

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

Injury No.: 07-041658

Employee: William Rook
Employer: Bodine Aluminum, Inc.
Insurer: Mitsui Sumitomo Insurance Company of America
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, 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 resolve the following issues: (1) future medical care; (2) permanent disability; and (3) Second Injury Fund liability.

The administrative law judge rendered the following findings and conclusions: (1) employee is awarded such medical treatment as may reasonably be required to cure and relieve from the effects of the injury; (2) employee is permanently and totally disabled as a result of the combination of his preexisting disabilities and the primary low back injury; (3) employer is liable for a 40% permanent partial disability to employee's body as a whole; and (4) employee has proven his eligibility for Second Injury Fund benefits due to his lack of employability in the open labor market.

The Second Injury Fund filed a timely Application for Review with the Commission alleging employer, rather than the Second Injury Fund, is liable for permanent total disability benefits.

The issue presently before us is whether employer or the Second Injury Fund is liable for employee's permanent total disability.

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 as to the issues disputed at the hearing. We adopt and 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.

The last injury considered in isolation

The parties presented conflicting expert medical testimony on the issue of the nature and extent of disability employee suffered as a result of the low back injury he sustained

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at work on April 22, 2007. The issue is complicated by the fact, agreed among the various experts, that employee suffered from significant preexisting low back problems. We consider each expert's testimony below.

Dr. Volarich diagnosed the April 2007 injury as resulting in an "aggravation lumbar syndrome" including disc protrusion at L4-5 to the right and bulge at L5-S1 centrally with a new bulge at L3-4 causing lumbar bilateral lower extremity radicular symptoms. Dr. Volarich diagnosed employee's preexisting low back conditions as a central disc protrusion at L4-5 with bulging centrally at L5-S1 and chronic L5-S1 denervation. Dr. Volarich rated the April 2007 injury at 35% permanent partial disability to the body as a whole. Dr. Volarich opined that employee is permanently and totally disabled as a result of the work injury of April 22, 2007, combined with his preexisting medical conditions.

Dr. Volarich assigned the following physical restrictions with respect to the April 2007 work injury: avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing, and similar tasks to an as-needed basis; no handling weights greater than 15-20 pounds; no handling weight overhead or away from the body, or over long distances or uneven terrain; avoid remaining in fixed position for more than 30 minutes at a time, including sitting and standing; change positions frequently to maximize comfort; and rest when needed, including resting in a recumbent fashion. We note that, directly contrary to what employer asserts in its brief, Dr. Volarich did, in fact, assign the foregoing restrictions specifically with respect to the April 2007 work injury considered alone:

Q. Okay. So due to the April '07 work injury alone, you would impose the same restrictions as listed on page 14 of your report?

A. Yes. That's what those are specifically for.

Transcript, page 220.

Meanwhile, Dr. Coyle diagnosed the April 2007 injury as resulting in an acute L4-5 disc herniation with right lower extremity radiculopathy. Dr. Coyle explained that pre-injury diagnostic studies revealed degenerative changes at L4-5, but an MRI obtained about two weeks after the work injury revealed a right-sided paracentric and foraminal disc herniation at L4-5 compressing both the foramen opening for the nerve and the thecal sac. Dr. Coyle believes that employee is not exaggerating his pain and that employee's complaints are consistent with what the doctor would expect from someone with employee's low back problems.

Dr. Wayne, on the other hand, ultimately diagnosed the April 2007 injury as a mere sprain or strain occurring against a backdrop of diffuse multilevel degenerative abnormalities in employee's low back. Dr. Wayne rated the April 2007 injury as resulting in a 6% permanent partial disability of the body as a whole. As of September 12, 2007, Dr. Wayne released employee to work full duty, with no work restrictions related to the April 2007 work injury. Dr. Wayne acknowledged that employee suffers from severe low back problems, but opined that all of employee's ongoing problems are caused by the preexisting conditions of his low back, rather than the work injury.

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We note that, in his earlier reports, Dr. Wayne consistently opined that employee suffered from a “superimposed” disc protrusion lateralizing to the right at the L4-5 level. Dr. Wayne’s use of the word “superimposed,” and his specific acknowledgment, in his report dated August 22, 2007, that the L4-5 disc pathology did not appear in diagnostic studies predating the work injury, suggest that Dr. Wayne initially agreed with Dr. Coyle that the L4-5 disc pathology was a result of the work injury. But in his June 30, 2008, report—the first of such reports addressed to employer’s counsel—Dr. Wayne changed his impression of the April 2007 injury to that of a mere temporary low back sprain or strain. Dr. Wayne did mention the L4-5 disc herniation in that report, but he grouped it with a finding of “degenerative disc disease,” and made no mention of the fact that this pathology did not appear on pre-injury diagnostic studies.

