 people; assigned jobs; performed inventory; prepared reports; and scheduled employees. He owned a two way radio repair business. He has been a successful General Manager of a radio station and has worked at several radio stations in various capacities including being a DJ, a producer, and engineer. He wrote commercials and prepared the news.

3. *The employee has extensive skills and knowledge that he uses for his hobbies.*

   The employee has extensive computer experience. He uses the internet to research Bible history and to look at concordances. He has extensive knowledge of and skills in using tools for electronic repairs. He converts vinyl records to digital form. He restores old radios, juke boxes, and other electronic devices. He was in charge of the sound system at his church and set up and ran a mock radio station with church youth.

4. *After having the cervical fusion, the employee's symptoms substantially improved.*

   The employee testified that prior to his neck surgery in September of 2012 he was having a lot of neck and upper back pain. Due to that he had trouble sitting for a long time and got relief.
from lying down. At the time of his deposition in November of 2011, he was taking prescription medication including Hydrocodone for his upper back pain as well as over-the-counter Tylenol. He was taking up to 12 pain pills a day. He was lying down 3-4 times a day for 30-45 minutes to relieve the pain; and had difficulty sleeping. Due to his physical condition at that time he thought it would be tough to work at a radio station for 40 hours a week due to his inability to sit, but if his condition was repaired he thought he would be able to perform a full-time job.

The employee testified that the September of 2012 neck fusion really helped his condition and symptoms. He no longer had back or neck pain but continued to have numbness in his hands. Dr. Yingling’s records corroborate that the surgery relieved the pain. At the end of November of 2012, the employee had no neck pain and the employee was doing well. Dr. Yingling released him on an as-needed basis. The employee returned to Dr. Yingling in June of 2013 for right hand symptoms and surgery was performed in November of 2013. Dr. Yingling again released the employee in February of 2014 with no mention of cervical or upper back complaints. The employee was to resume normal activities. The employee told Mr. Lalk in January of 2015 that the cervical surgery resolved his neck and upper back pain. At the hearing the employee testified that he was taking several medications but none for neck or upper back pain.

5. **The employee continued to work until 2013 and quit due to a disagreement and not his physical condition.**

The employee testified that after June of 2010 he continued to work at the Marble Hill radio station until he was fired by the General Manager due to a dispute with him. The employee thought he would still be able to work at a radio station.

6. **The employee’s self-imposed limitation to only work for gospel radio stations.**

The employee testified that he could work at a radio station but gospel radio stations were few and far between. When asked about working at a radio station with a different format he stated that gospel was the only music as far as he was concerned.

7. **The employee continued to perform electronic repair until December of 2015 or January of 2016.**

When the employee saw Mr. Lalk in January of 2015, he reported he was still performing his hobbies. The employee testified that continued to perform electronic repairs until 8 or 9 months before the hearing.

**Permanent Disability Opinions:**

Dr. Straubinger stated that the employee was probably unfit for physical labor and specifically those job tasks that he had at North American Tie & Timber. Dr. Stahly concurred and stated that the employee should be in an occupation that did not put excessive demands on his body.
Employee: Eugene A. Peacock

Dr. Straubinger stated that his restrictions from September of 2010 were limited to sedentary tasks. He thought the employee was fit for sedentary tasks including working at a desk, bench, or a table with positional changes; he could drive a private vehicle; work at ground level only; no walking or standing more than 15 minutes per hour per shift; no walking on uneven ground; and no lifting, pushing, pulling over 15 pounds. Those restrictions would be ongoing until he had treatment.

When Dr. Yingling released the employee from treatment after the neck surgery, the employee reported that he did not have any neck pain. It was Dr. Yingling's opinion that the employee was doing well after the two level anterior cervical fusion. Dr. Yingling did not put any work restrictions on the employee and stated he was to resume normal activities.

It was Dr. Berkin's opinion that a result of the June 28, 2010 accident that the employee sustained a 40% permanent partial disability of the body as a whole at the level of the cervical spine. With regard to pre-existing conditions, it was his opinion that the employee had a 20% permanent partial disability of the lower left extremity at the level of the knee; a 20% permanent partial disability of the body as a whole for the degenerative disc disease in the neck and low back; a 20% permanent partial disability of the body as a whole due to the coronary artery disease, and a 30% permanent partial disability of each upper extremity at the level of the wrist due to the carpal tunnel syndrome. It was his opinion that these pre-existing conditions and disabilities were a hindrance and obstacle to his employment or re-employment at the time of the September 2009 and June 2010 injuries. It was his opinion that the combination of his disabilities was significantly greater than their simple sum and a loading factor should be applied.

