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

Injury No.: 11-063860

Employee: Clifford Potts

Employer: State of Missouri, Fulton State Hospital

Insurer: CARO

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

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

Preliminaries
The parties asked the administrative law judge to determine the following issues: (1) whether the work accident of August 10, 2011, is the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence; (2) employer’s liability, if any, for permanent partial disability benefits or permanent total disability benefits; (3) the liability of the Second Injury Fund, if any, for permanent partial disability benefits or permanent total disability benefits; and (4) employer’s liability, if any, for future medical benefits pursuant to § 287.140 RSMo.

The administrative law judge determined as follows: (1) the accident was the prevailing factor causing employee to suffer the resulting medical conditions of chronic lumbar sprain/strain, symptomatic lumbar disc protrusions at L4-5 and L5-S1, bilateral lower extremity radiculitis, chronic cervical sprain/strain, and aggravation of cervical degenerative disc disease; (2) employer is liable for 100 weeks of permanent partial disability benefits for permanent partial disability resulting from the work injury to the extent of 5% of the body as a whole referable to the neck and 20% of the body as a whole referable to the low back; (3) employee is not permanently and totally disabled, and therefore, the Second Injury Fund is not liable for permanent total disability benefits, and employee’s claim for permanent partial disability benefits from the Second Injury Fund fails because it is not supported by sufficient evidence; and (4) there is a reasonable probability that employee will continue to need medications and epidural steroid injections indefinitely, and therefore, an order of future medical benefits is required.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred in concluding that employee did not meet his burden on the issue of permanent total disability.
For the reasons stated below, we modify the award and decision of the administrative law judge referable to the issue of Second Injury Fund liability.

Discussion

Second Injury Fund Liability

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

At the time of the work injury on August 10, 2011, employee was suffering from a number of preexisting permanent partially disabling conditions, including a learning disability; a severe frostbite injury to both feet that prevented employee from working for approximately one year and continues to limit his ability to work outdoors; type 2 diabetes with neuropathy affecting the lower extremities, which causes employee to experience pain and occasional instability while walking on hard surfaces; right knee pain referable to chondromalacia that requires employee to wear a brace and inhibits his ability to engage in deep knee bending, squatting, and climbing; degenerative disc disease affecting his cervical spine and resulting in some neck and left arm pain requiring a course of conservative treatment including injections; and prior low back complaints prompting employee to seek medical treatment, including at least one discrete injury event in 2005.

Employee’s learning disability and functional illiteracy are of particular concern to us, given the persuasive expert opinion evidence (further discussed below) that these conditions considerably narrow the prospective jobs employee might be capable of performing. Accordingly, we supplement the administrative law judge’s findings on this particular topic with our own findings, as follows.

Employee’s academic career in the public school setting ended in the seventh grade when Fulton Junior High School expelled him because of severe behavior and learning problems. Thereafter, employee was admitted to Fulton State Hospital as an outpatient in 1971 and diagnosed with a learning disturbance. In 1972, he was admitted as an inpatient because of ongoing severe difficulties and behavior problems at school and at home. Employee’s treatment as an inpatient at Fulton State Hospital included individual therapy sessions, prescription medication, and special education. Employee briefly escaped from the hospital, whereupon he was made a ward of the Juvenile Court and committed to (what was then known as) the Division of Mental Diseases. Academically, employee was functioning at only a fourth-grade level when released in 1974. Employee never returned to public school, never obtained a GED, and remains functionally illiterate.

In light of these circumstances, we are convinced that this is not a case such as *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 866 (Mo. App. 1997), where the court noted the general rule in Missouri that "[w]here illiteracy is not due to inability to learn, but to lack
of education, it is not a permanent partial disability for Second Injury Fund purposes."
Instead, we are convinced that employee’s illiteracy and limited academic achievement are, indeed, referable to a learning disability, that this condition is permanent, and that this condition thus qualifies as a preexisting permanent partial disability for purposes of § 287.220.

We turn now to the question whether employee’s preexisting partially disabling conditions were serious enough to constitute hindrances or obstacles to employment. Our analysis is guided by the following test, as articulated by the Missouri courts:

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

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

Although we acknowledge the Second Injury Fund’s position that employee’s preexisting conditions cannot be deemed hindrances or obstacles to employment or reemployment because employee was able to successfully perform his job for employer for well over 30 years, it appears to us that this argument improperly asks us to focus on the extent to which employee’s conditions caused difficulty in the past. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995). Applying the relevant test as identified by the *Knisley* court above, we find that each of employee’s preexisting disabling conditions were hindrances or obstacles to employment or reemployment, because we are convinced that each had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of these preexisting conditions.

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


Section 287.220 requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Id.* After careful consideration, we are not persuaded to disturb the administrative law judge’s findings that employee suffered permanent partial disability resulting from the work injury to the extent of 5% of
the body as a whole referable to the neck, and 20% of the body as a whole referable to the low back, and that the effects of the work injury, considered alone, do not render employee permanently and totally disabled. We turn now to the question whether employee is permanently and totally disabled as a result of the effects of the work injury in combination with his preexisting disabling conditions.

We note that the administrative law judge found “that the opinion of James England is correct, i.e., that [employee] is able to perform less demanding physical work such as retail sales, security work, cashier positions, light assembly, and packing jobs. Thus, I find that [employee] is able to compete in the open labor market, and that [employee] is not permanently and totally disabled.” Award, page 14. While we generally agree with the administrative law judge that Mr. England provided credible and persuasive testimony in this matter, we disagree with the administrative law judge’s analysis, for the following reasons.

First, we note that the above-quoted statement suggests the administrative law judge believed that the mere fact employee could perform certain jobs necessarily compelled a finding that employee could compete for such jobs in the open labor market. But, as the Missouri courts have consistently instructed, our inquiry does not end with identifying the particular jobs, if any, that employee might be able to perform given his physician-imposed restrictions and physical limitations; instead, we must consider whether the employee is reasonably likely to be hired for such positions:

The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.