At his deposition, Dr. Wayne did not explain why his impression changed, nor did he even mention the disc pathology at L4-5. Instead, the doctor persisted in characterizing the work injury as a mere low back sprain. Given this chain of events, it appears that Dr. Wayne minimized or ignored the previously identified L4-5 pathology so as to tailor his impressions in favor of the employer and insurer. We find Dr. Wayne’s opinions with respect to the nature and extent of the April 2007 injury to lack any credibility.

Instead, we deem most credible Dr. Coyle’s opinion (and so find) that the April 2007 injury resulted in an acute disc herniation at L4-5. We find Dr. Coyle’s opinion with respect to the cause of the disc herniation at L4-5 to be more credible than Dr. Volarich’s opinion on the topic, as Dr. Coyle is a spine surgeon whereas Dr. Volarich does not perform surgery, and also because we believe Dr. Volarich did not provide a persuasive rationale for why his diagnosis differed. We do, however, find credible Dr. Volarich’s testimony assigning permanent restrictions specifically with respect to the April 2007 injury, including the restriction that employee rest in a recumbent fashion when needed.

With respect to employee’s psychiatric condition, Dr. Stillings diagnosed multiple disorders as resulting from the April 2007 injury: a mood disorder with associated 20% permanent partial disability of the body as a whole, an anxiety disorder with associated 10% permanent partial disability of the body as a whole, and a pain disorder with an associated 10% permanent partial disability of the body as a whole. Dr. Stillings opined that employee is totally disabled from gainful employment; he did not specify whether he believed employee’s permanent total disability to be a result of the primary injury considered in isolation, or rather a combination of the effects of the primary injury and employee’s preexisting difficulties.

There is no competing psychiatric opinion in this case. We find Dr. Stillings’s diagnoses and ratings to be credible with regard to the effects of the April 2007 work injury. We find that, as a result of the April 2007 work injury, employee suffers from a mood disorder, anxiety disorder, and pain disorder, which together amount to a 40% permanent partial psychiatric disability of the body as a whole.

In addition to the expert medical testimony, employee offered his own testimony as to the effects of the work injury. We find employee’s testimony credible. We find that employee suffers the following limitations as a result of the work injury. Employee can

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walk about five to ten minutes at a time before he starts to experience pain. Employee has to use a motorized cart if he goes shopping, even though he finds it embarrassing. Employee can sit for about a half hour before he has to move. Employee has to lie down five or six times during the day for about a half hour to relieve his back pain. Employee wakes up about four or five times every night because of pain. On some days, employee's back pain is so bad he can't even get out of bed, and his wife has to help him get up to use the restroom. Sometimes employee's wife has to help him get dressed. Occasionally employee experiences a sudden pain in his back that is so severe that it will cause him to fall down. Employee takes Flexeril, Cyclobenzepine, and Naproxen everyday to manage his pain, and Effexor for depression. On a scale from one to ten, employee describes his pain as an eight or nine without taking medications. With medications, as on the day of the hearing, employee described his pain as a five or six out of ten.

With regard to maximum medical improvement, it's clear from the medical records, the credible expert medical testimony, and employee's testimony that the course of conservative treatment following the work injury did little to cure or relieve employee's symptoms. Given these circumstances, we find that employee reached maximum medical improvement on September 12, 2007, the date Dr. Wayne rendered permanent partial disability findings and opined employee should be returned to work.

Permanent total disability

The parties presented conflicting expert vocational testimony on the issue whether employee is permanently and totally disabled, and if so, why. The administrative law judge found that employee is permanently and totally disabled, and no party has appealed that finding. Consequently, the focus of our inquiry is to what extent the vocational experts assign permanent total disability to the last injury in isolation, or to a combination of the effects of the last injury and employee's preexisting conditions.

Employee presents the testimony of James England, who initially opined that, assuming the restrictions from Dr. Volarich, employee's permanent total disability results from a combination of his preexisting conditions of ill and the effects of the work injury, but who conceded on cross-examination that if the work injury results in a need to lie down multiple times per day, that would be enough to render employee unable to compete in the open labor market. Mr. England explained that a need to get into a recumbent position at times because of pain can negate someone's ability to do work, regardless of anything else.

Employer presents the testimony of Donna Kisslinger-Abram, who initially opined that employee is able to work a number of sedentary jobs, but who ultimately agreed, on cross-examination, that employee would experience considerable difficulty competing for work. Ms. Kisslinger-Abram assigned such difficulty to a combination of employee's problems, but on cross-examination, Ms. Kisslinger-Abram conceded that she is not aware of any employer in today's economy that would hire someone who has to lie down multiple times per day.

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It appears to us that the vocational experts are in substantial agreement that a need to lie down during the day renders employee unable to compete for work on the open labor market. We find more credible Mr. England's testimony on this point. We find it difficult to imagine any employer hiring employee given the restrictions referable to the primary injury. We find that employee's need, resulting from the work injury, to lie down five to six times per day renders him unable to compete for work.