It was Dr. Berkin's opinion that the employee should avoid rapid and extreme movements of the neck and avoid maintaining his neck in a fixed position for extended periods of time. He recommended that lifting should be limited to 40-45 pounds on an occasional basis, and 25 pounds on a frequent basis. He should avoid lifting with his arm extended from his body and should avoid excessive lifting or working with his arms above shoulder level. With respect to the left leg, he should avoid excessive squatting, kneeling, stooping, turning, twisting, lifting and climbing; and should avoid standing for long periods of time or walking for long distances. He should be cautious when climbing ladders and stairs, working heights above ground level or walking on uneven surfaces. With regard to the bilateral carpal tunnel syndrome he should avoid forceful gripping, squeezing, pinching, pulling, twisting or reaching with his hands for extended periods of time. He should avoid torque-like or high impact stresses to his hands and should limit his exposure to operating power tools or vibratory equipment. The employee should remain as active as possible but pace himself and take frequent breaks to avoid exacerbation of the symptoms or further injury to his neck and left leg.

Dr. Berkin deferred to a vocational expert in regard to the employee's employability in the open labor market.

Mr. Lalk stated that both Dr. Straubinger and Dr. Stahly agreed that the employee was unfit for physical labor. Mr. Lalk noted that after surgery Dr. Yingling stated that the employee did not have any restrictions with regard to his cervical spine and right hand. The employee
described symptoms and limitations consistent with Dr. Berkin’s restrictions and described the need to rest repeatedly during the day from 45 minutes to 1 hour at a time.

It was Mr. Lalk’s opinion that based upon Dr. Berkin’s restrictions, his review of the medical records, and the symptoms and limitations reported by the employee, the employee was not able to secure and maintain employment in the open labor market and is not able to compete for any position. It was his opinion that the employee is permanently and totally disabled if his symptoms continue permanently. An employer is not going to be able to tolerate and accommodate those periods of rest; and the employee would not be able to effectively perform his duties and is unemployable in the open labor market based upon the complaints affecting his multiple body parts. Mr. Lalk did not think the right and left hand symptoms were contributing to his inability to work and the hearing problems contributed in some manner. The two areas that are primarily affecting his ability to work were his neck and left leg symptoms. He would defer to a physician in regard to causation whether it was a combination or the last injury alone or other factors.

Mr. Lalk testified that if he could find a position at a radio station, he thought the employee could perform those duties since being a DJ is sedentary in nature. Mr. Lalk stated that it was the repeated need to recline and rest that would really take him out of the workplace. With Dr. Berkin’s restrictions and if the employee did not need to take frequent breaks, it was Mr. Lalk’s opinion that the employee could work in some type of sedentary or near sedentary position.

Ms. Abram stated that Dr. Cooper and Dr. Yingling did not place permanent restrictions, and based on that the employee could go back to work to what he was doing or any other job. Dr. Berkin’s restrictions fall into part of the medium range of physical demand but not the entire category with the lifting restrictions. Not being able to stand or walk for long periods of time eliminates the majority of medium range positions. Dr. Straubinger’s restrictions limits the employee to the sedentary range of physical demand including occasional standing and walking.

Ms. Abram stated that the employee is well versed in using a computer including a home laptop; writing scripts for commercials; and setting up his time at radio stations. His typing skills are above average. He has very skilled hobbies including restoring music and old electrical devices. He reads as a hobby, is in charge of his church’s sound system, and set up and runs a mock radio station with church youth. With regard to employability the employee has very strong assets. Even with his problems and the restrictions by Dr. Berkin and Dr. Straubinger, the employee has had a variety of jobs and skills and is clearly highly employable in the open labor market in a wide range of jobs and industries.

With regard to placeability in the open labor market there were mixed assets. The employee had a previous work history in sedentary and light range of work and had an extensive knowledge of electronics which would be highly marketable. Whether or not he would be able to obtain and maintain a new job is not as clear. The employee is of advanced age and has developed a very sedentary and disabled lifestyle including lying down 3 to 4 times a day at least 30 to 45 minutes at a time. His personal requirement to lie down multiple times a day is an
accommodation that is difficult to provide by most employers. Ms. Abram could not state that the requirement to lie down would not be a barrier if job placement were to occur. The employee had been out of work for close to three years and his disabled lifestyle would be very difficult to break. Based on the doctor’s opinions about his current level of functioning, the employee could locate a new job with a very diligent search, if he thought he could work. If the employee is unable to change his opinion he will never be able to persuade a new employer to hire him. If the employee cannot be active during the day and believes he cannot return to work, he is never going to return to work.

