

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

Injury No.: 08-008879

Employee: Steven Reichardt  
Dependent: Pamela G. Reichardt  
Employer: Industrial Sheet Metal Erectors, Inc.  
Insurer: New Hampshire Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 7, 2011, award and decision of Administrative Law Judge Edwin J. Kohner. 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 stipulated the following issues in dispute: (1) future medical care; (2) permanent disability; (3) Second Injury Fund liability; and (4) dependency.

The administrative law judge made the following findings: (1) employee is entitled to pain management relative to his low back condition; (2) employee suffered a 32.5% permanent partial disability of the low back as a result of the work injury; (3) the Second Injury Fund is liable for 13% permanent partial disability enhancement of the body as a whole owing to the combination of employee's preexisting disabilities with the effects of the primary injury; and (4) employee's daughter is not a dependent, but employee's wife is a dependent.

Employee submitted a timely Application for Review alleging the administrative law judge erred: (1) in finding employee is not entitled to permanent total disability benefits; and (2) in limiting the type of future medical care to which employee is entitled.

For the reasons set forth below, the Commission modifies the award and decision of the administrative law judge.

**Findings of Fact**

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact on the disputed issues. We incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modification herein.

Preexisting conditions

We adopt the administrative law judge's permanent partial disability ratings as to employee's preexisting permanent partial disabilities as to the right shoulder, neck, and body as a whole (referable to pancreatitis). We note, however, that the administrative law judge did not rate or

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appear to take into account employee's history of preexisting low back problems (which prompted a 1999 lumbar fusion surgery and additional treatments in 2006) in his analysis. Employee testified that he had an initial good result from the 1999 surgery, but in the years leading up to the primary injury, he experienced an intermittent return of low back problems, and these problems interfered with his work in that he had trouble bending over or doing heavy lifting. Employee indicated that the problems subsided after he received an injection in his low back in 2006. Dr. Lichtenfeld opined that employee suffered a 27.5% permanent partial disability of the body as a whole referable to his preexisting low back surgery and complaints. Dr. Lichtenfeld opined that, even though employee experienced relief of his pain and radicular symptoms from the injection in 2006, employee's spinal fusion is still a serious condition that cannot be discounted.

We find employee's evidence as to his preexisting low back condition credible. We find that at the time of the primary injury, employee suffered preexisting permanent partial disability of the body as a whole referable to his low back.

We further credit Dr. Lichtenfeld (and so find) that employee's preexisting right shoulder, neck, and body as a whole disabilities constituted hindrances or obstacles to his employment.

#### The primary injury

We adopt the administrative law judge's findings as to the nature and extent of permanent disability resulting from the primary injury.

#### Expert medical and vocational testimony

Employee testified that, following the work injury, he still sometimes engages in various activities, such as mowing his lawn with a riding lawn mower and occasionally hunting or fishing, but that he "pay[s] for it" with debilitating pain after exerting himself. Employee testified he reclines at least two or more hours per day in order to relieve his back pain. We find employee credible.

Dr. Lichtenfeld believes employee is permanently and totally disabled, and that this is "definitely" due to a combination of his preexisting disabilities and the effects of the work injury. Timothy Lalk, the vocational expert, agrees that employee is permanently and totally disabled based on the restrictions Dr. Lichtenfeld assigned to employee. Mr. Lalk also pointed out that Dr. Lichtenfeld's restrictions are more in line with what employee actually reports as to his capabilities and limitations, while Dr. Kennedy's restrictions do not appear to take employee's pain and actual symptoms into account.

In fact, all three vocational experts agreed that employee is permanently and totally disabled under the restrictions assigned by Dr. Lichtenfeld. Gary Weimholt, however, expressed his opinion that employee is not really permanently and totally disabled, and that he believed Dr. Kennedy's restrictions were more reliable or credible than those provided by Dr. Lichtenfeld. Delores Gonzalez did not indicate whether she thought Dr. Kennedy's or Dr. Lichtenfeld's restrictions were more reliable, but registered her opinion that none of employee's preexisting conditions constituted a hindrance or obstacle to his employment, because he wasn't accommodated in his job with employer.

The administrative law judge, despite finding that employee is not permanently and totally disabled, determined that employee's overall disability is "100% of the body as a whole." (We note that this calculation apparently did not take into account employee's preexisting low back problems). How did the administrative law judge determine that an employee who is 100% disabled is, nevertheless, employable in the open labor market? The answer appears to lie in the language of § 287.190.6(2) RSMo, which the administrative law judge interpreted to mean

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we must disregard Dr. Lichtenfeld's expert opinions and restrictions. That section provides, in relevant part, as follows:

In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

The administrative law judge appears to have read the foregoing section as requiring that we discount an employee's pain complaints in any case where there is a functional capacity evaluation (FCE) or a doctor who provides work restrictions that do not take into account employee's symptoms and complaints. But this analysis is improper because the results of an FCE or the imposition of more liberal restrictions do not amount to objective medical findings as to pain. Rather, they simply demonstrate what a particular practitioner believes is an appropriate level of work activity for the employee. In fact, a review of the record in this matter reveals no objective medical findings whatsoever as to the extent and severity of employee's pain. For this reason, we do not believe that § 287.190.6(2) is implicated in the question whether we are to accept Dr. Lichtenfeld's restrictions, because we have not been presented with conflicting objective versus subjective medical findings as to employee's pain. To the contrary, we believe that the resolution of the conflicting medical and vocational opinions in this matter remains within our special province to determine what evidence is more credible.