Conclusions of Law

Section 287.220.1 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." The statute 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 Fund has no liability. *Id.*

We note that the administrative law judge failed to specifically consider the effects of the work injury in isolation *before* inquiring as to employee's preexisting conditions of ill. As the Missouri cases consistently instruct, "pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Pruett v. Fed. Mogul Corp.*, 365 S.W.3d 296, 306 (Mo. App. 2012)(citation omitted). See also *Birdsong v. Waste Mgmt.*, 147 S.W.3d 132, 138 (Mo. App. 2004); *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003); and *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000). Employee certainly had preexisting back problems. But we are not permitted to consider them until we have determined employer's liability for the primary injury.

Applying the appropriate statutory analysis, we have found that the work injury, considered in isolation, causes employee to need to lie down five to six times per day. We have credited the testimony from Mr. England that this precludes employee from competing in the open labor market. It follows that employee is permanently and totally disabled owing to the effects of the work injury considered alone.

We conclude that employer, not the Second Injury Fund, is liable for permanent total disability benefits.

Award

We modify the award of the administrative law judge as to the issue whether employee is permanently and totally disabled due to the effects of the last injury considered alone. The employee is permanently and totally disabled, but it is employer, not the Second Injury Fund, that is liable to employee for permanent total disability benefits. In all other respects, we affirm the award.

We direct employer to pay to employee a permanent total disability benefit in the amount of \$718.87 per week, beginning September 13, 2007, the day after employee achieved maximum medical improvement, to continue for employee's lifetime, or until modified by law.

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The award and decision of Administrative Law Judge Edwin J. Kohner, issued October 18, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 10th day of April 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: William Rook Injury No.: 07-041658
Dependents: N/A Before the
Employer: Bodine Aluminum, Inc. **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Mitsui Sumitomo Insurance Company of America Jefferson City, Missouri
Hearing Date: September 13, 2012 Checked by: EJK/lsn

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: April 22, 2007
5. State location where accident occurred or occupational disease was contracted: Lincoln 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, an assistant maintenance manager, aggravated his lumbar syndrome when he tripped on a bolt while descending steps at work.
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: 40% permanent partial disability to the low back
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: \$20,003.12

- 17. Value necessary medical aid not furnished by employer/insurer? None to date
- 18. Employee's average weekly wages: \$1,335.75
- 19. Weekly compensation rate: \$718.87/\$376.55
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

160 weeks of permanent partial disability from Employer	\$60,248.00
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- 22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: weekly differential (\$342.32) payable by SIF for 160 weeks beginning September 12, 2007 and, thereafter, \$718.87 for Claimant's lifetime	Indeterminate
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TOTAL:	Indeterminate
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- 23. Future requirements awarded: None

Said payments to begin as of September 12, 2007, 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: James A. Fox, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	William Rook	Injury No.: 07-041658
Dependents:	N/A	Before the
Employer:	Bodine Aluminum, Inc.	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Mitsui Sumitomo Insurance Company of America	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
		Checked by: EJK/lsn

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, an assistant maintenance manager, aggravated his lumbar syndrome when he tripped on a bolt while descending steps at work. The issues for determination are (1) Future medical care, (2) Permanent disability, and (3) Liability of the Second Injury Fund. The evidence compels an award for the claimant for future medical care and permanent disability benefits.

At the hearing, the claimant testified in person and offered depositions of David T. Volarich, D.O., Andrew M. Wayne, M.D., and James M. England, Jr., a medical report from Wayne A. Stillings, M.D., and voluminous medical records. During much of the hearing, claimant was noted to be standing, leaning against the wall, leaning forward on his hands and elbows, and changed positions frequently. The defense offered depositions of the claimant, Donna Kisslinger-Abram, and James J. Coyle, M.D.

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 April 22, 2007, this 59-year-old claimant, a maintenance supervisor, injured his low back when he stepped on a bolt while descending a staircase. His foot slipped, and he twisted his back when he caught himself on the railing as his body lunged forward. He felt immediate pain in the area of his low back. He did not seek medical care immediately. Over the next week, the claimant's pain became progressively worse with radiating pain into his lower extremities. After reporting his injury to his employer, Dr. Pearson examined the claimant on May 3, 2007. Dr. Pearson's initial assessment was low back pain, and he gave the claimant medication, prescribed physical therapy, and placed the claimant on light duty. After returning to Dr. Pearson on May 7 with worsening symptoms, Dr. Pearson ordered an MRI, changed his medications, and started the claimant on aquatic therapy, and increased his work restrictions.

The MRI of May 8, 2007 revealed degenerative changes at L3-4, L4-5, and L5-S1 with a right sided para-central and foraminal disc herniation compressing both the foraminal opening

for the nerve and the thecal sac. The claimant remained in therapy for a month with no improvement. He was then referred to Dr. Wayne, a physiatrist, for further treatment.

Dr. Wayne initially examined the claimant on June 25, 2007, and opined that the claimant had a sprain/strain injury superimposed on a chronic condition with some temporary aggravation of his chronic condition. He recommended an epidural steroid injection, which was performed on July 3, 2007. When the epidural failed to achieve any improvement of the claimant's condition, Dr. Wayne recommended a surgical consult with Dr. Coyle, a spine surgeon.