At the time of the work accidents the employee was 56 and 57 years old. The employee continued to work at a radio station after his last work accident in 2010. He stopped working in 2013 when he was fired due to a personality conflict with a new manager and not because he physically could not do the job. Ms. Abram stated that in 2010 and 2013 his age was not as significant of a factor as it is now.

Dr. Berkin had the most extensive list of restrictions which fell into light range of physical demand. Dr. Straubinger’s restrictions were sedentary. Neither indicated that the employee should recline during the day as needed. No doctor has stated he cannot be active throughout the day. It was Ms. Abram’s opinion that since no doctor has stated that he needs to lie down or be less than sedentary, the employee could be employable and placeable. It was Ms. Abram’s opinion that the employee is employable in a variety of job types and levels of responsibility.

Based on a review of the evidence, I find that the employee’s physical complaints, limitations, and extent of disability, including the alleged need to lie down during the day, are not as significant or as severe as the employee indicated during his testimony, or what he told Dr. Berkin and Mr. Lalk. I find that his testimony is not persuasive.

The restrictions of Dr. Stahly and Dr. Straubinger are substantially affected by the fact that those were given prior to the 2012 cervical surgery that substantially improved the employee’s symptoms and conditions.

The opinions of Dr. Berkin and Mr. Lalk as to permanent disability are substantially affected by my findings that the employee’s complaints and limitations are not as significant as he told them.

Based on a review of the evidence, I find that on the issue of employability the opinions of Dr. Yingling and Ms. Abram are persuasive and more persuasive than the opinions of Dr. Berkin, Mr. Lalk, Dr. Stahly and Dr. Straubinger.

Based on the evidence, I find that the employee has failed to satisfy his burden of proof on his claimed permanent total disability. The evidence does not support a finding that the employee is unemployable in the open labor market. I find that the employee is not permanently and totally disabled. The employee’s request for an award of permanent total disability against the Second Injury Fund is denied.
Employee: Eugene A. Peacock

Injury No. 09-108576; 10-055756; 10-114063

**Permanent Partial Disability:**

Based on the evidence, I make the following rulings:

**Primary Injury:**

I find that the primary injury to the employee’s neck resulted in a 20% permanent partial disability of the body as a whole referable to his cervical spine for a total of 80 weeks of compensation.

**Pre-Existing Left Leg Condition:**

I find that the employee’s left calf injury was of such seriousness as to constitute a hindrance or obstacle to employment or obtaining re-employment. I find that the pre-existing left calf injury resulted in a 10% permanent partial disability of the left lower extremity at the 160 week level for a total of 16 weeks of compensation.

**Pre-Existing Heart Condition:**

I find that the employee’s pre-existing heart condition of coronary artery disease with a double bypass was of such seriousness as to constitute a hindrance or obstacle to employment or obtaining re-employment. I find that his pre-existing heart condition resulted in a 12.5% permanent partial disability of the body as whole at the 400 week level for 50 weeks of compensation.

**Pre-Existing Spine Condition:**

I find that the employee’s pre-existing spine condition of degenerative disc disease involving the neck and low back was such seriousness as to constitute a hindrance or obstacle to employment or obtaining re-employment. I find that his pre-existing spine condition resulted in a 10% permanent partial disability of the body as whole at the 400 week level for a total of 40 weeks of compensation.

**Conclusion:**

I find that the employee’s pre-existing left leg, spine and heart conditions and the primary injury to the cervical spine combined synergistically to create a total disability of 209.25 weeks. This total disability is based on a loading factor of 12.5%. After deducting the percent of disability that existed prior to the primary injury (106 weeks) and the disability resulting from the primary injury alone (80 weeks) from the total disability attributable to all injuries or conditions existing at the time of the last injury (209.25 weeks), the remaining balance to be paid by the Second Injury Fund is equal to 23.25 weeks. The Second Injury Fund is therefore ordered to pay to the employee the sum of $422.97 per week for 23.25 weeks for a total award of permanent partial disability of $9,834.05.
Employee: Eugene A. Peacock  Injury No. 09-108576; 10-055756; 10-114063

ATTORNEY'S FEE:

Chris Weiss, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney’s fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

I certify that on 11-10-16, I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division’s case file.

Made by: Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers’ Compensation