Second, we note that Mr. England ultimately did not opine that employee would be capable of performing the full gamut of jobs listed by the administrative law judge. Instead, at his deposition, Mr. England acknowledged that employee’s poor academic history and illiteracy will significantly limit employee’s ability to perform such jobs:

[T]hings like retail sales, security work, cashiering, light assembly packing, office cleaning, I mean those would be light types of jobs, but I think his learning disability and his inability to read would negate his ability to do some of these things because I – you know, I think assembly packing, office cleaning would still be options, but on the other hand, if you look at retail sales, security work, cashiering, those would be negated not by physical restriction but by his – his learning problems and his inability to read effectively.

Transcript, page 725.
Based on the foregoing, it appears to us that Mr. England ultimately believed that, assuming the restrictions from Dr. Raymond Cohen and in light of employee’s preexisting disabling conditions, employee would only be capable of performing, at best, assembly packing or office cleaning jobs. We note that the administrative law judge, in resolving the issue of medical causation, expressly rejected the opinion from Dr. Russell Cantrell that employee suffered no permanent disability and no physical restrictions as a result of the work injury, and instead credited the opinions of Dr. Cohen. Given that there is no argument currently pending before this Commission that would challenge the administrative law judge’s findings with respect to medical causation, we adopt the administrative law judge’s findings as our own, including the implicit finding that the physical restrictions identified by Dr. Cohen are more persuasive and are the more appropriate set of restrictions to consider in this case.

Consistent with the foregoing, we will now consider, from the perspective of a reasonable employer, employee’s merits as a potential candidate for assembly packing or office cleaning jobs. At the time employee reached maximum medical improvement on April 2, 2012, he was 54 years of age, functionally illiterate as a result of his preexisting learning disability, and had a work history confined to heavy-duty and labor-intensive jobs that he can no longer perform. Owing to the effects of the work injury and his preexisting disabling conditions, employee suffers from the following: constant low back pain that radiates into his hips and lower extremities; an inability to work overhead without experiencing debilitating pain in his neck; intermittent numbness, tingling, and pain in both feet that causes occasional instability while walking on hard surfaces; chronic right knee pain that requires employee to wear a brace and inhibits his ability to engage in deep knee bends, squatting, or climbing; and, as a consequence of his injuries and disabling conditions affecting both the cervical and lumbar spine, severe limitations in his ability to tolerate prolonged standing, sitting, and walking. Suffice to say that, in light of the foregoing, we find it very difficult to envision any reasonable employer hiring employee for an assembly packing or office cleaning job.

The administrative law judge also suggested that the medical records undermine employee’s testimony that he could no longer tolerate working for employer, because the epidural steroid injections provided by Dr. Mitesh Patel appear to have been quite successful in helping employee manage his low back pain. But given employee’s unrebutted and credible testimony as to his duties following the work injury, it appears employee was also benefitting from an informal arrangement with his supervisor whereby it was generally understood that employee would be assigned less physically demanding tasks. We so find.

The commendable willingness on the part of this employer to informally accommodate a valued employee of over 30 years does not, in our view, compel a finding that employee can compete for work in the open labor market, as it is difficult to imagine a prospective employer offering employee the same accommodations as a new hire. While we acknowledge that employee’s continued work with employer after the August 2011 accident is a relevant factor in this case, we are ultimately convinced by employee’s testimony (and so find) that he tolerated modified duty for employer until May 1, 2013, solely owing to pressing financial necessity, and that he could not have worked any
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Employee: Clifford Potts

longer for employer due to his physical limitations and symptoms referable to the work injury and his preexisting disabling conditions.

In sum, after careful consideration, we are persuaded that employee is not capable of competing for work in the open labor market, and we so find. Further, we find that employee’s inability to compete for work in the open labor market is a result of the primary injury in combination with his preexisting disability. We conclude, therefore, that the Second Injury Fund is liable for permanent total disability benefits.

Attorney fee lien

Taking administrative notice of the records of the Division of Workers’ Compensation, we note that employee’s attorney of record at the time of the January 11, 2017, hearing before the administrative law judge in this case was Douglas L. Van Camp. In his award, the administrative law judge granted a lien in the amount of 25%, plus expenses, of all payments under the award in favor of attorney Christine Kiefer, who was then associated with the Van Camp Law Firm, LLC.

On April 24, 2017, the Commission received a “Motion to Withdraw” from Van Camp Law Firm, LLC, and Douglas L. Van Camp (hereinafter “Motion”). The Motion indicated that employee had requested his file be transferred to the Law Office of Christine Kiefer, and that Douglas L. Van Camp asserted a lien for expenses and attorney’s fees in the total amount of $16,246.89.

On May 1, 2017, Ms. Kiefer entered her appearance on behalf of employee. On May 24, 2017, the Commission granted the Motion.

On January 23, 2018, Ms. Kiefer filed correspondence with the Commission indicating that she agrees that the lien filed by Van Camp Law Firm, LLC, and Douglas L. Van Camp is valid, and that she has an agreement to satisfy such lien in the amount of $16,246.89 out of the proceeds of her fees and expenses as awarded by the administrative law judge.

Conclusion

We modify the award of the administrative law judge as to the issue Second Injury Fund liability.

Employee is entitled to, and the Second Injury Fund is hereby ordered to pay, weekly permanent total disability benefits beginning April 2, 2012, at the differential rate of $18.91 for 100 weeks, and thereafter at the stipulated weekly rate for permanent total disability benefits of $444.10. The weekly payments shall continue for employee’s lifetime, or until modified by law.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.
We approve and affirm as fair and reasonable the administrative law judge’s allowance of an attorney’s fee in the amount of 25% of the compensation awarded in favor of Christine Kiefer, Attorney at Law. We additionally memorialize the agreement on the part of Ms. Kiefer that Van Camp Law Firm, LLC, and Douglas L. Van Camp, are to receive the amount of $16,246.89 in full and final satisfaction of their lien asserted in this matter.

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

Given at Jefferson City, State of Missouri, this 26th day of January 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

________________________________________
John J. Larsen, Jr., Chairman

VACANT
Member

________________________________________
Curtis E. Chick, Jr., Member

Attest:

________________________________________
Secretary
AWARD

Employee: Clifford Potts

Injury No. 11-063860

Dependents: 

Employer: Fulton State Hospital

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Dates: January 11, 2017

Checked by: RJD/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.

2. Was the injury or occupational disease compensable under Chapter 287? Yes.

3. Was there an accident or incident of occupational disease under the Law? Yes.

4. Date of accident or onset of occupational disease: August 10, 2011.

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

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

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? Yes.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Employer is self-insured.

11. Describe work employee was doing and how accident occurred or occupational disease contracted. Employee was loading an air conditioner unit from the back of a truck with a coworker, when Employee fell backwards onto a concrete surface, striking his low back, head and neck on the concrete.

12. Did accident or occupational disease cause death? No. Date of death? N/A.

13. Part(s) of body injured by accident or occupational disease: Head, neck, low back.

14. Nature and extent of any permanent disability: 5% permanent partial disability of the body as a whole at the neck, 20% permanent partial disability of the body as a whole at the low back.

15. Compensation paid to-date for temporary disability: $63.44.

17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wages: $666.15.


**COMPENSATION PAYABLE**

Employer is ordered to pay to Claimant the sum of $42,519.00 for permanent partial disability benefits.

Employer is ordered to provide future medical benefits as may reasonably be required to cure and relieve Claimant from the effects of the August 10, 2011 work injuries.

The claim against the Second Injury Fund is denied in full.

Claimant’s attorney, Christine Kiefer, is allowed 25% of the benefits awarded herein, exclusive of future medical benefits, as and for necessary attorney’s fees, and the amount of such fees shall constitute a lien on those benefits.

Any past due compensation shall bear interest as provided by law.
FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Clifford Potts        Injury No. 11-063860
Dependents: 
Employer: Fulton State Hospital
Additional Party: Second Injury Fund
Insurer: Self-Insured
Hearing Dates: January 11, 2017

ISSUES DECIDED

The evidentiary hearing in this case was held on January 11, 2017, in Jefferson City. Employee, Clifford Potts, appeared personally and by counsel, Christine Kiefer. Employer, Fulton State Hospital, appeared by counsel, David McCain, Assistant Attorney General. The Second Injury Fund appeared by counsel, Kailey Jacomet, Assistant Attorney General. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on February 15, 2017.

The hearing was held to determine the following issues:

1. Whether the work accident of August 10, 2011 was the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
2. The liability, if any, of Employer for permanent partial disability benefits or permanent total disability benefits;
3. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits; and
4. The liability, if any, of Employer for future medical benefits pursuant to Section 287.140.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers’ Compensation has jurisdiction over this claim;
2. That venue for the evidentiary hearing is proper in Callaway County and adjoining counties, including Cole County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers’ Compensation Law at all relevant times;
5. That Claimant’s average weekly wage is $666.15 with compensation rates of $444.10 for temporary total disability benefits and permanent total disability benefits, and $425.19 for permanent partial disability benefits;
6. That Claimant sustained an accident arising out of and in the course of his employment with Fulton State Hospital on August 10, 2011;
7. That the notice requirement of Section 287.420, RSMo, does not serve as a bar to the claim for compensation;
8. That Employer paid medical benefits in the amount of $16,816.62;
9. That Employer paid temporary disability benefits of $63.44;
10. That Claimant’s condition reached maximum medical improvement on April 2, 2012; and
11. That Fulton State Hospital was an authorized self-insured for Missouri Workers’ Compensation purposes at all relevant times.

**EVIDENCE**

The evidence consisted of the testimony of Claimant, Clifford Potts; medical records; the narrative reports of Dr. Raymond Cohen; the deposition testimony of Dr. Raymond Cohen taken August 7, 2014; the Second Opinion report of Dr. Brett Taylor; the deposition testimony of Dr. Brett Taylor taken August 16, 2016; the narrative report of Dr. Russell Cantrell dated October 8, 2013; the narrative report and October 8, 2014 deposition testimony of Phillip Eldred, a certified vocational rehabilitation counselor; the narrative report and August 12, 2015 deposition testimony of James England, a rehabilitation counselor.

**DISCUSSION**

Clifford Potts ("Claimant") was born July 29, 1957. Claimant has very little formal education and no GED. At approximately age 14, Claimant was put in a residential youth center because of behavior problems. At age 17, he was released from the center and had no additional education. At that point, Claimant’s academic skills were those of a fourth-grader. Beginning at age 17, Claimant would work at a dude ranch in Arizona for part of the year and work in construction in Missouri for part of the year. At age 20, Claimant had severe frostbite on both feet while working in the cold. He remained off work for almost a year. Claimant testified that he could no longer work outdoors due to the condition of his feet. At age 21, he began working for Fulton State Hospital ("Employer"), where he worked for over 34 years, until his retirement on May 1, 2013.

Claimant was diagnosed with type 2 diabetes in 2003. His diabetes never has been insulin dependent. The diabetes, however, did cause additional numbness and tingling in Claimant’s lower extremities. That numbness and tingling caused Claimant to stumble at work and he had difficulty walking on concrete floors due to pain in his feet. He would experience
cramps in his arches which caused him to walk slower. When Claimant made it home following work, he would have to put his feet up to rest his legs.

Claimant began experiencing right knee pain in 2009. He was referred to orthopedic specialist Dr. John Havey. Employee was diagnosed with chondromalacia, recommended to lose weight, and provided a knee brace. Since being diagnosed with chondromalacia, Claimant has experienced trouble with squatting, stooping, and kneeling. His knee still bothers him and he has worn the knee brace the majority of the time since 2009.

Claimant was diagnosed with sleep apnea in approximately 2007. He has used a CPAP machine since his diagnosis. According to Claimant’s hearing testimony, the CPAP machine has treated his sleep apnea effectively. He denied any difficulties related to that condition.

Claimant had low back pain in 2005 when, according to his hearing testimony, he began feeling a stabbing pain in his low back. He was seen by Dr. Jeffery Parker at the Columbia Orthopedic Group in May 2008. Dr. Parker noted that he had seen Claimant on several prior occasions for low back pain. During the visit, Claimant also complained of neck pain worsened in the past few weeks, left arm pain, and numbness in his left hand. Dr. Parker’s assessment was mild diffuse degenerative disc disease of the cervical spine without myelopathy or radiculopathy and suggestions of neural compression in the neck. Dr. Parker ordered an MRI. The MRI revealed disc bulges or protrusions at three levels resulting in mild effacement of the cerebrospinal fluid space and left disc protrusion at C6-7 with hypertrophy resulting in mild narrowing. Dr. Parker provided a series of injections to treat Claimant’s symptoms. Claimant testified that the injections helped and he therefore was able to continue to work full duty without restrictions despite his neck and back complaints. His last visit with Dr. Parker before the August 2011 injury occurred in 2009. Claimant was not under any active treatment for his neck or back when his August 10, 2011 work injury occurred.

As stipulated, Claimant sustained an accident arising out of and in the course of his employment with Fulton State Hospital (“Employer”) on August 10, 2011. On that date, Claimant was loading an air conditioner unit from the back of a truck with a coworker, when Claimant fell backwards onto a concrete surface, striking his low back, head, and neck on the concrete. He continued to work that day.

The next morning Claimant went to Fulton Medical Clinic for treatment. He was seen by Nurse Practitioner Kristen Oesch and examined for generalized achiness and pain in his head, neck, and low back. He also was examined for bilateral foot and toe numbness. Following the examination, Nurse Oesch assessed low back pain, prescribed medication, ordered x-rays, and took him off work pending the x-ray results. Claimant’s x-rays showed degenerative disc disease but no fractures. He was kept off work for a few days before being released without restrictions. Claimant testified that he stayed off work and used his sick leave.

Claimant continued to experience back and neck pain. Because of that pain, he was referred to Dr. Eddie Runde for additional treatment. On August 23, 2011, Dr. Runde diagnosed neck pain, occipital headache, and low back pain. He placed Claimant on restricted duty pending the results of diagnostic studies.
X-rays of the cervical spine showed degenerative disc disease in the mid cervical spine without evidence of compression deformity. An MRI of the cervical spine revealed the following: multi-level degenerative disc disease; spondylosis; and disc osteophytes at several levels. Claimant continued to follow-up with Dr. Runde. On August 29, 2011, Claimant reported a noticeable improvement regarding his headache complaints. But despite improvement with headaches, his neck and low back pain persisted. Dr. Runde diagnosed degenerative disc disease, neck pain, low back pain, and headache/head contusion, improving. Physical therapy was prescribed.

Claimant continued to follow up with Dr. Runde while he attended physical therapy at Select Physical Therapy. He was discharged from physical therapy on October 18, 2011, and released to work full duty. It does appear that Claimant returned to work at that point in time. Claimant testified that he essentially worked modified duty, as his supervisor was accommodating him. In February 2012, Claimant was referred to Dr. Russell Cantrell for complaints of shooting pain in the left thigh and recent onset of bilateral foot numbness. Dr. Cantrell diagnosed cervical and lumbar strain and prescribed physical therapy.

Claimant’s second round of physical therapy was completed at The Work Center where he attended four sessions. Claimant saw Dr. Cantrell after completing physical therapy. On April 2, 2012, Dr. Cantrell placed Claimant at maximum medical improvement and released him from care at full duty without restrictions. According to Dr. Cantrell, Claimant “no longer had any residual pain complaints in his neck, but did report crepitus.” Claimant also reported continued low back pain with heavier physical activities.

After being released by Dr. Cantrell, Claimant was referred to Dr. Brett Taylor, an orthopedic spine specialist, for a second opinion. Dr. Taylor saw Claimant on June 26, 2012, and issued a report of the same date. Dr. Taylor diagnosed symptoms consistent with degenerative disc disease of the cervical and lumbar spine. He also diagnosed congenital stenosis due to trefoil cervical canal space and shortened lumbar pedicles. Dr. Taylor opined that work was not the cause for Claimant’s persistent symptoms. Instead, Dr. Taylor believed that Claimant’s work accident had caused only a transient exacerbation of preexisting degenerative disc disease. Dr. Taylor also noted the work exposure “did not alter the natural history and course of (Claimant’s) preexisting degenerative disc disease.”

On October 3, 2012, Claimant began treatment on his own. On that date, Claimant underwent an epidural steroid injection (“ESI”) at L4-5 at Advanced Radiology of Columbia. There is no record as to whether the injection was beneficial; however, Claimant did have to undergo an epidural blood patch procedure due to post-dural puncture headache.

On December 26, 2012, Claimant was first seen by Dr. Mitesh Patel, a pain management specialist at Boone Hospital Center Pain Management Clinic. Dr. Patel noted Claimant’s history, including the recent ESI and blood patch. Dr. Patel scheduled Claimant for a series of transforaminal ESIs.
On December 28, 2012, Dr. Patel performed a transforaminal ESI at L4-5. When seen by Dr. Patel on January 2, 2013, Claimant reported a 25% improvement in his left lower extremity pain from the ESI.

On January 4, 2013, Dr. Patel performed an interlaminar ESI at L5-S1. When seen by Dr. Patel on January 17, 2013, Claimant reported an 80% improvement in his left lower extremity pain from the ESI. Dr. Patel decreased Claimant’s Vicodin.

On January 18, 2013, Dr. Patel again performed an interlaminar ESI at L5-S1. When seen by Dr. Patel on January 31, 2013, Claimant reported a greater than 80% improvement in his left lower extremity pain from the ESI. Dr. Patel noted that Claimant was “very capable of performing activities” and decided to withhold the next ESI for eight to twelve weeks.

On April 19, 2013, Dr. Patel again performed an interlaminar ESI at L5-S1. On May 1, 2013, Claimant retired. When seen by Dr. Patel on July 8, 2013, Claimant reported significant improvement in low back and left lower extremity pain. Dr. Patel talked to Claimant about a trial of a dorsal column stimulator.

On August 2, 2013, Dr. Patel again performed an interlaminar ESI at L5-S1. When seen by Dr. Patel on August 29, 2013, Claimant noted 75% or greater improvement in low back pain and lower extremity pain. Claimant rated his pain as “3” on a zero-to-ten scale.

When Claimant saw Dr. Patel on November 7, 2013, Claimant reported that his left lower extremity had improved since the August 2, 2013 injection. Claimant told Dr. Patel that he would like to hold off on any further injection therapy.