On the claimant's initial visit on August 1, 2007, Dr. Coyle diagnosed an acute L4-5 disc herniation with right lower extremity radiculopathy. Dr. Coyle reviewed the prior MRI from four years earlier and noted the disc herniation was not present at that time. Mr. Rook also indicated he had been pain free for three years before the accident producing the L4-5 disc herniation and resulting symptoms. Dr. Coyle recommended conservative treatment to include physical therapy and he released the claimant to full duty. On August 5, 2007, the claimant went to the emergency room for severe back pain. Following his release, he returned to Dr. Coyle on August 7. Dr. Coyle ordered a repeat MRI. The MRI was unchanged from the May 8, 2007 study. At that point, Dr. Coyle again returned the claimant to the care of Dr. Wayne for conservative care.

Dr. Wayne saw claimant on three further occasions before releasing him on September 12, 2007 at maximum medical improvement. Dr. Wayne had reviewed medical records of claimant's prior back problems in 2001 through 2003. Following his review of these records, Dr. Wayne opined that all of claimant's present complaints were related to his pre-existing condition. He was released to full duty with no restrictions related to the April 22, 2007 accident. Dr. Wayne recommended claimant follow up with his family doctor under his private health insurance for further treatment. He also acknowledged that claimant had stopped working due to psychological reasons.

In September 2007, claimant began treating with Dr. William Wang, a psychiatrist, for depression. The claimant had previously treated with Dr. Wang in 2001 for depression following a prior bout of severe back pain. Dr. Wang provided a release from work due to his severe condition. Dr. Wang opined that the claimant's depression was associated mainly with his back injury that forced him out of his regular work. The claimant has remained under Dr. Wang's care through the present date.

Following his release from authorized medical care, claimant went to Dr. Vatterott, his family doctor, who referred the claimant to a pain management specialist, Dr. Vellinga, for trigger point injections and eventually to Dr. Scott Kutz, a neurosurgeon. On January 23, 2008 Dr. Kutz recommended a three-level fusion at L3-4, L4-5, and L5-S1. The claimant did not undergo the procedure recommended at that time but tendered Dr. Kutz' recommendations to the employer.

In response, the employer referred the claimant to Dr. Coyle, who examined the claimant on May 14, 2008. Dr. Coyle disagreed with Dr. Kutz' recommendations and opined that an extensive lumbar fusion surgery would not realistically offer claimant a reasonable prospect of being pain free. He recommended a return to Dr. Wayne to establish permanent restrictions.

On June 3, 2008, Dr. Wayne examined the claimant. Dr. Wayne opined that surgery was not indicated and reiterated his opinions of September 2007. He opined that the claimant suffered a 6% permanent partial disability to the low back from the April 22, 2007 accident.

Since 2008, Dr. Vatterott, his family physician, has provided pain management and has prescribed daily narcotic pain medication. The claimant has also attended a number of physical therapy sessions and chiropractic sessions and received additional injections and treatment for his back in the last four years. He has also remained under the care of Dr. Wang for chronic depression.

Pre-existing Conditions

In 2001, the claimant began receiving medical care for severe low back pain with radiating pain to both legs. An MRI on February 21, 2001 showed a mild bulge at L4-5 and a bulge at L5-S1 with mild bilateral foraminal narrowing. Dr. Logan treated the claimant for a year and opined that the claimant had a low lumbar polyradiculopathy or myelopathy. He diagnosed transverse myelitis and prescribed Prednisone and Naprosyn. In May 2002, Dr. John McGarry, a neurologist, began treating the claimant. The claimant also went to the Mayo Clinic in Arizona for back pain but did not obtain relief from his back pain. See Exhibit D.

From March 2004 through May 2005, the claimant went to the Back Pain Institute for a therapy called VAX-D, a form of traction therapy. The records of this institute indicate claimant reached a remarkable level of recovery. Following his release from the Back Pain Institute on May 3, 2005 claimant did not receive any medical treatment and was on no medications or work restrictions for back pain until after the primary injury in this case. See Exhibit D.

The claimant described his prior pain levels as less severe than the levels he has suffered since April 22, 2007, however he testified that his pain level was intolerable and that he had sought any means available to try to find relief. The claimant insisted however, that after his treatment at the Back Pain Institute from 2004 through 2005, he felt pain free for the first time. He stated he was able to work and function fully in every respect. He took no medications and saw no doctors for back or leg pain until after April 22, 2007. The claimant testified that he was very cautious about his activities and mechanical functioning and favored his back and avoided risks of strain to his back during that period.

The claimant testified that he had been treated for depression by his psychiatrist, Dr. Wang, before April 22, 2007. He felt his depression was related to his back pain levels from 2001 through 2005. He stated after his pain was resolved, his depression was lifted as well.