The test for permanent total disability is whether employee is able to compete in the open labor market. To answer that question we ask whether an employer, in the ordinary course of business, would be reasonably expected to hire employee, given his present physical condition. *Molder v. Mo. State Treasurer*, 342 S.W.3d 406, 411 (Mo. App. 2011). Here we have an employee with preexisting fusions to both his cervical and his lumbar spine, who was significantly limited in his ability to use his arms, work overhead, and turn his neck before the work injury, and who now experiences daily severe low back pain that requires him to spend several hours each day reclining. We acknowledge the evidence that employee continues to occasionally mow his lawn, hunt and fish, or perform other activities, but employee explained that he pays a price (in the form of debilitating pain) when he does so. We are not persuaded that employee's continuing to engage in activities he enjoys—even though they are painful to him—says anything about whether an average employer is likely to hire a 60-year-old employee with previous back surgeries at multiple levels, right shoulder disability, a serious back injury requiring surgery in 2008, and disabling pain levels.

After carefully considering the opinions of each of the medical and vocational experts, as well as employee's own testimony, we are convinced that employee is permanently and totally disabled. Specifically, we find the opinion of Dr. Lichtenfeld as to permanent total disability more credible than the other experts, and based on that opinion we find that employee is permanently and totally disabled as a result of a combination of his preexisting conditions of ill and the effects of the primary injury.

### **Conclusions of Law**

#### *Future medical treatment*

We agree with the administrative law judge that employee met his burden on the issue of future medical treatment. We disagree, however, with the administrative law judge's decision to limit employee's future medical award to "pain management relative to his low back condition."

Section 287.140.1 RSMo provides, as follows:

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In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Where the employee's burden of proof is met, the foregoing language makes clear that employee is entitled to that treatment which "may reasonably be required" to "cure and relieve from the effects of the injury." Generally, in the context of a future medical award, we are not called upon to determine (or set limitations upon) the specific treatment or procedures that will reasonably be required, as such an award would make no account for the ongoing or transitory nature of various medical conditions, and would involve the impossible task of predicting what will "reasonably be required" in an unknown future. (Of course, the parties may place in issue the question whether a certain treatment flows from the injury, but this is not the case here). For these reasons, we consider it inappropriate to bind employee's award of future medical expenses to a specific course of treatment or specific medical provider.

Accordingly, we modify the administrative law judge's award of future medical treatment. We conclude that employee is entitled to receive (and employer is obligated to provide) that medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required to cure and relieve from the effects of the January 28, 2008, injury.

*Liability of the Second Injury Fund*

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

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

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

We note that Ms. Gonzalez's opinion that employee's preexisting conditions did not constitute hindrances or obstacles to employment because employer did not accommodate him in the past appears to be premised on the exact type of analysis specifically rejected in the above quotation. We are convinced that employee's preexisting disabilities were serious enough to constitute hindrances or obstacles to employment for purposes of § 287.220 RSMo. We have adopted the administrative law judge's findings that employee suffered significant preexisting permanent partial disabilities of the right shoulder, neck, and body as a whole related to pancreatitis. In addition, we have found employee suffered preexisting disability of the body as a whole referable to the low back. Finally, we have credited Dr. Lichtenfeld's testimony that each of employee's preexisting conditions of ill did constitute hindrances and obstacles to his employment.

Accordingly, we conclude that employee has satisfied the threshold showing under § 287.220 RSMo, in that employee suffered from preexisting permanent partial disabilities referable to his right

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shoulder, neck, and body as a whole (referable to both pancreatitis and to employee's low back), and that these conditions constituted hindrances or obstacles to employee's employment or reemployment at the time he sustained the primary injury in this matter.

We now proceed to the question whether employee met his burden of establishing entitlement to compensation from the Second Injury Fund. Section 287.220.1 RSMo provides, in relevant part, as follows:

If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, ... the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" ...

The foregoing section requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, and not the Second Injury Fund, is responsible for the entire amount of compensation. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). We have affirmed and adopted the administrative law judge's finding that, as a result of the last injury, employee sustained a 32.5% permanent partial disability of the body as a whole referable to the low back. Dr. Lichtenfeld opined that employee is permanently and totally disabled as a result of the permanent disability resulting from his work injury in combination with his preexisting conditions of ill, and we have found Dr. Lichtenfeld credible.

Accordingly, we conclude that employee is permanently and totally disabled due to a combination of his preexisting disabilities in combination with the effects of the primary injuries.

In sum, we are persuaded that employee has met his burden of establishing Second Injury Fund liability for permanent total disability under § 287.220.1. The Second Injury Fund is liable for permanent total disability benefits.

### **Award**

We modify the award of the administrative law judge on the issue of Second Injury Fund liability. The Second Injury Fund is not liable for enhanced permanent partial disability, but rather permanent total disability. Accordingly, the Second Injury Fund is ordered to pay to employee weekly payments of \$353.68, the difference between employee's permanent total disability rate (\$742.72) and employee's permanent partial disability rate (\$389.04) for 130 weeks (the extent of employer's liability for the work injury) beginning October 7, 2008 (employee's date of maximum medical improvement). Thereafter, the Second Injury Fund is liable to employee for weekly permanent total disability benefits in the amount of \$742.72 for his lifetime, or until modified by law.

The award and decision of Administrative Law Judge Edwin J. Kohner issued April 7, 2011, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award, and decision herein.

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The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 10<sup>th</sup> day of November 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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CONCURRING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

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Secretary

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**CONCURRING OPINION**

I write separately to disclose the fact that I did not participate in the September 28, 2011, oral argument in this matter. I have reviewed the evidence, read the briefs of the parties, and considered the whole record. I concur with the decision of the majority of the Commission.

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Curtis E. Chick, Jr., Member

## AWARD

Employee:	Steven Reichardt	Injury No.:	08-008879
Dependents:	Pamela G. Reichardt		Before the
Employer:	Industrial Sheet Metal Erectors, Inc.		<b>Division of Workers'</b>
Additional Party:	Second Injury Fund		<b>Compensation</b>
Insurer:	New Hampshire Insurance Company		Department of Labor and Industrial
Hearing Date:	February 15, 2011		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	EJK/ch

### 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: January 28, 2008
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
The employee, a foreman for an architectural sheet metal firm, suffered a low back injury while moving heavy sheets of steel.
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: Low back
14. Nature and extent of any permanent disability: 32 ½% Permanent partial disability of the low back
15. Compensation paid to-date for temporary disability: \$24,509.76
16. Value necessary medical aid paid to date by employer/insurer: \$108,831.26

- 17. Value necessary medical aid not furnished by employer/insurer? None to date
- 18. Employee's average weekly wages: \$1,313.44
- 19. Weekly compensation rate: \$742.72/\$389.04
- 20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

1 5/7 weeks of temporary total disability (overpayment)	(\$1,273.23)
130 weeks of permanent partial disability from Employer	\$50,575.20

22. Second Injury Fund liability: Yes

52 weeks of permanent partial disability from Second Injury Fund	\$20,230.08
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TOTAL: \$70,805.28

23. Future requirements awarded: See Additional Findings of Fact and Rulings of Law

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dean L. Christianson, Esq.

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

Employee:	Steven Reichardt	Injury No.: 08-008879
Dependents:	Pamela G. Reichardt	Before the
Employer:	Industrial Sheet Metal Erectors, Inc.	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	New Hampshire Insurance Company	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/ch

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a foreman for an architectural sheet metal firm, injured his back on January 28, 2008, when he twisted while moving heavy sheets of steel. The issues for determination are (1) future medical care, (2) permanent disability, (3) liability of the Second Injury Fund, and (4) dependency. The evidence compels an award for the claimant for future medical care and permanent partial disability benefits.

At the hearing the claimant testified in person and offered depositions of Mark A. Lichtenfeld, M.D., Timothy G. Lalk, and voluminous medical records. The defense offered a deposition of Gary Weimholt, with additional medical records.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

### **SUMMARY OF FACTS**

On January 28, 2008, this sixty year old claimant, a sheet metal worker for an architectural sheet metal firm, suffered a low back disc injury while installing a metal roof on the employer's shop. The claimant and a coworker were moving sheets of large heavy sheet metal onto the roof two at a time, when the claimant twisted and felt a pulling pain in his back at the belt line. He stopped working for a short while, but then started working again. He did not seek medical care that day hoping that the low back pain would simply improve with time. However, his pain worsened with time and on February 6, 2008, he spoke with his employer about severe pain in his back radiating down his right leg. On February 6, 2008, the claimant went to Concentra and reported pain in his right leg, buttock, and groin after lifting and pulling roof sheets onto a fork truck. See Exhibit F. The claimant received medication, was placed on restrictions, and referred to an orthopedic surgeon. See Exhibit F.

On February 13, 2008, the claimant consulted Dr. Kennedy, a neurosurgeon, for low back pain. A myelogram and CT scan revealed spondylolisthesis and stenosis at L4-5, along with a disc extrusion. See Exhibit M. He diagnosed an L4-5 disc herniation with associated spondylolisthesis. See Exhibit M. Dr. Mirkin, an orthopedic surgeon, evaluated the claimant on

March 10, 2008, found an acute herniated disc at L4-L5 requiring surgery, and opined that the accident at work was the prevailing factor causing the herniation. On March 26, 2008, Dr. Kennedy performed a L4-5 laminectomy, discectomy with bilateral foraminotomy; pedicle screw fixation and fusion of L4-5; and removal of instrumentation and exploration of fusion mass. See Exhibit M.

From June 2008 to August 18, 2008, the claimant went to ProRehab for physical therapy. At the last visit, the claimant reported pain at a level of 3 to 5 out of 10 at rest, and rising to a level of 6 at its worst. His Waddell testing showed negative in all categories. In his final self-report of his symptoms, the claimant listed:

- Pain medication provides me with moderate relief from pain.
- I can take care of myself normally, but it increases my pain.
- I can lift only very light weights.
- Pain prevents me from walking more than one mile.
- Pain prevents me from sitting more than one hour.
- Pain prevents me from standing more than ten minutes.
- I can sleep well only by using pain medication.
- Pain prevents me from going out very often.
- My pain restricts my travel over one hour.
- Pain prevents me from doing anything but light duties.

On October 7, 2008, Dr. Kennedy opined that the claimant had reached maximum medical improvement, and he placed permanent restrictions of no lifting more than thirty pounds on an occasional basis, or twenty pounds on a frequent basis. See Exhibit 3. He opined that the claimant suffered a 25% permanent partial disability of the lumbar spine from the occurrence. See Exhibit N.

Dr. Feinberg, a pain management specialist, examined the claimant on November 4, 2009, for low back pain which was worse on the right side. Dr. Graham began treating the claimant in November 2009. See Exhibit I. He recommended discontinuing narcotic pain relievers and muscle relaxant medication, because he did not believe that the claimant received substantial improvement with them. He recommended restricting pain medication to Ultram, an anti-inflammatory. He also recommended a home exercise program, and he placed restrictions on claimant of lifting no more than thirty pounds with only limited lifting, bending, and twisting. Dr. Fox, a primary care physician, has prescribed muscle relaxers and pain medication since August 2008.

### Preexisting Conditions

On January 11, 1999, the claimant underwent a decompressive lumbar laminectomy L5-S1, as well as bilateral foraminotomy and pedicle screw fixation with iliac crest bone harvest and graft. His symptoms worsened after the surgery, and on the fourth day the wound was re-explored and an epidural hematoma was found and repaired. See Exhibit E. On October 18, 2006, the claimant underwent electrical studies of his lower extremities due to a one year history of pain and weakness in his right leg revealing an L5 radiculopathy. See Exhibit E.

In December 1999, the claimant went to St. Joseph Hospital for chest pain and was diagnosed with acute cholecystitis with pancreatitis. See Exhibit D. Other testing for cardiac problems ruled out any active problem. On December 21, 1999, the claimant underwent an endoscopic retrograde cholangiopancreatography with sphincterotomy. He was discharged on medication with instructions for a special diet. The claimant was re-admitted to the hospital on December 28, 1999, and had a laparoscopic cholecystectomy with Hasson technique.

On November 24, 2004, Dr. Fagan, an orthopedic surgeon, evaluated the claimant for left shoulder pain. See Exhibit G. A steroid injection provided partial relief. On February 7, 2005, he performed a right shoulder arthroscopy with acromioplasty and an open Mumford procedure. Physical therapy was then performed. On December 6, 2005, the claimant complained of a sharp pain in the shoulder and reported that his shoulder occasionally flares up. Dr. Fagan opined that the claimant had permanent disability in his shoulder.

In 2006, the claimant consulted his primary care physician, Dr. Boesch for neck and shoulder pain. The claimant now consults an arthritis specialist for this condition and is taking the prescription Voltaren. However, he complained the medication tears up his stomach. Dr. Boesch also diagnosed esophageal disease, high cholesterol, and hypertension. In April 2006, the claimant had the same complaints from taking both a muscle relaxer and anti-inflammatory medication. In October 2006, the claimant returned to Dr. Boesch with right leg and low back pain. Dr. Boesch noted muscle spasm and opined that the claimant had a possible L3-4 nerve root impingement. Dr. Boesch recommended time off work, a CT scan, and prescribed Vicodin and Flexoril.

On November 1, 2006, the claimant went to St. Luke's Hospital with a two month history of low back pain with mild weakness in the right leg and occasional give-away weakness with attempting to climb ladders. See Exhibit E. He was taking Vicodin and Flexoril at the time. See Exhibit E. The impression was lumbar spondylosis and spondylolisthesis with possible right L5 radiculopathy; osteoarthritis; possible right hip pathology; and multiple spine surgeries. An epidural steroid injection was performed and physical therapy was recommended. See Exhibit E.

In 1997, Dr. Kennedy diagnosed the claimant with a C5-6 disc herniation and performed a discectomy with fusion. He then did not see claimant again until June 2007, at which time claimant complained of a six month history of neck complaints, along with problems with vertigo. On June 24, 2007, the claimant reported to Dr. Kennedy that he had six occurrences of vertigo over the prior six months. See Exhibit L. He also had pain across his shoulders and into his neck, along with trouble moving his arms. A June 20, 2007, cervical and thoracic spine MRI revealed numerous bulging discs, stenosis, and spondylotic changes. See Exhibit L. There was likely spinal cord impingement at the C6-7 level, and there was a large disc herniation at the T1-2 level with cord impingement. See Exhibit L. Disc herniations were also found to be likely at the T3-4 and T4-5 levels. See Exhibit L. A June 20, 2007, brain MRI was negative for masses, though it showed several areas of hyperintensity. See Exhibit L. He was diagnosed with a possible disc herniation at the T1-2 level. See Exhibit L. By August 28, 2007, Dr. Kennedy reported that his examination was benign, but the claimant still had "some aching pain at the base of the cervical spine but no radiating hand pain." See Exhibit L. Motor and sensory examinations were grossly normal, and Dr. Kennedy continued the claimant's anti-inflammatory medications. See Exhibit L.

### Current Conditions and Limitations

This sixty year old claimant has a high school education with no post high school education outside of on-the-job training. He previously served in the U.S. Army from 1968 to 1974 and received an honorable discharge. He worked for this employer for thirty-six years, and most of his other past employment has involved sheet metal and construction work.

The claimant testified that his low back pain wakes him up early in the morning and sometimes at night, requiring him to get up and take medication. He testified that he is not able to perform activities for more than one or two hours. He has difficulty getting up from a squatting position and has to grab onto something to help him. He testified that the pain medication reduces his low back pain, but Tramadol, prescribed by Dr. Graham, was not helpful. He testified that after driving for thirty minutes, his entire right leg goes numb requiring him to get out of the car and walk around for at least five minutes to get the feeling back in his leg.

His daily activities do not involve much in the winter time. In the summer, he tries to do things outdoors. He has a 40' by 50' garden and a tractor to till the garden, which he and his wife plant and weed. He only gardens a portion of this due to his low back pain. He puts in stakes in the ground and some strings, though he cannot do much else. His problems with the garden are because of his back pain. Other yard work involves mowing his lawn. He has six acres total, though his actual yard is smaller than one acre. He mows the lawn with a riding mower and take breaks but completes the lawn in 30 to 45 minutes. Afterwards, he is very stiff and has trouble standing up. He then has to take a pain pill and rest. Rest involves sitting in his reclining chair and reclining all the way back. He testified that he uses a grass catcher on the mower and that it does not involve lifting any appreciable weight. He also uses a tractor to mow the other three or four acres. This takes a couple of hours but he breaks it up because of his back pain. Afterwards, he is not able to straighten up and walks bent over. He eventually is able to straighten up and take medication.

He does some laundry and some cleaning around the home. He testified that he has difficulty standing or walking on a concrete floor because of his back pain. He can go with his wife to the store but can only walk around for 30 minutes at best. His sitting is similar. During the hearing, he took breaks and stood up at times. He testified that any activity results in having to "pay for it" with severe pain requiring him to quit the activity. The next day he will have to lie in his recliner. He testified that he lies in his recliner every day, even if he has not been performing activity. He leans the recliner all the way back into a lying down position. He testified that he spends two or more hours in this position daily.

The claimant's hobbies include hunting and fishing, but he only fishes in the spring and sold his boat. He testified that he always goes with someone else and that there is very little required in putting the boat into the water. Sometimes he fishes for several hours if he can stand up and sit down. He has a well cushioned seat in the boat. He does some hunting and went out this past year with his brother and had a ride on a four wheeler to a blind. They ride very slowly on a gravel road. He had a chair in the blind to sit and stand at will. He did not get a deer this past year. However, he did get a deer from his home. He used a cross bow and he uses a special

winch so that he can pull the cross bow. After he got the deer, his wife helped him to slide it onto a cart with large wheels and roll it fifty yards back to the barn. He does a little wood working creating small light-weight pieces for other people. He has difficulty putting on his socks, underwear, and shoes due to low back pain. He testified that he sits in his recliner and reclines all the way back 90% to 95% of the time to reduce his pain and prevent pain.

#### Dr. Lichtenfeld

Dr. Lichtenfeld examined the claimant on March 26, 2009, and diagnosed: chronic lumbosacral spine strain; incitation, exacerbation and acceleration of pre-existing degenerative changes in the lumbar spine; symptomatic right L4-L5 herniated nucleus pulposus; right L5 radiculopathy; aggravation of spinal stenosis at L4-5; status post hardware removal and fusion exploration at L5-S1; status post bilateral lumbar laminectomy and discectomy at L4-5; status post spinal fusion with hardware from L4 through S1; cerebrospinal fluid fistula; status post closure of cerebrospinal fluid fistula; and right S1 radiculopathy. See Dr. Lichtenfeld deposition, pages 14-15. He attributed all of these conditions to the January 28, 2008, accident, and opined that the claimant suffered a 37 ½% permanent partial disability of the person as a whole as a result of the January 28, 2008, accident. He placed restrictions on claimant's activities due to these conditions as follows: avoid ascending and descending stairs, inclines and ladders; avoid working on uneven and slick surfaces such as ice, gravel, snow, mud and wet grass; avoid working on uneven and unstable surfaces, as well as pitched surfaces such as roofs; use extreme caution operating any type of motor vehicles or dangerous or heavy equipment due to his need to take narcotic pain medication as this medicine makes him very drowsy and causes an inability to focus attention on certain tasks; rest and lie down due to back pain periodically; avoid lifting more than 20 to 25 pounds on a one-time basis and 10 pounds repetitively; avoid twisting, bending and stooping; lift only between the waist and shoulder height; no lifting from the ground level overhead; avoid pushing or pulling more than 40 pounds occasionally and 15 to 20 pounds frequently. See Dr. Lichtenfeld deposition, pages 18-19. He recommended continuing pain medications and exercise.

He also opined that the claimant had pre-existing permanent partial disabilities: 32 ½% of the right shoulder; 40% of the cervical spine; 27 ½% of the lumbar spine; 17 ½% of the body referable to pancreatitis; and 15% of the left wrist. See Dr. Lichtenfeld deposition, page 20.

#### Timothy Lalk

On May 29, 2009, Timothy Lalk, a vocational rehabilitation counselor, met with the claimant and reviewed his medical records, and his educational, vocational, family and social background. The claimant reported that he had to rest during the day, and that he tries to avoid taking his narcotic pain medications during the daytime due to the side effects. After his evaluation, Mr. Lalk concluded that the claimant would be able to work if he considered only the restrictions given by Dr. Kennedy for the 2008 work injury in an unskilled, entry-level position, possibly in the light category, but more likely in the sedentary category. He also concluded that the claimant would be unable to compete for work in the labor market if he takes into consideration the restrictions given by Dr. Lichtenfeld. The restrictions on positioning that were given by Dr. Lichtenfeld are less than the sedentary level of work. Mr. Lalk testified that the

claimant told him about limitations on positioning which were closely aligned with the restrictions given by Dr. Lichtenfeld.

Mr. Lalk performed reading and math testing and concluded that the claimant would not benefit by further education. He testified that the claimant's age would make it difficult to obtain a professional position, because he would be competing with younger individuals.

Mr. Lalk testified that if a person has to recline throughout the day, then they would not be employable in entry-level employment, especially at the unskilled level. He testified that if the claimant has to recline during the day, then he is unemployable on the open labor market, and if the need to recline is due to the injury of January 28, 2008, then claimant would be unemployable due to the last injury alone. Mr. Lalk testified that it is inappropriate to expect a person to take a job in which the routine activities of the job increase the pain. He also opined, "If I simply assume that a person has capabilities greater than the person is reporting, then there's no need to consider a person's restrictions given to him by any doctor as long as I'm willing, and the person is willing to live with the consequences of possibly creating greater suffering for themselves and exacerbating their condition. My job is to try to help a person avoid that". See Lalk deposition, pages 86, 87.

Gary Weimholt

Mr. Weimholt, a vocational rehabilitation counselor, met with the claimant and reviewed medical records. He did not perform any educational testing. He testified that if he assumes the restrictions that were given by Dr. Kennedy, then claimant would be employable in jobs requiring a light physical demand level. He also opined that the claimant had skills that would be transferable to jobs of a lighter nature, such as a sales clerk, cashier, security guard, or skate attendant. On the other hand, he opined that if he assumes the recommendations of Dr. Lichtenfeld, then claimant would not be employable. He took a history from the claimant of having to sit in a recliner during the day due to his back complaints. He opined that the claimant would be unemployable based upon the need to either rest or recline during the day.

Mr. Weimholt also addressed the claimant's other medical conditions. He testified that the claimant's abdominal cramping could affect his employability, especially if it was incapacitating him for fifteen to twenty minutes at a time. He opined that the claimant's previous neck and back injuries would have hindered the claimant's ability to secure and maintain employment in the labor market. He also opined that the 2005 shoulder surgery was a hindrance to employment.

Mr. Weimholt testified that if he assumes the restrictions from all of the physicians, then the claimant would be unable to maintain full-time employment. He opined that if the accident of January 28, 2008 caused the claimant to lie down during the day, then the claimant would be unemployable solely due to the effects of that accident.

Delores E. Gonzalez

Ms. Gonzalez, a vocational rehabilitation counselor, reviewed medical records and reports but did not personally interview the claimant. She testified that the claimant's pre-

existing medical conditions “were not so severe as to constitute a hindrance or obstacle to employment”. She testified that if she assumes the restrictions given by Dr. Graham, then the claimant is employable in the open labor market in a sedentary to light level of work with limited bending, lifting, and twisting. On the other hand, if she assumes the restrictions of Dr. Lichtenfeld, then the claimant would be unemployable on the open labor market based upon the need to lie down throughout the day.

Ms. Gonzalez testified that the claimant’s age places him in the “advanced age” category of worker. She opined that the claimant had transferable skills regarding managerial duties. Ms. Gonzalez testified that she saw nothing in claimant’s pre-existing medical conditions that would have affected his ability to seek new employment.

### **FUTURE MEDICAL CARE**

The Workers' Compensation Act requires employers “to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment[.]” § 287.120.1. This compensation often includes an allowance for future medical expenses, which is governed by Section 287.140.1. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App.2001). Section 287.140.1 states:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana, 46 S.W.3d at 622. The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App.2002). Nonetheless, to be awarded future medical benefits, the claimant must show that the medical care “flow [s] from the accident.” Crowell v. Hawkins, 68 S.W.3d 432, 437 (Mo.App.2001) (quoting Landers v. Chrysler Corp. 963 S.W.2d 275, 283 (Mo.App.1997)).

While an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury. Stevens v. Citizens Mem'l Healthcare Found., 244 S.W.3d 234, 238 (Mo.App.2008); *see also* Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 270 (Mo.App.2004) (claimant must present “evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible” for future medical treatment). Conrad v. Jack Cooper Transport Co., 273 S.W.3d 49, 52 (Mo.App. W.D. 2008).

The evidence compels a finding that the claimant requires further medical care with respect to conditions stemming from his January 28, 2008, back injury. Dr. Lichtenfeld testified that the claimant will need anti-inflammatory medication, muscle relaxers, oral steroids, and

narcotic pain medication. Dr. Kennedy referred the claimant to a pain management physician, and Dr. Graham continues to provide pain management. The claimant is awarded pain management relative to his low back condition from a medical provider to be selected by the employer.

### **PERMANENT DISABILITY**

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

"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. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp.,

690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

In this case, the evidence is very clear that the claimant suffered a substantially disabling permanent disability from this work-related accident and is not currently employed. Therefore, this analysis requires a consideration whether the claimant is employable in the open labor market and the extent to which the last injury contributed to his current condition.

From a medical perspective, the medical experts provided contrasting sets of restrictions. First, Dr. Kennedy, the claimant's treating neurosurgeon, requested a functional capacity evaluation to determine the claimant's restrictions which opined that the claimant can function on a full-time basis with restrictions of: (1) Material handling: lifting / handling at least 30 pounds occasionally and 10 pounds frequently. Push / pull 60 to 70 pounds occasionally and 20 pounds frequently. (2) Non-material handling: no limitations as compared with his previous job listing related to the low back. He complained of difficulty reaching due to past medical history of cervical fusion. (3) I am unable to document objective proof that he could function at full duty levels. He should be able to function on a full time basis in the medium work demand level. See Exhibit 6. Dr. Kennedy opined that the claimant required permanent restrictions of no lifting more than 30 pounds on an occasional basis, or 20 pounds on a frequent basis. See Exhibit 3. He opined that the claimant suffered a 25% permanent partial disability of the lumbar spine. See Exhibit N. Dr. Graham placed restrictions on claimant of lifting no more than 30 pounds with only limited lifting, bending and twisting.

In contrast, Dr. Lichtenfeld opined that the claimant suffered a 37 ½% permanent partial disability of the person as a whole from the work accident and opined that the claimant should:

avoid ascending and descending stairs, inclines and ladders; avoid working on uneven and slick surfaces such as ice, gravel, snow, mud and wet grass; avoid working on uneven and unstable surfaces, as well as pitched surfaces such as roofs; use extreme caution operating any type of motor vehicles or dangerous or heavy equipment due to his need to take narcotic pain medication as this medicine makes him very drowsy and causes an inability to focus attention on certain tasks; rest and lie down due to back pain periodically; avoid lifting more than 20 to 25 pounds on a one-time basis and 10 pounds repetitively; avoid twisting, bending and stooping; lift only between the waist and shoulder height; no lifting from the ground level overhead; avoid pushing or pulling more than 40 pounds occasionally and 15 to 20 pounds frequently. See Dr. Lichtenfeld deposition, pages 18-19.

Three vocational experts offered remarkably consistent evaluations of the claimant's employability. All three vocational experts opined that if the claimant's only restrictions and limitations are those provided by Dr. Kennedy, Dr. Graham, and the functional capacity evaluation, the claimant is employable in the open labor market. All three vocational experts also opined that if the claimant needs to rest or recline during the day, then he is unemployable on the open labor market. Therefore, the critical question is whether resting or reclining during the day is an appropriate restriction or limitation.

The defense argues that Dr. Kennedy's opinion as the treating surgeon should be believed over that of Dr. Lichtenfeld, an evaluating physician:

Much was made of Dr. Lichtenfeld's recommendation that claimant's rest/lie down during the day. ... However, the simple fact is that if claimant chooses to recline in his recliner after "overdoing it" during the day, as he testified to at trial because of back pain, there is no way to determine whether that pain results from the last injury alone, the prior degenerative spinal condition, the prior fusion, or a combination of these conditions. Additionally, this pain may have been present at this point in claimant's retired life whether he had the last injury or not. Claimant may even choose to rest in his recliner throughout the day because of neck or shoulder pain. See Employer/Insurer Brief.

However, Dr. Lichtenfeld opined that all of the restrictions that he prescribed "were solely due to that work injury of January 2008." See Dr. Lichtenfeld deposition, page 42. The Second Injury Fund argued that if the tribunal finds that Dr. Lichtenfeld's restriction is binding then the Employer/Insurer bears the liability for the total disability.

On the other hand, the claimant argues in his brief that Dr. Lichtenfeld's restrictions are more appropriate as the standard, because Dr. Kennedy, Dr. Graham, and the functional capacity evaluation did not opine to the contrary and because the claimant's reports of pain should be the basis of his restrictions:

Dr. Kennedy never stated that it was unreasonable for claimant to rest or recline during the day -- he simply did not comment upon it at all. ... Dr. Kennedy is simply silent on the subject. While it is possible to make certain inferences in these matters, we cannot state with certainty that he feels resting and reclining is improper. Further, while Dr. Kennedy would probably have an advantage over a family practitioner in specific neurosurgical issues, there is no reason to believe or conclude that his opinions on *disability* should be taken at greater value than an evaluating physician. ... So in analyzing the disabling effect of claimant's condition, this court does not believe that Dr. Kennedy is to be granted deference simply because of his surgical training. ...

And then there is the role of a person's *symptoms*, which [Mr. Lalk] said also must be taken into consideration. Mr. Lalk explained that in vocational rehabilitation symptoms play a causative role in the creation of limitations:

[t]he symptoms are what I look at as basically the cause of -- one of the causes of the limitations. If a person is experiencing certain symptoms, then if it's simply a matter of the symptom being a pain because of some activity, then typically, I can -- I can determine that the person should simply try to avoid that type of activity in a work environment and look for jobs in which that activity is not going to be an essential function of the job.

Other symptoms are more systemic or organic to the individual; for example, if a person is experiencing depression and has symptoms which cause limitations in their ability to concentrate or remain motivated, then I need to take that into account. If a person is experiencing chronic pain, then that also can be a factor that can reduce the person's ability to attend to work and maintain a -- a acceptable work rate or persist at a job through a full day.

So while both employer and the Second Injury Fund argue for a strict interpretation of claimant's vocational abilities based solely upon Dr. Kennedy's restrictions, such an argument fails to take into consideration the symptoms to which claimant [is] credibly versed, and therefore fails to consider his limitations as well. It is true that if claimant simply follows the restrictions of Dr. Kennedy then he may have no further damage to his lumbar spine; but if he simply follows those restrictions then the inevitable result will be an immediate increase in symptomology, which in this case is pain. Mr. Lalk in fact referred to the role of "pain" in the vocational rehabilitation field, stating:

[i]n my profession, it is not appropriate to expect a person to take on any type of job in which the routine activities of the job increase pain. See Claimant's Brief.

This brings the analysis to which of the medical expert's restrictions govern this case. Dr. Lichtenfeld testified that he based his restrictions on the claimant's verbal report. "He had told me that, and especially when he took the narcotic pain medication, that he would have to lay down. ... He said it helps him when he's having a lot of chronic pain, but he said he doesn't ... he could try to stay up if he wasn't taking ... it was painful and he preferred to lay down. ... It would help the pain in a certain degree." See Dr. Lichtenfeld deposition, pages 53, 54.

The restrictions from Dr. Kennedy and Dr. Graham appear consistent with the functional capacity evaluation. The cases cited by the claimant's counsel appear to relate to cases that arose out of work related injuries occurring before August 2005. The law in force at the time of the injury in this case provides, in part:

287.190.6 (2) Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those

findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

The medical opinions addressing compensability and disability in this case appear to be inconsistent and conflicting. The findings of Dr. Kennedy, Dr. Graham, and the functional capacity evaluation appear to be based on findings demonstrable on physical examination or by appropriate tests or diagnostic procedures. Dr. Lichtenfeld appears to have formulated his conclusions based on the claimant's subjective reports based on his testimony cited above. Therefore, the medical opinions of Dr. Kennedy, Dr. Graham, and the functional capacity evaluation prevail over those of Dr. Lichtenfeld on this issue.

Given those findings, the three vocational experts opined that the claimant was employable in the open labor market in many entry level unskilled positions. None of the inquiry challenged the existence of those positions in sufficient numbers in the open labor market during this phase of the national or local economic conditions. Therefore, the evidence supports a finding that the claimant is not permanently and totally disabled. Based on this analysis, the claimant suffered a 32 ½% permanent partial disability to his low back from the work related accident.

### **SECOND INJURY FUND**

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).
2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability 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. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) The employer's liability is considered in isolation - "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability;" (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Having determined above that the claimant suffered a 32 ½% permanent partial disability from the 2008 work related injury and that the claimant is not permanently and totally disabled, it is important to determine the degree or percentage of the claimant's preexisting disabilities. The only medical evaluation of the claimant's preexisting disabilities is from Dr. Lichtenfeld, who opined that the claimant's pre-existing permanent partial disabilities were: 32 ½% of the right shoulder; 40% of the cervical spine; 27 ½% of the lumbar spine; 17 ½% of the body referable to pancreatitis; and 15% of the left wrist. See Dr. Lichtenfeld deposition, page 20. He also testified, "All of these preexisting permanent partial disabilities combine and concur with one another as well as with the disability caused by the injury at his workplace on January 28, 2008, to form an overall disability that is greater than the simple sum of the disabilities combined. In addition, they create a significant obstacle and/or hindrance to Mr. Reichardt obtaining employment and/or reemployment." See Dr. Lichtenfeld deposition, page 20.

Based on the evidence as a whole, the following permanent partial disabilities combine with the claimant's 2008 32 ½% permanent partial disability to form an overall greater disability than the simple sum and are an obstacle or hindrance to employment or reemployment: 25% of the right shoulder, 27 ½% of the neck, and 12 ½% of the body as a whole related to his pancreatitis. The simple sum of these permanent partial disabilities is 348 weeks or 87% of the body as a whole. The claimant's overall disability is 100% of the body as a whole based on the evidence, and the claimant is awarded the difference of 13% of the body as a whole as permanent partial disability from the Second Injury Fund.

### **DEPENDENCY**

Under Schoemehl v. Treasurer of the State of Missouri, 217 S.W.3d 900 (Mo.2007), decided on January 9, 2007, the surviving dependent of an injured worker who has been awarded permanent total disability benefits is entitled to the unpaid, unaccrued balance of benefits for the duration of the dependent's life. Schoemehl, 217 S.W.3d at 903. The holding was abrogated by Section 287.230.3, RSMo Cum.Supp.2009, which became effective June 26, 2008 and states, "[i]n applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate the holding in Schoemehl v. Treasurer of the State of Missouri, 217 S.W.3d 900 (Mo.2007), and all cases citing, interpreting, applying, or following this case." The amended statute provides, in pertinent part, as follows:

The right to unaccrued compensation for permanent total disability of an injured employee terminates on the date of the injured employee's death in accordance with section 287.230, and does not survive to the injured employee's dependents, estate, or other persons to whom compensation might otherwise be payable. Section 287.200.2, RSMo Supp 2009.

The amended statute is not retroactive and will only apply to claims initiated after the effective date of the amendment. Bennett v. Treasurer of State, 271 S.W.3d 49, 53 (Mo.App. W.D.2008). Thus, "recovery under Schoemehl is limited to claims for permanent total disability benefits that were pending between January 9, 2007, the date the Missouri Supreme Court issued its decision in Schoemehl, and June 26, 2008, the effective date of [the amendment to Section 287.230.3]." Id.

[C]ase law has strictly limited recovery under Schoemehl to situations in which the injured worker's case was still pending before the Commission and when no determination had been made on the injured worker's claim against the Second Injury Fund for permanent total disability benefits. Strait v. Treasurer of Mo., 257 S.W.3d 600 (Mo. banc 2008); Cox v. Treasurer of State, 258 S.W.3d 835 (Mo.App.2008); Buescher v. Mo. Highway & Transp. Comm'n, 254 S.W.3d 105 (Mo.App.2008). As the Missouri Supreme Court said in Strait: The question of whether [dependents] may receive the permanent total disability payments after the death of [the injured worker] is dependent on whether the [injured worker's] claim was final-or was still pending-at the time of her death. Id. at 52.

A motion is, apparently, an appropriate manner to add a spouse as a party in a workers' compensation proceeding for permanent total disability benefits. Taylor v. Ballard R-II School District, 274 S.W.3d 629 (Mo.App. W.D. 2009). A claim pending before the Division of Worker's Compensation is, apparently, a "pending claim" under this doctrine, because the claim is not final. See Tilley v. USF Holland, Inc., 325 S.W.3d 487, 494 (Mo.App. E.D. 2010).

A wife of an injured worker, with whom she lives or is legally liable for support, is conclusively presumed to be totally dependent for support under Section 287.240, RSMo 2000. The evidence supports a finding that the claimant and his spouse were married on March 30, 1987. See Exhibit P. The evidence does not support a finding that the marriage has been terminated by death or dissolution to date.

A child of an injured worker, under the age of eighteen, is also conclusively presumed to be totally dependent for support under Section 287.240, RSMo 2000. The section also adds a qualification for children over the age of eighteen years if physically or mentally incapacitated from wage earning. In this case, the evidence supports a finding that the employee's daughter, Lisa Ann Reichardt was born on December 25, 1987, and attained the age of eighteen years on December 25, 2005. See Exhibit Q. The employee did not present any evidence that Lisa Ann Reichardt was mentally incapacitated from wage earning or was otherwise dependent on the employee for support.

Therefore, the employee and his spouse were married before the accident, on the date of the hearing and on all dates between those dates. In this case, the evidence supports a finding that the employee's spouse was a dependent of the employee at the time of the injury, at the time of the hearing, and at all times in between.

The evidence also supports a finding that the injured employee filed a claim for compensation on March 6, 2008, and that his claim for compensation was pending before the Division of Workers' Compensation between March 6, 2008, and June 26, 2008. The employee did not add his dependent spouse as an employee or as a party to this case before June 26, 2008. Neither the employee nor his spouse or daughter filed an entry of appearance alleging that either is a claimant or as a dependent of the employee. The claim and amended claim leave the section blank.

The employee's spouse is not entitled to benefits at this time, because she can only receive compensation as an "employee" if she survives her spouse, the injured worker. Since her spouse is still living, she is entitled to no benefits as a claimant at this time. The dicta in the cases finding compensation for a surviving spouse as an "employee" under the Schoemehl doctrine requires a finding that the injured worker's claim be pending between January 9, 2007 and June 26, 2008. None of the cases involves the factual situation in this case where an injured worker's claim was pending, but the dependent spouse was not added as a party. However, our courts have held that the claim of a dependent spouse vests on the date of injury.

It is clear that a dependent's right to benefits under *Schoemehl* vests at the same time the worker's rights vest, which is when the worker suffers the work-related injury. A theory that the status and rights of a dependent vest at some later time than those of the injured worker vest is not supported by logic, case law, or

statute, and fails to follow the logic of section 287.240(4) RSMo. (2000), which defines the term "dependent" as used throughout the workers' compensation law. Gervich v. Condaire, Inc., et al., Slip Op., Case No. ED94726 (Mo.App. E.D. March 8, 2011).

In summary, the employee's daughter is not a dependent, because she attained the age of eighteen years of age before the date of injury and has no other qualifying basis to be considered a dependent after that age. The employee's spouse was and is a dependent of the employee, but is not entitled to any workers' compensation benefits at this time for failure to prove that she survived the employee.

### **OTHER ISSUES**

The employer contends that it is entitled to a credit for temporary total disability benefit paid for 1 5/7 weeks (\$1,273.23) from October 7, 2008, the date that Dr. Kennedy opined that the claimant attained maximum medical improvement, to October 19, 2008, the last date that the employer paid temporary total disability benefits to the claimant. Based on the evidence the employer and insurer are entitled to a credit of \$1,273.23.

Made by: /s/ EDWIN J. KOHNER  
EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated and attested to this 7th day of April, 2011.

/s/ NAOMI L. PEARSON  
*Naomi L. Pearson*  
*Division of Workers' Compensation*