Claimant did, however, return to see Dr. Patel on December 6, 2013, and another interlaminar ESI was performed. Dr. Patel noted that he would follow up with Claimant in eight weeks, or earlier if needed; however, this is the last record of the Boone Hospital Center Pain Management Clinic in evidence.

At the hearing, Claimant testified to continued complaints related to the August 10, 2011 accident. Claimant testified that he continues to experience neck and low back pain. He also has headaches at times. Claimant testified that his neck and back pain has gotten worse since he stopped seeing Dr. Patel. Claimant testified that the injections he received from Dr. Patel provided significant relief. Claimant testified that he no longer sees Dr. Patel for treatment because the doctor moved back to India.

The symptoms that Claimant reported at the hearing included low back pain that radiates to his left foot, and neck pain that limits his ability to turn his head. He maintained that he can stand or sit for about 30 minutes before experiencing an increase in pain. He also reported that he can walk only 100 yards without pain and that he does not sleep well because of pain. Claimant testified that he self-limits his lifting and tries to avoid lifting anything heavier than a gallon of milk. Claimant is under no active treatment for his August 10, 2011 work accident and spends most of his days watching television.
At the request of his attorney, Claimant was evaluated by Dr. Raymond Cohen on April 30, 2013. Dr. Cohen noted that in 2005 Claimant began having low back problems and that he had injections from Dr. Parker at the time. He noted that Claimant would have throbbing pain in the low back and it radiated into the right leg and that the injections would help him for approximately four to five days at a time. He also noted that Claimant had not had any type of treatment for one to two years prior to the work injury of August 10, 2011. Dr. Cohen also noted that Claimant was diagnosed with diabetes in approximately 2003 and that he was having numbness and tingling in his feet for several years due to this condition and that this would occasionally cause him to stumble at work. He also noted that Claimant would have difficulty walking on concrete floors due to pain in his feet. At the time of the evaluation, Claimant complained of constant pain in the low back radiating into both legs and into the toes of both feet, with the left being worse than the right. Claimant indicated that the injections he had been receiving worked for several months and then would wear off. He noted that he had problems sitting for longer than 30 to 45 minutes and that he needed to change positions frequently to alleviate his symptoms. Dr. Cohen noted that Claimant also had pain in the neck, keeping him awake at night, and the pain would be an average of a 5 or 6 on a 10-point pain scale. Claimant indicated that moving certain ways caused the neck to crunch and pop, and that it would occasionally lock up. Claimant reported that he was taking Vicodin for neck and low back pain. Dr. Cohen indicated loss of motion in both the cervical and lumbar spine and diagnosed Claimant with cervical strain/sprain with headaches, aggravation of cervical degenerative disc disease, lumbar strain/sprain, symptomatic lumbar disc protrusions at L4-L5 and L5-S1, bilateral lower extremity lumbar radiculitis secondary to disc protrusions, and a fall off a truck landing on a concrete surface, all stemming from the injury of August 10, 2011. Dr. Cohen stated that Claimant’s preexisting conditions were type 2 diabetes with diabetic polyneuropathy, cervical degenerative disc disease, and prior lumbar strains.

Dr. Cohen felt that the injury of August 10, 2011, was the prevailing factor in causing his condition, symptoms, need for treatment, and resulting disabilities. Dr. Cohen recommended ongoing use of medications. Dr. Cohen provided a rating of 25% of the neck referable to the injury of August 10, 2011, and 2.5% of the neck for his preexisting cervical spine condition. In reference to the lumbar spine, he gave a rating of 25% referable to the injury of August 10, 2011. He also provided a rating of 30% of each ankle due to preexisting diabetic neuropathy. He felt that the combination of the preexisting conditions and the conditions of the work injury of August 10, 2011 combined to create an overall disability than their simple sum.

Dr. Cohen recommended restrictions of not standing or sitting for greater than 30 minutes without being allowed a five-minute break and that Claimant needed to be restricted from any work in which he does any repetitive stooping, bending, twisting, and lifting greater than 15 to 20 pounds. Referable to the neck, Dr. Cohen recommended no lifting over 10 to 15 pounds, no repetitive twisting or turning of the head and neck, and no keeping the head or neck in any kind of awkward or sustained positions.

As it relates to his preexisting conditions, Dr. Cohen said he would have restricted him from any work where he would have had to do significant walking on hard surfaces or any work in which is feet or lower extremities would be susceptible to cuts or abrasions.
On October 8, 2013, Dr. Cantrell authored a report to the employer/insurer. Dr. Cantrell provided ratings of 0% of both the neck and lumbar spine referable to the injury of August 10, 2011.

On February 11, 2014, Dr. Cohen reviewed additional records, including the 2013 notes from Dr. Patel outlining medications and ongoing epidural steroid injections. Dr. Cohen noted that Claimant retired from Fulton State Hospital because he could no longer do the work and that he left because of low back pain. He also indicated that Claimant was unable to bend over, climb ladders, and do the heavy lifting required of his job. Dr. Cohen did another physical examination where he noted additional range of motion loss in both the neck and low back. He recommended ongoing medications for the cervical spine and lumbar spine and for his headaches, and recommended analgesics, muscle relaxers, and anti-inflammatories. Dr. Cohen also recommended that Claimant receive ongoing steroid injections as they have helped with his low back and lower extremity pain. He provided a rating of 25% of the neck referable to the injury of August 10, 2011, and 2.5% of the neck for preexisting condition. For the lumbar spine, he gave a rating of 30%, indicating that he had raised it from 25% since the symptoms were worse and there were significant changes in his range of motion. He did not change his ratings referable to the preexisting left and right foot issues. He kept virtually the same restrictions of the lumbar spine, except he indicated that Claimant could not lift more than 10 to 20 pounds. Dr. Cohen also opined that Claimant was permanently and totally disabled and that the primary work-related injury alone is the prevailing factor leading to his disability status.

On November 18, 2014, Dr. Brett Taylor authored a chart review. He concluded that his opinions regarding causation were not changed and that the injections provided by Dr. Patel were not needed as the result of the work exposure, but were reasonable treatments for degenerative disc disease along with congenital stenosis. Dr. Taylor opined that Claimant’s work exposure was not the prevailing factor in leading to those conditions and that the treatment from Dr. Patel did not flow from the work injury.

Claimant was evaluated by Philip Eldred, a certified rehabilitation counselor. Mr. Eldred reviewed all of the medical records, conducted an interview with Claimant, administered vocational testing, and authored a report of May 31, 2014. Mr. Eldred indicated that the restrictions given by Dr. Cohen were defined at the less than sedentary work level. On the vocational testing, Claimant tested at the 2.8 grade level in reading, 2.6 grade level in spelling, and 3.8 grade level in math computation. These were all at the fifth percentile level or lower. Mr. Eldred concluded that there were no sedentary occupations to which Claimant’s skills would transfer if he was capable of doing sedentary work. Mr. Eldred concluded that Claimant was not able to return to his previous work and that he had no transferable job skills. He also indicated that even if Claimant could do sedentary work, his worker trait profile would not be comparable to any sedentary jobs that would allow him to be retrained. Mr. Eldred also opined that Claimant did have preexisting conditions but that they did not constitute a hindrance or obstacle to employment. Mr. Eldred felt that it was unlikely that any reasonable employer in the normal course of business would hire Claimant for competitive gainful employment and that he would have problems being retrained in a formal training program due to his low academic scores, use of narcotic pain medication, and his constant pain. Mr. Eldred felt that Claimant was
unemployable in the open labor market and that he was permanently and totally disabled as a result of his injury on August 10, 2011 in isolation.

Claimant was also evaluated by a certified vocational counselor, James England, at Employer’s request on January 12, 2015. Mr. England summarized the medical records and met with Claimant, who indicated that his worst problem was pain in the mid and low back and that after he suffered from frostbite in the 1970’s and he did change jobs so that he could work indoors. Mr. England also noted that Claimant had constant numbness in his feet, that it was painful for him to reach up without having pain in his neck, that he had trouble standing more than 30 to 45 minutes at a time and walking more than 15 to 20 minutes at a time. He noted that bending exacerbated his low back pain and that he is unable to lift more than a gallon of milk or a case of soda. He indicated that he was only able to sit for 30 to 45 minutes at a time. Mr. England administered the Wide Range Achievement Test and noted that Claimant had a reading score of 2nd grade 8-month level and a math score of 3rd grade 8-month level. He noted that Claimant was unable to handle more math than beyond basic fractions or decimals. He felt that Claimant would be limited to work that did not require reading, writing, or recordkeeping, and that this restricted his overall vocational options. Mr. England concluded that Claimant had a limited education, no GED, and learning disabilities involving reading. Mr. England noted that Claimant is “functionally illiterate at this point.” Mr. England opined that Claimant would be unable to do his past work as a maintenance man, but that he could do less demanding physical work such as retail sales, security work, cashier positions, light assembly, and packing jobs. Mr. England noted “(o)bviosuly, his learning disability would have a very negative effect, however, on his ability to perform any type of work that involved any more than basic reading and/or required a GED.” Mr. England felt that even with Dr. Cohen’s restrictions, Claimant would not be precluded from certain types of entry-level service employment, but that he was limited because of his academic and learning problems. Mr. England concluded:

If one combines Dr. Cohen’s restrictions with the fact that he has a learning disability and is unable to read and write effectively, I believe he would likely be precluded from competing successfully for employment in the open labor market. If, therefore, Dr. Cohen’s restrictions are considered more accurate than the lack of those assigned by Dr. Cantrell, then his total disability would be due to a combination of his physical problems he has now in combination with the significant preexisting learning disability and psychiatric issues which have been problems for the man all the way back to his childhood.”

**ISSUE #1: Whether the work accident of August 10, 2011, was the prevailing factor in the cause of Claimant’s neck and low back issues.** Dr. Cohen testified that the August 10, 2011 accident was the prevailing factor in the cause of:

- Chronic lumbar sprain/strain
- Symptomatic lumbar disc protrusions at L4-5 and L5-S1
- Bilateral lower extremity radiculitis
- Chronic cervical sprain/strain
- Severe aggravation of cervical degenerative disc disease
Dr. Taylor attributes all of Claimant’s complaints to preexisting degenerative disc disease.

Claimant admits that back in 2005, he initially began to have symptoms in his low back and at that time he treated with Dr. Parker. Claimant also admitted that he had several injections back at that time in his low back, and he also testified that he did have some symptoms in his neck. However, Claimant sought no medical treatment for either his back or his neck after May 2008 when he saw Dr. Parker and underwent an MRI of the cervical spine. Claimant also testified that he was doing all of his regular duties at work leading up to August 10, 2011. He had no special accommodations, was not working with any restrictions, and was doing his job full-duty without any major difficulty.

Dr. Taylor finds that “the work exposure caused a temporary exacerbation of (Claimant’s) condition, and his condition was a preexisting condition that included both congenital stenosis as well as age related degenerative disc disease.” However, this is not a temporary exacerbation in that Claimant’s symptoms began on August 10, 2011 and have persisted through the hearing date. There is nothing “temporary” about this exacerbation. He goes on to say that it is natural to have waxing and waning symptomology or flare ups in individuals with this type of degenerative disc disease. However, Claimant did not have any “flare ups” since 2008, he was doing well, working full time and having minimal to no symptoms. It was not until August 10, 2011 that this “flare up” began. Also, the flare up seems to suggest an issue of short duration, where clearly Claimant has had problems for over five years.

In Weinbauer v. Grey Eagle Distributors, 661 S.W.2d 652, 654 (Mo. 1983) the Court found that disability “sustained by the aggravation of a pre-existing non-disabling condition or disease caused by a work-related accident causes the condition to escalate to the level of disability.” Though Claimant may have had a pre-existing condition in his spine, he was not experiencing a disabling condition in the years leading up to the August 10, 2011 injury. Further, aggravation of a pre-existing and non-disabling condition which is caused by an accident at work, “is compensable even though the accident would not have produced the injury in a person not having the condition.” Kelley v. Banta & Stude Construction, 1 S.W.3d 43, 48 (Mo. App. E.D. 1999).

The evidence in the case leads me to find that the August 10, 2011 work accident was indeed the prevailing factor in the cause of the injuries and conditions to which Dr. Cohen testified.

**ISSUE #2:** The liability, if any, of Employer for permanent partial disability benefits or permanent total disability benefits. Claimant alleges that he is permanently and totally disabled, and is seeking permanent total disability benefits from Employer or, alternatively, from the Second Injury Fund.

Under section 287.020.7, “total disability” is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Fletcher v. Second Injury Fund, 922 S.W.2d 402, 404 (Mo. App. W.D.1996). The test for permanent and total disability is the worker’s ability to compete in the open labor market in that it measures the worker’s potential for returning to employment. Knisley v. Charleswood Corp., 211 S.W.3d 629, 635 (Mo.App. E.D. 2007). The primary inquiry
is whether an employer can reasonably be expected to hire the claimant, given his present physical condition, and reasonably expect the claimant to successfully perform the work. *Id.*

Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that constitutes a hindrance or obstacle to employment or re-employment, that combines with a compensable injury to create a disability greater than the simple sums of disabilities. Section 287.220.1 RSMo 2000; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576, (Mo.App.E.D. 1985). When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990). In order to find permanent total disability against the Second Injury Fund, it is necessary that Employee suffer from a permanent partial disability as a result of the last compensable injury, and that disability has combined with prior permanent partial disability(ies) to result in total disability. 287.220.1 RSMo 1994, *Brown v. Treasurer of Missouri*, 795 S.W. 2d 479, 482 (Mo. App. 1990), *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo.App. 1985). Where preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the disability resulting from the work related injury. *Reiner v. Treasurer of State of Mo.*, 837 S.W. 2d 363, 366 (Mo.App. 1992) (emphasis added). In determining the extent of disability attributable to the employer and the Second Injury Fund, an Administrative Law Judge must determine the extent of the compensable injury first. *Roller v. Treasurer of the State of Mo.*, 935 S.W. 2d 739, 742-43 (Mo. App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is, therefore, necessary that the Employee’s last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.

The first question that must be answered is whether Claimant is totally disabled. Claimant’s case is unique. Despite some significant initial obstacles to employment, Claimant obtained employment with Employer, and successfully performed that employment for well over thirty years. Despite foot problems from frostbite and diabetes, Claimant continued to work without restrictions. Despite knee problems and back problems, Claimant continued to work without restrictions, even working a second job in the heating and air conditioning field. Then came the August 10, 2011 accident. After some time off post-accident (which Claimant testified was three months, but may have been just over two months), Claimant returned to work and worked for over seventeen months before retiring. Claimant testified that his last seventeen months of employment was “officially” full duty, but in reality was “sort of light duty”, as his supervisor assigned Claimant the lighter jobs.

Claimant testified that he took early retirement on May 1, 2013. Claimant testified that May 1, 2013, was the earliest he could retire and still get his “five-year backdrop”. Claimant testified that he had hoped to work until age 65 in order to pay off his mortgage. Claimant has not worked since May 1, 2013, nor has he sought work. Claimant testified that he was only able to continue working for Employer post-accident because of the relief from the injections that Dr. Patel was giving him. Claimant also testified that he could not work past May 1, 2013, “because
I hurt so bad”. Claimant testified that he could not have worked any longer due to constant pain in the low back. He described it as a shooting pain into his buttock and hip that radiates into his left leg and left foot along the back side of the leg. The medical records in evidence strongly suggest that Claimant’s testimony (described in this paragraph) may not be wholly accurate.

Claimant returned to work post-injury on a full-time basis somewhere between October 19, 2011, and April 3, 2012; according to Claimant’s testimony, he returned to work post-injury on a full-time basis approximately November 10, 2011.\(^1\) Claimant then worked full-time until his May 1, 2013 retirement date. Claimant’s first injection wasn’t until October 3, 2012 (at Advanced Radiology), and his first injection with Dr. Patel wasn’t until December 28, 2012. Therefore, Claimant worked full-time for a period of six to eleven months before receiving his first injection; Claimant worked full-time for a period of eight to thirteen months before his first injection with Dr. Patel; therefore Claimant’s testimony that he could only work because of the injections Dr. Patel was giving him is simply not accurate.

Claimant retired on May 1, 2013; this was right in the middle of Claimant’s treatment with Dr. Patel. On January 31, 2013, Claimant told Dr. Patel that the January 18, 2013 ESI had improved his lower extremity pain by 80%. Also on January 31, 2013, Dr. Patel noted that Claimant was “very capable of performing activities” and decided to withhold the next ESI for eight to twelve weeks. On April 19, 2013, (less than two weeks before Claimant retired) Dr. Patel administered another ESI. When next seen by Dr. Patel on July 8, 2013, (about two months post-retirement) Claimant reported significant improvement in low back and left lower extremity pain. And when Claimant saw Dr. Patel on August 29, 2013, (as a follow-up to an August 2, 2013 ESI), Claimant noted 75% or greater improvement in low back pain and lower extremity pain and rated his pain as “3” on a zero-to-ten scale. The truth is that, leading up to May 1, 2013, Claimant’s pain situation was improving and he was “very capable of performing activities”. After May 1, 2013, Claimant’s pain situation continued to improve, to the point where his back pain was a 3/10. This strongly suggests that the decision to retire was not made because of Claimant’s inability to work due to back pain. According to Dr. Patel (and according to Claimant himself, assuming Dr. Patel’s records are accurate), Claimant’s back and lower extremity pain were very well controlled from January 2013 until at least November 7, 2013.\(^2\)

The bottom line is that, despite the August 10, 2011 injuries, Claimant was clearly able to continue to work on May 1, 2013, and thereafter. Claimant was clearly able to work while under Dr. Patel’s care. Claimant testified that the ESI therapy stopped “because Dr. Patel went back to India,” apparently suggesting that Dr. Patel was his only potential source of ESI therapy. Such a suggestion is ludicrous on its face; additionally on February 12, 2014, Dr. Cohen wrote:

\(^{1}\) Claimant testified that he returned to work after using three months’ sick leave; that would put his return to work date at approximately November 10, 2011. Claimant was under Dr. Runde’s care and actively in physical therapy through October 18, 2011, when he was released to full duty, so it is possible that Claimant’s return to work was as early as October 19, 2011. Claimant was subsequently seen by Dr. Cantrell and four additional physical therapy sessions were ordered, and Dr. Cantrell released Claimant at maximum medical improvement on April 2, 2012, so it is also possible that Claimant’s return to work date was as late as April 3, 2012.

\(^{2}\) On November 7, 2013, Claimant stated that his left lower extremity had improved since the August 2, 2013 ESI and that he would like to hold off on further injection therapy.
... it is further my medical opinion that he will need further lumbar epidural steroid injections in the future as these have helped with his severe low back pain and lower extremity radicular pain. Generally the epidural steroid injections can be given at a frequency of three times per year. It is my opinion that the above noted treatment will be required for Mr. Potts’ injuries to his spine from the 8-10-11 injury indefinitely.

It would make little sense for Dr. Cohen to recommend ESI therapy indefinitely if there were only one physician, and one physician alone, who could provide same. Claimant’s decision not to pursue additional ESI treatment was NOT because such treatment was unavailable, nor was it because such treatment was ineffective.

In light of the above, I find that the opinion of James England is correct, i.e., that Claimant is able to perform less demanding physical work such as retail sales, security work, cashier positions, light assembly, and packing jobs. Thus, I find that Claimant is able to compete in the open labor market, and that Claimant is not permanently totally disabled.

I find that Claimant has sustained permanent partial disability of 5% of the body as a whole (rated at the neck) and 20% of the body as a whole (rated at the low back) as a result of the work-related accident of August 10, 2011. This results in 100 weeks of permanent partial disability benefits at the rate of $425.19, totaling $42,519.00.

**ISSUE #3:** The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits. Claimant is not permanently and totally disabled, and, therefore, the Second Injury Fund is not liable for the payment of permanent total disability benefits.

Regarding the potential liability of the Second Injury Fund for permanent partial disability benefits, there must be sufficient evidence of a synergistic effect between Claimant’s permanent partial disabilities caused by the August 10, 2011 work accident and the prior permanent partial disabilities. *Winingear v. Treasurer*, 474 S.W. 3d 203 (Mo. App. W.D. 2015). The only evidence of synergistic effect is the following portion of Dr. Cohen’s initial report dated April 30, 2013:

It is further my opinion that his pre-existing conditions or disabilities combine with the primary work-related injury of 8-10-11 to create a greater overall disability than their simple sum. Due to this multiplicative effect, there is a load factor of 20%.

*Winingear* holds that such conclusory statements are insufficient, standing alone, to establish a synergistic effect.

The claim against the Second Injury Fund shall be denied.

**ISSUE #4:** The liability, if any, of Employer for future medical benefits pursuant to §287.140, RSMo. In *Null v. New Haven Care Center, Inc.*, 424 S.W. 3d 172 (Mo. App. E.D. 2014), the Court stated (at page 180):
In order to receive future medical benefits, an employee need not present “conclusive evidence” that future medical treatment is needed. (Citation omitted.) Instead, the employee needs only to show a reasonable probability that the future treatment is necessary because of his work-related injury. (Citation omitted.) The employee is not required to present evidence of the specific medical care that will be needed, but must establish through competent medical evidence that the care requested flows from the accident. (Citation omitted.)

Dr. Cohen’s opinion on Claimant’s future medical needs (quoted above) is more than sufficient evidence to satisfy Claimant’s burden of proof for future medical benefits.

**FINDINGS OF FACT AND RULINGS OF LAW**

In addition to those facts and legal conclusions to which the parties stipulated, I find the following:

1. The work accident of August 10, 2011 was the prevailing factor in the cause of injury to Claimant’s neck and low back, including chronic lumbar sprain/strain, symptomatic lumbar disc protrusions at L4-5 and L5-S1, bilateral lower extremity radiculitis, chronic cervical sprain/strain, and aggravation of cervical degenerative disc disease.
2. The low back injury, caused by the work accident of August 10, 2011, required medical treatment, including lumbar epidural steroid injections.
3. Under section 287.020.7, “total disability” is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Fletcher v. Second Injury Fund, 922 S.W.2d 402, 404 (Mo. App. W.D.1996). The test for permanent and total disability is the worker’s ability to compete in the open labor market in that it measures the worker’s potential for returning to employment. Knisley v. Charleswood Corp., 211 S.W.3d 629, 635 (Mo.App. E.D. 2007). The primary inquiry is whether an employer can reasonably be expected to hire the claimant, given his present physical condition, and reasonably expect the claimant to successfully perform the work. Id.
4. Claimant is currently able to compete in the open market for employment.
5. Claimant is not permanently and totally disabled.
6. The work accident of August 10, 2011 resulted in a permanent partial disability of 5% permanent partial disability of the body as a whole at the neck.
7. The work accident of August 10, 2011 resulted in a permanent partial disability of 20% permanent partial disability of the body as a whole at the low back.
8. The work accident of August 10, 2011 did not result in total disability.
9. In order to receive future medical benefits, an employee need not present “conclusive evidence” that future medical treatment is needed. Instead, the employee needs only to show a reasonable probability that the future treatment is necessary because of his work-related injury. The employee is not required to present evidence of the specific medical care that will be needed, but must establish through competent medical

10. There is a reasonable probability that Claimant will continue to need medications and epidural steroid injections indefinitely, and, therefore, an order of future medical benefits is required.


12. There is insufficient evidence in the record of a synergistic effect between Claimant’s permanent partial disabilities caused by the August 10, 2011 work accident and the prior permanent partial disabilities.

13. There is insufficient evidentiary basis for an award from the Second Injury Fund.

**ORDER**

Employer is ordered to pay to Claimant the sum of $42,519.00 for permanent partial disability benefits.

Employer is ordered to provide future medical benefits as may reasonably be required to cure and relieve Claimant from the effects of the August 10, 2011 work injuries.

The claim against the Second Injury Fund is denied in full.

Claimant’s attorney, Christine Kiefer, is allowed 25% of the benefits awarded herein, exclusive of future medical benefits, as and for necessary attorney’s fees, and the amount of such fees shall constitute a lien on those benefits.

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

Made by___________________________

/s/ Robert J. Dierkes – 3-17-2017
Chief Administrative Law Judge

*Division of Workers’ Compensation*