Apparently, the claimant developed avascular necrosis in both shoulders in 2006 due to the extensive Prednisone therapy received in 2001 to 2002. In 2006, Dr. Galatz, an orthopedist, performed bilateral shoulder hemiarthroplasties in 2006. Dr. Galatz released the claimant with permanent 40 pound lifting restrictions in March 2007. See Exhibit D.

The claimant testified that after the April 22, 2007 incident, his back pain and radiating leg pain has been unremitting. Certain days are better than others, but his pain levels are such that on an average day he must recline for 30-45 minutes at least a few times each day. He will

often have severe episodes where he is virtually bedridden for days. He continues to take significant narcotic pain medication, muscle relaxers, and sleep aids to cope with his daily existence. He often requires assistance from his wife in caring for his personal needs, such as using the restroom and dressing himself.

The claimant described a very sedentary existence. He is unable to do most chores around his house. Vacuuming and cleaning are difficult and avoided. He cuts his grass with a riding mower, but this will usually take days to complete, because he cannot sit long enough to complete the task in one day. He drives short distances before stopping to get out of his vehicle to move around. On trips to the grocer, he usually uses a motorized cart to get around. He performs minimal maintenance around his home. The claimant testified that he cannot walk, sit, or stand in one position for more than a few minutes. He cannot kneel or squat and rising from a seated position is difficult and painful. He frequently has trouble rising from his bed due to pain. The claimant described frequent episodes of severe or sharp jolts of pain causing him to collapse. In 2008, he collapsed and fell in his driveway after such an episode and sustained a compression fracture of a thoracic vertebra.

The claimant testified that he suffers from depression due to his pain and his inability to work and support his family. His marriage has come very close to divorce due to his emotional and physical state. He feels strongly that he is failing in his obligations to his family and wife.

With respect to his present physical and emotional state, the claimant indicated he was extremely frustrated and is desperate to find relief from his pain. He feels the medical care provided by the employer was aborted and he was abandoned to deal with this on his own. He testified that he chose not to pursue the surgery recommended by Dr. Kutz because there was no guarantee that it would improve his pain levels and there was a risk it could make it worse. The claimant does not feel he can work in a fulltime capacity and testified that he would be unable to serve even in a sedentary capacity such as a security guard at a building entrance, because he needs to lie down throughout the day to relieve his pain.

Dr. Volarich

On October 12, 2009, Dr. Volarich examined the claimant and diagnosed an aggravation lumbar syndrome including disc protrusion at L4-5 to the right and bulge at L5- S1 centrally with new bulge at L3-4 causing lumbar bilateral lower extremity radicular symptoms from the April 2007 accident. With respect to pre-existing conditions, Dr. Volarich diagnosed a central disc protrusion at L4-5 with bulging centrally at L5- S1 and EMG findings of chronic L5-S1 denervation. He also diagnosed right and left shoulder avascular necrosis status post hemiarthroplasty. Dr. Volarich opined that the April 2007 accident was the prevailing factor causing the aggravation of his pre-existing lumbar syndrome including a disc protrusion at L4-5 centrally and a bulge at L5- S1 as well as causing a new bulge at L3-4, all of which required conservative treatment. He opined that the claimant sustained a 35% permanent partial disability to the body as a whole related to the April 22, 2007 injury and had a 25% pre-existing disability to the lumbar spine and 65% pre-existing disability to each shoulder. He deferred to a psychiatrist for any disability relating to the claimant's depression. He also opined that the claimant was permanently and totally disabled as a result of the work injury of April 22, 2007 combined with his pre-existing medical conditions as well as his depression and that the claimant

was unable to engage in substantial gainful activity nor could he perform in an ongoing working capacity in the future. Dr. Volarich recommended ongoing medical care for the claimant's pain syndrome including medications and physical therapy and ongoing treatments at a pain clinic.

With respect to the claimant's April 2007 lumbar spine injury, Dr. Volarich proposed restrictions: avoid all bending, twisting, lifting, pushing, pulling, carrying, and climbing on an as needed basis, no handling weights greater than 15-20 pounds, no handling weight over his head or away from his body, or over long distances or uneven terrain, avoid remaining in fixed position for more than 30 minutes including sitting and standing, change positions frequently to maximize comfort and rest when needed including resting in a recumbent fashion.

Dr. Volarich testified that the claimant reported to him that he was pain free for two to three years before his work injury of April 22, 2007, and that the claimant was working with 40 pound weight restrictions due to his pre-existing right and left shoulder diagnosis. Dr. Volarich testified that all of the restrictions relate specifically to the April 22, 2007 injury alone and that claimant's need to lie down occasionally throughout the day relate specifically to the April 22, 2007 injury alone.

Dr. Stillings

Dr. Stillings, a board certified psychiatrist, performed a psychiatric examination of the claimant on April 12, 2010, and diagnosed a pre-existing adjustment disorder, a mood disorder with a major depressive-like episode and an anxiety disorder due to claimant's general medical condition and April 22, 2007 injury and a pain disorder associated with both psychological factors and a general medical condition. He assigned a GAF score of 50, indicating serious symptoms and impairment.

He opined that the April 22, 2007 work injury was the prevailing factor in causing the claimant to experience a mood disorder with an associated 20% psychiatric permanent partial disability to the body as a whole and an anxiety disorder with an associated 10% psychiatric permanent partial disability to the body as a whole and a pain disorder associated with a 10% psychiatric permanent partial disability to the body as a whole. He opined that the claimant was at psychiatric maximum medical improvement with respect to the April 22, 2007 injury and he opined that the April 22, 2007 work injury was the prevailing factor in the claimant's need for ongoing psychiatric treatment primarily to consist of medication management by a psychiatrist every one to two months on an open-ended basis. Finally, Dr. Stillings opined that the claimant was totally disabled from gainful employment.

Dr. Stillings opined that the claimant's pre-existing adjustment disorder would account for a 7.5% permanent partial disability and that his pre-existing personality disorder would provide another 10% permanent partial disability.

Dr. Coyle

Dr. Coyle, an orthopedic surgeon, examined the claimant on three occasions, August 1, 2007, August 7, 2007, and May 9, 2008. In his initial exam, Dr. Coyle made significant objective findings consistent with low back pain and sciatica. He reviewed an MRI which

confirmed a disc herniation at L5-S1 and degenerative disc disease at L3-4, L4-5, and L5-S1. Dr. Coyle also opined that the claimant had an acute L4-5 lumbar disc herniation and that the claimant's April 2007 accident was the prevailing factor in its cause. Dr. Coyle recommended conservative management of the claimant's condition and referred him back to Dr. Wayne for treatment. The claimant returned to Dr. Coyle in May 2008 after receiving recommendations from Dr. Kutz for extensive lumbar fusion surgery. Dr. Coyle testified that he opposed the surgery recommended by Dr. Kutz because it offered no real assurance that it would relieve the pain. Dr. Coyle concluded that a lot of the claimant's current pain levels were related to his pre-existing degenerative condition. He testified that the claimant reported to him that he was entirely pain free for two to three years prior to his April 22, 2007 injury. Dr. Coyle opined that the claimant was not in way exaggerating, malingering, or faking any of his complaints and that all of his subjective complaints were consistent with what he would expect from someone with the objective findings on the films and MRI.

Dr. Andrew Wayne

Dr. Wayne, employer's treating physiatrist, testified that he examined the claimant six times in 2007 and once in 2008. Dr. Wayne's initial diagnosis was a lumbar strain/sprain with degenerative changes at L3 through S1 and a disc protrusion at L4-5. He administered an epidural steroid injection in July 2007, but the claimant reported no relief from this procedure. Dr. Wayne then referred the claimant to Dr. Coyle for surgical consult. After Dr. Coyle returned the patient to him, Dr. Wayne attempted additional physical therapy, increased his pain medications, and prescribed traction therapy. Once again, none of these treatments resulted in the reduction of the claimant's pain. After receiving copies of the claimant's prior medical records from his back pain episode from 2001 through 2005, Dr. Wayne opined that the claimant was at maximum medical improvement on September 6, 2007, and advised the claimant to seek medical care on his own through his private health insurance in the future. In June 2008, Dr. Wayne examined the claimant and opined that the claimant suffered a 6% permanent partial disability related to the April 22, 2007 injury alone and placed no restrictions relative to that injury alone.

Dr. Wayne was aware of the claimant's overall condition but did not take into consideration any of these factors in his opinions. Dr. Wayne testified that the claimant was still having significant back problems at the time of his last examination, but he opined that these problems weren't related to the April 22, 2007 injury. Dr. Wayne also testified that even though he assigned 6% permanent partial disability to claimant's back injury of April 22, 2007, he would assign a higher number to the claimant's pre-existing back disabilities. Dr. Wayne also testified that in opining that the claimant could return to his normal work activities, he was only referring to the result from the April 22, 2007 injury and not claimant's overall condition including his psychiatric condition, his shoulder limitations, or his prior back disabilities.

James M. England, Jr.

On February 22, 2010, James England, a licensed vocational rehabilitation counselor, performed vocational testing, reviewed the claimant's entire medical history, and opined that the claimant was permanently and totally disabled from a vocational standpoint. He opined that based upon the medical restrictions combined with claimant's description of his day-to-day

functioning, the claimant would not be able to sustain even sedentary work on a consistent day-to-day basis. Mr. England also opined that if he was looking at the restrictions of Dr. Wayne alone, the claimant would be employable, but if he assumes Dr. Volarich's restrictions, the claimant is totally disabled from a vocational standpoint due to a combination of his medical problems. Mr. England opined that the restrictions applied by Dr. Volarich for the April 22, 2007 injury alone would be sufficient to find that the claimant is permanently and totally disabled. This is largely due to the claimant's need to lie down throughout the day to relieve pain.

Donna Kisslinger-Abram

Donna Kisslinger-Abram, a certified vocational rehabilitation counselor, opined that the claimant was employable in the open labor market and recited a number of sedentary jobs for which the claimant is employable. However in rendering her opinions Ms. Abram acknowledged the following factors which qualified her opinions.

1. The claimant's need to lie down five to six times per day would preclude his return to work.
2. The claimant can no longer perform his old job duties at Bodine Aluminum.
3. Whether the claimant could obtain and maintain a job is unclear.
4. The unchallenged psychiatric evidence clearly prevents the claimant from returning to work.
5. The restrictions placed by Dr. Volarich would also prevent a return to work.
6. The employers are reluctant to hire someone such as the claimant at a pay level below what he previously made, and the jobs that she identified are all below his pay level.
7. Employers are reluctant to hire someone not in the work force for the last three years.
8. The claimant would have to compete for jobs with a very large and younger group of people. His lack of a college degree alone is a large obstacle.
9. Unless he can get his pain levels under control, he is not able to return to work.

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)].

To receive an award of future medical benefits, a claimant need not show "conclusive evidence" of a need for future medical treatment. ABB Power T & D Co. v. Kempker, 236 S.W.3d 43, 52 (Mo.App. W.D. 2007). Instead, a claimant need only show a "reasonable probability" that, because of her work-related injury, future medical treatment will be necessary. Id. A claimant need not show evidence of the specific nature of the treatment required. Aldridge v. Southern Missouri Gas Co., 131 S.W.3d 876, 883 (Mo.App. S.D. 2004); Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W.3d 234, 237 (Mo.App. S.D. 2008).

"The worker's compensation act permits the allowance for the cost of future medical treatment in a permanent partial disability award." Sharp v. New Mac Electric Cooperative, 92 S.W.3d 351, 354 (Mo. App. S.D. 2003). There is no requirement for a claimant to prove specific medical treatment will be required in order for payment of future medical expenses to be made available. Id. What is required is proof there is a "reasonable probability" that additional medical care will be needed to treat the work-related injury. Id. In determining whether medical treatment is “reasonably required” to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 519 (Mo.App. W.D 2011). Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. Id. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. Id. Application of the prevailing factor test to determine whether medical treatment is required to treat a compensable injury is reversible error. Id. at 521.

Dr. Volarich recommended ongoing medical care for the claimant’s pain syndrome including medications and physical therapy and ongoing treatments at a pain clinic. However, he offered no forensic medical opinion whether those medical treatments “flowed” from the April 2007 accident. Dr. Wayne opined that the claimant “would benefit from continuation of his current medications, but I believe that the prevailing reason for him needing Vicodin would be to his chronic pre-existing lower back conditions as opposed to the injury” on the date of injury. See Dr. Wayne deposition, Exhibit 2.

Dr. Stillings opined that the claimant was at psychiatric maximum medical improvement with respect to the April 22, 2007 injury and he opined that the April 22, 2007 work injury was the prevailing factor in the claimant’s need for ongoing psychiatric treatment primarily to consist of medication management by a psychiatrist every one to two months on an open-ended basis.

Based on Dr. Stillings’ forensic medical opinion, the claimant is awarded such medical treatment as may reasonably be required to cure and relieve from the effects of the injury.

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.

Various physicians provided forensic medical opinions regarding the claimant's disabilities from the last injury alone. Dr. Volarich opined that the April 2007 accident was the prevailing factor causing the aggravation of his pre-existing lumbar syndrome including a disc protrusion at L4-5 centrally and a bulge at L5- S1 as well as causing a new bulge at L3-4, all of which required conservative treatment. He opined that the claimant sustained a 35% permanent partial disability to the body as a whole related to the April 22, 2007 injury and had a 25% pre-existing disability to the lumbar spine and 65% pre-existing disability to each shoulder. He deferred to a psychiatrist for any disability relating to the claimant's depression. He also opined that the claimant was permanently and totally disabled as a result of the work injury of April 22, 2007 combined with his pre-existing medical conditions as well as his depression and that the claimant was unable to engage in substantial gainful activity nor could he perform in an ongoing working capacity in the future. Dr. Wayne opined that the claimant suffered a 6% permanent partial disability related to the April 22, 2007 injury alone and placed no restrictions relative to that injury alone. He offered no forensic medical evidence regarding the claimant's pre-existing conditions.

Dr. Stillings opined that the April 22, 2007 work injury was the prevailing factor in causing the claimant to experience a mood disorder with an associated 20% psychiatric permanent partial disability, an anxiety disorder with an associated 10% psychiatric permanent partial disability, and a pain disorder associated with a 10% psychiatric permanent partial disability. Dr. Stillings opined that the claimant's pre-existing adjustment disorder would account for a 7.5% permanent partial disability and that his pre-existing personality disorder would provide another 10% permanent partial disability. Dr. Stillings opined that the claimant was totally disabled from gainful employment.

Looking at the claimant's employability, Dr. Volarich and Dr. Stillings opined that the claimant is permanently and totally disabled as did Mr. England. Mrs. Kisslinger-Abram opined that the claimant cannot return to his prior position with this employer, is not employable with the restrictions established by either Dr. Volarich or Dr. Stillings, and is not employable if he needs to lie down five to six times per day. The great weight of the evidence is that the claimant is unemployable in the open labor market.

The Second Injury Fund argued in its well written brief that the claimant had no pre-existing disabilities, because the claimant testified that his low back was pain free before the accident and the claimant had no restrictions or limitations regarding work or other major activities. In essence, the Second Injury Fund suggests that the claimant's pre-existing conditions were not disabling and did not constitute permanent partial disabilities. On the other hand, Dr. Volarich and Dr. Stillings opined that the claimant had substantial pre-existing permanent partial disabilities to his low back and shoulders as well as psychiatric disabilities. Dr. Volarich was the only forensic expert to focus on the combination of the claimant's pre-existing permanent partial disabilities with his permanent partial disabilities from the 2007 accident. He opined that the claimant was permanently and totally disabled as a result of the work injury of April 22, 2007

combined with his pre-existing medical conditions as well as his depression and that the claimant was unable to engage in substantial gainful activity nor could he perform in an ongoing working capacity in the future.

Dr. Wayne and Dr. Coyle opined that the April 2007 accident was a relatively minor sprain/strain to the claimant's low back, but was superimposed upon diffuse multi-level degenerative abnormalities in the lumbar spine. Dr. Volarich testified that the claimant was unable to return to work because of the combination of his prior injuries and the 04/22/07 work injury. See Dr. Volarich deposition, page 9. Mr. England testified that the claimant's inability to work from a vocational standpoint is from a combination of his medical problems. See England deposition, page 19. He also testified that the claimant's need to recline periodically during the day compels a conclusion that the claimant is not employable in the open labor market. He also testified that, assuming Dr. Volarich's forensic conclusions, the restrictions for the claimant's low back condition are "just due to the primary injury and if that's the case then that could totally disable him regardless of the shoulders and the other things." See England deposition, page 17. Donna Kisslinger-Abram concluded that it is doubtful that the claimant can obtain and sustain a new job, but that difficulty with returning to work "is a combination of his primary work history along with his other medical and psychological conditions based on the reported ongoing problems he delineated, his pre-existing physical restrictions, and level of functioning at the time of his work injury." See Kisslinger-Abram deposition, pages 59-60.

The essential question is whether the claimant's severe low back restrictions requiring him to recline periodically during the day for pain relief resulted solely from the last accident alone. Most of the focus is on the forensic medical evidence which the attorneys have construed to result in different conclusions. However, the weight of the evidence compels a conclusion that the claimant's low back condition resulted from a synergistic combination of the claimant's low back disability from the April 2007 accident and the substantial structural defects in his low back from the prior condition. The structural defect caused serious disabling features before the claimant received traction type treatment using VAX-D. However, the treatment left him pain free but not necessarily nondisabled. Dr. Volarich opined that the claimant had substantial pre-existing disability based on his medical history:

I asked Mr. Rook about difficulties he had with his back prior to 4/22/07 and he admitted that although he had some problems in the past, after using the decompression treatments his pain had resolved and he was markedly improved. He was very cautious however and limited himself to approximately 60 pounds maximum weight to lift and he was very careful to use proper body mechanics. He was quick to ask for help and in general had learned to slow down and take his time whereas previously he was always in a rush. He only would take an occasional Tylenol and did not miss time off work or have any physician imposed restrictions. See Dr. Volarich deposition, Exhibit 2, pages 6, 7.

This suggests a significant disability involving the claimant's lifting limitations. The prior medical records disclose a significant low back defect from the March 17, 2004 lumbar MRI that revealed disc space narrowing at L5-S1 with a central herniation and disc bulging with a disc osteophyte complex that narrowed the intervertebral foramen. At L4-5 there was a central herniation with a posterior bulge that caused a concave defect on the thecal sac. A sensory nerve

conduction test on March 29, 2004 showed a mild deficit at L4 to the left, a moderate deficit bilaterally at L5, a very severe deficit to the right at S-1. See Exhibit D.

Based on the evidence in the record, Dr. Volarich's evaluation of pre-existing permanent partial disabilities is accurate. Thus, the claimant is permanently and totally disabled as a result of the combination of his pre-existing disabilities and the primary low back injury. Accordingly, liability for permanent and total disability benefits rests with the Second Injury Fund. As of the date of maximum medical improvement, September 12, 2007, the Second Injury Fund is liable for permanent total disability benefits going forward for the period of the claimant's lifetime. However, the employer bears liability for the 40% permanent partial disability to the claimant's body as a whole.

SECOND INJURY FUND

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in [a]ll cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined..."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

Section 287.220.1, RSMo 1994, contains four distinct steps in calculating the compensation due an employee, and from what source:

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).

Based on the above findings, the claimant has proven his eligibility for Second Injury Fund benefits due to his lack of employability in the open labor market due to the combination of this permanent partial disability from his 2007 accident at work and his pre-existing permanent partial disabilities.

Made by: _____
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation