

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

Injury No. 09-068337

Employee: Troy Schroer
Employer: City of Fulton
Insurer: Missouri Intergovernmental Risk Management
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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 26, 2015. The award and decision of Administrative Law Judge Vicky Ruth, issued June 26, 2015, is attached and incorporated by this reference.

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 20th day of January 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Troy Schroer	Injury No. 09-068337
Dependents:	N/A	Before the
Employer:	City of Fulton	DIVISION OF WORKERS' COMPENSATION
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Missouri Intergovernmental Risk Management	Jefferson City, Missouri
Hearing Date:	May 19, 2015	Checked by: VR/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: September 1, 2009.
5. State location where accident occurred or occupational disease was contracted: Callaway County, Missouri.
6. Was above employee in the employ of above employer at the time of the 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: As claimant was climbing out of a manhole, he slipped and hit his head on the rim of the manhole.
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: body as a whole referable to the head.
14. Nature and extent of any permanent disability: permanent total disability due to the last injury alone.
15. Compensation paid to-date for temporary disability: \$9,469.83.
16. Value necessary medical aid paid to date by employer/insurer? \$22,544.16.
17. Value necessary medical aid not furnished by employer/insurer? (See Award).
18. Employee's average weekly wages: \$705.20.

- 19. Weekly compensation rate: \$422.97/\$470.13.
- 20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable from employer:

Permanent total disability benefits of \$470.13 from January 21, 2010, and ongoing for claimant's lifetime, subject to review and modification as provided by law.

- 22. Second Injury Fund liability: None.
- 23. Future medical awarded: Yes.

Said payments to begin immediately and to be payable and 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: Robert Hines.

Employee: Troy Schroer

Injury No. 09-068337

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Troy Schroer

Injury No. 09-068337

Dependents: N/A

Employer: City of Fulton

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Missouri Intergovernmental Risk Management

Hearing Date: May 19, 2015

PRELIMINARIES

On May 19, 2015, Troy Schroer (the claimant), the City of Fulton (the employer), Missouri Intergovernmental Risk Management (the insurer), and the Second Injury Fund appeared in Jefferson City, Missouri, for a final award hearing. Claimant was represented by attorney Robert Hines. The employer/insurer was represented by attorney Susan Turner. The Second Injury Fund was represented by attorney Maggie Ahrens. Claimant testified in person at the hearing and also by deposition. Dr. Eli Shuter, Dr. A. E. Daniel, Gary Weimholt, James England, and Dr. Wayne Stillings testified by deposition. The parties submitted briefs on or about June 12, 2015, and the record closed at that time.

STIPULATIONS

The parties stipulated to the following:

1. On or about September 1, 2009, Troy Schroer (the claimant) was an employee of the City of Fulton (the employer) when he sustained an injury by accident to his body as a whole referable to the head. This accident occurred while claimant was in the course and scope of his employment with employer.
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was insured by Missouri Intergovernmental Risk Management.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Callaway County is proper. For trial purposes, venue is also proper in Jefferson City, Missouri.
5. Notice is not an issue.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. Claimant's average weekly wage is \$705.20, yielding a weekly compensation rate of \$422.97 for permanent partial disability benefits and \$470.13 for permanent total disability benefits.
8. Medical aid was provided in the amount of \$22,544.16.

Employee: Troy Schroer

Injury No. 09-068337

9. Temporary total disability was provided in the amount of \$9,469.83.
10. If the employer/insurer is found liable for permanent total disability benefits, the employer/insurer and the employee agree that benefits should begin on January 21, 2010.

ISSUES

The parties agreed that the following issues were to be resolved in this proceeding:

1. Medical causation.
2. Whether claimant is permanently and totally disabled, or
3. Nature and extent of permanent partial disability.
4. Liability, if any, of the Second Injury Fund.
5. Unpaid medical bills.
6. Future medical treatment.

EXHIBITS

On behalf of Claimant, the following exhibits were entered into evidence without objection:

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|------------|---|
| Exhibit 1 | Deposition of Dr. Eli Shuter. |
| Exhibit 2 | <i>Curriculum Vitae</i> of Dr. Shuter. |
| Exhibit 3 | Medical report of Dr. Shuter (5/15/2011). |
| Exhibit 4 | Deposition of Dr. A. E. Daniel. |
| Exhibit 5 | <i>Curriculum Vitae</i> of Dr. Daniel. |
| Exhibit 6 | Report by Dr. Daniel of psychiatric evaluation of claimant. |
| Exhibit 7 | Deposition of Gary Weimholt. |
| Exhibit 8 | <i>Curriculum Vitae</i> of Gary Weimholt. |
| Exhibit 9 | Report by Gary Weimholt of Vocational Rehabilitation Assessment Evaluation of claimant. |
| Exhibit 10 | Claimant's Request for Records dated 2/23/10 (Callaway Community Hospital). |
| Exhibit 11 | Claimant's Request for Records dated 2/09/2015 (Mid-Missouri Neurology). |
| Exhibit 12 | Claimant's Request for Records dated 5/19/10 (Neurology, Inc). |
| Exhibit 13 | Medical records from Neurology, Inc. |
| Exhibit 14 | Medical records from Boone Hospital Center. |
| Exhibit 15 | Medical billings and records from Mid-Missouri Neurosurgery. |
| Exhibit 16 | Medical records from Fulton Family Health Associates. |
| Exhibit 17 | Medical records from Fulton Family Health Associates. |
| Exhibit 18 | Medical records from Boone Hospital Center. |
| Exhibit 19 | Claimant's Request for Records dated 2/27/12 (Barnes-Jewish West County Hospital). |
| Exhibit 20 | Unpaid medical bills. |

Employee: Troy Schroer

Injury No. 09-068337

On behalf of the employer/insurer, the following exhibits were admitted into the record without objection:

Exhibit A	Independent Medical Report of Dr. John Selhorst (12/10/2010).
Exhibit B	Deposition of James England.
Exhibit C	Deposition of Dr. Wayne Stillings.

On behalf of the Second Injury Fund, the following exhibit was admitted into evidence:

Exhibit I	Deposition of Troy Schroer, the claimant.
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Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence. All depositions were admitted subject to any objections contained therein. Unless noted otherwise, the objections are overruled.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. Claimant was born on November 16, 1972. At the time of the hearing, he was 42 years of age. Claimant lives in Fulton, Missouri, with his wife.
2. Claimant has a high school education.
3. Claimant worked for the City of Fulton (the employer or the City) for 19 years. His last position held was as a Senior Construction Inspector. This job involved inspecting all new construction for the City.
4. On September 1, 2009, claimant was inspecting sewer mains for a new fire station. In order to perform this task, claimant climbed down to the bottom of a manhole, approximately 14 feet, inspected it, and climbed back up the wall. He put one hand on the ladder to come out of the manhole and his feet were on the ladder. As he pulled himself out, the cuff of his pants caught on the ladder and caused him to slip and fall back and hit the back of his head on the metal ring at the back of the manhole. Claimant "saw a flash and stars," but was able to hold on to the ladder to avoid dropping 14 feet. He testified at trial that he believes he did not lose consciousness, because if he had done so, he would have fallen. He did not know how much time passed before he heard a friend yell for him. Claimant then climbed out of the manhole. He put the cover on the manhole and started to drive back to the City. The claimant became sick while driving and felt nauseated, had cold sweats, and his left side became numb. He called his boss and was told to go to the Callaway Community Hospital. He was admitted to the hospital and kept overnight; a CT scan of the brain was performed during that visit.
5. The next day claimant was transferred to Boone Hospital Center Intensive Care, where he

saw a neurosurgeon, Dr. Terry Ryan. Dr. Ryan diagnosed “closed head injury, history of cavernous malformation.” Dr. Ryan continued to treat claimant after he was released from Boone Hospital Center. Dr. Ryan took claimant off work after the injury on September 1, 2009. He treated him with Ultram and Topamax for his headaches. Dr. Ryan ordered CT scans of claimant’s head in September 2009 and October 2009. Dr. Ryan then referred claimant for speech therapy and physical therapy. Dr. Ryan also referred claimant to Dr. Allyn Sher, a neurologist, for his headaches.

6. Claimant saw Dr. Sher on December 7, 2009, for an evaluation of headache management.¹ The doctor’s impression was (1) post-concussive/post-traumatic syndrome, and (2) history of pontine cavernous malformation. The doctor put claimant on a trial of amitriptyline and Imitrex. At the visit on January 21, 2010, Dr. Sher indicated he would taper claimant off the amitriptyline. He also put him on a trial of Inderal LA 80 for headache prevention and noted that claimant should start a trial of Treximet and or should continue Imitrex for headaches.²
7. On February 17, 2010, Dr. Sher opined claimant was permanently and totally disabled due to the primary injury.³ Dr. Sher noted “when Mr. Schroer gets headaches, they are quite debilitating and along with the headaches comes nausea, vomiting, and double vision.”⁴
8. Dr. Ryan referred claimant to a pain specialist, but this treatment was denied by the worker’s compensation insurance carrier in February 2010; the employer/insurer provided no additional medical treatment after this time. Claimant continued to obtain his medications from his primary care doctor, Dr. Bruce Windsor.
9. In Dr. Ryan’s February 21, 2010 report, he indicated claimant was not at maximum medical improvement.
10. Dr. Ryan filled out a Medical Source Statement Physical and Medical Source Statement Mental in January 2011, stating Dr. Ryan’s opinion of claimant’s restrictions.⁵ Regarding claimant’s physical impairment, Dr. Ryan stated that claimant’s maximum capacity to lift is 25 pounds occasionally; stand 4 hours (1 hour continuously); sit 4 hours (2 hours continually); push/pull less than 26 pounds; no climbing or balancing; stooping, kneeling, crouching, or bending occasionally; seeing – limited; and that lying down for up to 30 minutes 1-3 times per day would be helpful to claimant. As to claimant’s mental impairment, Dr. Ryan stated that claimant had moderate impairment understanding and remembering instructions, making judgments on work related decisions because of often debilitating headaches, some memory difficulties, and double vision. Dr. Ryan opined that the blow to claimant’s head, combined with the pre-existing cavernous malformation, resulted in claimant’s above described problems. Dr. Ryan ordered an MRI of the brain that was done on September 2, 2009; that study showed a cavernous malformation of the brain stem that was unchanged from a prior MRI in 2005.

¹ Exh. 12.

² *Id.*

³ Exh. 13.

⁴ *Id.*

⁵ Exh. 11.

Employee: Troy Schroer

Injury No. 09-068337

11. On July 14, 2010, claimant visited Boone Hospital Center for treatment regarding a migraine. The total unpaid charges for this visit are \$1916.20.⁶ Claimant indicates the migraine was due to his work injury.
12. Claimant was terminated by the City of Fulton in March 2010. Claimant has not worked since the September 1, 2009 injury. Dr. Ryan had taken claimant off work after the September 1, 2009 injury.

Pre-existing Condition

13. Claimant's cavernous malformation was discovered in 2000 when he had left thumb pain that started going up the left arm. He was admitted to Boone Hospital Center and then treated by Dr. Charles Bondurant, a neurosurgeon who was also Dr. Ryan's partner. Claimant had headaches and left-sided numbness from 2000 to 2005 and had several MRIs during this period. After 2005 and before September 1, 2009, claimant had occasional headaches and some left-sided numbness. Claimant testified that before September 1, 2009, the cavernous malformation did not affect his ability to do his job, but he did miss some work because of it.

Current Complaints

14. Claimant testified that he has not worked since the September 1, 2009 work accident because of headaches, migraines, numbness on the left side, double vision, and memory problems. He now has constant numbness on the left side. The numbness is a tingling feeling, making it hard to grasp things. He has headaches every day and migraines about three times per week that can last up to 36 hours each. The migraines are behind his eyes and between his ears. When the migraines start, he is sensitive to light and sound and he gets double vision. When the migraines are severe, he has to lie in a dark room with cool air and a cold rag. He takes Advil for headaches and Imitrex for migraines. At their worst, the migraines cause pain at the level of 8 out of 10 (10 being the worst possible pain). With severe headaches, he becomes nonfunctional and does not associate with anyone. Claimant has visited the emergency room approximately 6 to 12 times in the last 5 years because of the migraine pain.
15. Claimant stated he does not read or watch TV or use a computer for very long because these activities trigger headaches. His dizziness and visual problems increase with the severity of the headaches. Claimant has trouble sleeping and lies down 3-4 times per day to help with the headaches. Claimant also described memory problems. For example, sometimes he will go to the refrigerator to get something and forget why he was there.

Testimony of Vicky Schroer

16. Claimant's wife, Vicky Schroer, testified on claimant's behalf. She indicated claimant lives with daily headaches that vary in intensity and duration and that he lies down several times per day. She indicated claimant complains of dizziness that gets worse as the headaches escalate. She testified claimant has memory issues, like leaving a burner on or water running, or even leaving a knife on the counter when there is a three-year-old grandchild around. At trial, she testified that claimant "is a completely different man," "not the person I

⁶ Exh. 20.

married, and that “he used to be the wittiest guy” she knew.

Testimony of Scott Farley

17. Scott Farley testified on behalf of the employer/insurer. Mr. Farley is a bail bondsman, a court process server, and he performs surveillance. Mr. Farley observed claimant participating in several activities, including crawling under the house, tossing rocks out from under the house, carrying boards, and carrying a five-gallon bucket. Once he saw claimant leading a horse.

Independent Medical Evaluation - Dr. Shuter

18. On May 15, 2011, claimant was examined by Dr. Eli Shuter, a neurologist, at the request of claimant’s attorney. Dr. Shuter stated that claimant continues to suffer from symptoms of headaches, left-sided numbness, impaired balance, speech difficulty, and poor memory. Claimant has constant moderate headaches with pressing pains behind his eyes and squeezing pain in his temples. The doctor noted that claimant’s headaches become severe with a sharp midline pain radiating from the back of his head to behind his eyes on exposure to bright light, using a computer for more than 15 minutes, watching television for more than 30 minutes, noise exposure, activity, or trying to help his children with homework. Approximately two or three times a week the headaches become unbearable, at which time claimant tries to go to a quiet, dark room and he takes Imitrex. The medication helps somewhat. The severe headaches persist for 6-36 hours and are associated with nausea, double vision, and vertigo. The doctor noted that claimant also continues to have constant tingling and loss of feeling in the entire left side of his body. Dr. Shuter also indicated that impairment of balance is constant with vertigo developing during a severe headache. The doctor indicated that claimant now experiences double vision only with a migraine.
19. Dr. Shuter opined that as a result of the September 1, 2009 injury, claimant has severe post-traumatic stress disorder and post-concussive syndrome with multiple symptoms of prominent depression and anxiety with somatoform disorders of severe headaches, left-sided parathesia, vertigo, impaired balance, dysphasia, and impairment of speech, recent memory and recall. Further, because of the severity of these symptoms, the doctor believes claimant is totally and permanently disabled. Dr. Shuter also opined that because of the cavernous hemangioma, there is pre-existing permanent partial disability of 10% of the person.

Independent Medical Evaluation – Dr. Selhorst

20. On December 9, 2010, claimant saw Dr. John Selhorst for an independent medical evaluation on behalf of the employer/insurer. Dr. Selhorst indicated that claimant complained of constant headaches since the blow to the head on September 1, 2009. Dr. Selhorst made the following notation:

Mr. Schroer had a non-concussive blow to the head with no loss of consciousness. His neurological exam is normal now as it was in 2009. He has a history of infrequent episodic headaches associated with photophobia and

phonophobia in his records since at least 2005. Further, his current headaches resemble migraines. For sure, the described event in September 2009 was frightening, especially in a patient with a vascular malformation of the brain. He has developed a number of variable symptomatic complaints since the blow to the head and they have progressed and magnified over time. These symptoms are possibly joined by some depression. The symptom complex is most consistent with post traumatic stress disorder.⁷

21. Dr. Selhorst recommended psychological counseling and psychiatric intervention. He also noted that the use of selective serotonin uptake inhibitors or some other anti-depressant may be beneficial.

Independent Medical Evaluation (Psychiatric) – Dr. Stillings

22. On May 31, 2012, claimant saw Dr. Wayne Stillings for a psychiatric independent medical evaluation. Dr. Stillings opined that the September 2009 accident was not the prevailing cause of any neuropsychiatric disorder and that the claimant did not need psychiatric treatment or medications related to that work accident. Dr. Stillings noted that claimant had a pre-existing personality disorder. The doctor recorded that claimant over-reported neurologic issues, memory symptoms, and low intelligence. According to Dr. Stillings, claimant's general style is to over report his subjective complaints.

23. Dr. Stillings opined that claimant had no traumatic brain injury or post-concussive syndrome.

Independent Medical Evaluation (Psychiatric) – Dr. A. E. Daniel

24. On July 5, and 15, 2013, claimant saw Dr. A. E. Daniel for a psychiatric evaluation at the request of claimant's attorney. Dr. Daniel examined claimant, reviewed various medical records, and administered the Minnesota Multiphasic Personality Inventory (MMPI-2). According to Dr. Daniel, the MMPI-2 suggested claimant has the following conditions: anxiety disorder, not otherwise specified; cognitive disorder, not otherwise specified; post-concussive disorder; traumatic brain injury and cavernous malformation of the pontine region of the brain.⁸ Dr. Daniel determined that the September 2009 work-related injury involving a blow to the head was significantly physically and psychologically traumatic for claimant because he has a pre-existing cavernous malformation of the brain. Dr. Daniel notes that although the malformation was clinically stable with only occasional headaches and left-sided paresthesia, the severe blow to claimant's head (in a confined space) was anxiety provoking. The doctor indicates claimant suffered post-concussive symptoms of dizziness, vision problems, and aggravation of headaches; claimant also experienced anxiety symptoms such as sleep disturbance, tension, inability to concentrate, and irritability. According to Dr. Daniel, over the last several years, "the combination of the post-concussive symptoms and anxiety symptoms have significantly impacted his cognitive functions such as sustained attention and short-term memory and recall."⁹

⁷ Exh. A.

⁸ Exh. 6.

⁹ *Id.*

25. Dr. Daniel opined as follows:

As indicated by his MMPI-2, because of his tendency to somatize the anxiety and health concerns, he is likely to experience these symptoms as more disabling to him. Somatization is a psychological defense mechanism which is unconsciously mediated. Therefore, his symptoms manifestations are not intentionally produced and as such do not meet the criteria for Malingering. It is important to note that prior to the injury on September 1, 2009, he was fully functional at work as well as in his personal life.

Therefore, it is my opinion with a reasonable degree of medical certainty that the symptom complex of Anxiety Disorder, Not Otherwise Specified and Cognitive Disorder, Not Otherwise Specified are directly linked to the injury of September 1, 2009. Although he does not meet the criteria for a diagnosis of Post-Traumatic Stress Disorder (PTSD) as per DSM criteria, the Anxiety Disorder if left untreated is likely to develop into PTST.

Mr. Schroer does not have any preexisting psychiatric disorder(s) prior to September 1, 2009.¹⁰

26. Dr. Daniel further opined that claimant is totally and permanently disabled due to the combined impact of the psychological and physical disabilities from the work injury.¹¹

27. Dr. Daniel also recommended additional treatment to cure and relieve the effects of the injury, including medication management and psychotherapy. He noted the medication should include anti-anxiety agents and/or an antidepressant agent. Dr. Daniel indicated claimant's medications should be prescribed and managed by a Board-certified psychiatrist, and that psychotherapy is recommended in order to strengthen claimant's coping skills and to prevent further deterioration of anxiety. The doctor also noted claimant "has significant limitations that include poor concentration, depressed mood, anxiety, and some post-traumatic symptoms, all of which would affect his persistence and pace."¹²

Vocational Evaluation – James England

28. On October 2, 2013, claimant was evaluated by vocational expert James England on behalf of the employer/insurer. Mr. England administered the Wide Range Achievement Test, revision three, to evaluate claimant's current academic functioning. Mr. England noted claimant's efforts were adequate on the reading test but that he gave up on the math test even though there was still time allowed. Mr. England believed claimant's scores would likely underestimate his true ability.

29. Based upon his evaluation, Mr. England determined that if one assumes the findings of Dr. Shuter, then claimant would be totally disabled because of the combination of his pre-

¹⁰ Exh. 6.

¹¹ Exhs. 6 and 4.

¹² Exh. 6, p. 9.

Employee: Troy Schroer

Injury No. 09-068337

existing problems and those associated with the primary injury. He also indicated, however, that if one assumes the findings of Dr. Selhorst and Dr. Stillings, then claimant does not appear to have objective evidence of many of the problems of which he is complaining. Mr. England opined that pursuant to the findings of Dr. Selhorst and Dr. Stillings, there would be a wide variety of work available to claimant and he would not be permanently and totally disabled.

Vocational Evaluation – Gary Weimholt

30. On September 26, 2014, claimant was examined by Gary Weimholt, a vocational expert, at the request of claimant's attorney. Mr. Weimholt evaluated claimant, reviewed various medical records, and administered the Wide Range Achievement Test IV for reading and math computation. The results of that test indicate claimant has a reading ability at the 11.7 grade level and the 32nd percentile. Claimant's math score was at the 6.1 grade level and the 13th percentile. Mr. Weimholt noted claimant has a high school education, specialized training and on-the-job training and experience as a construction inspector for the City of Fulton, Missouri. At 41 years of age, he was characterized as a younger individual.
31. Pursuant to his evaluation, Mr. Weimholt concluded claimant was not employable on the open competitive labor market because of his medical condition and symptoms dating from September 1, 2009.¹³

CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable law, I find the following:

Issue 1: Medical causation

Issue 2: Whether claimant is permanently and totally disabled or

Issue 3: Nature and extent of permanent partial disability

Issue 4: Second Injury Fund liability

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.¹⁴ Proof is made only by competent and substantial evidence, and may not rest on speculation.¹⁵ Medical causation not within lay understanding or experience requires expert medical evidence.¹⁶ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.¹⁷

¹³ Exh. 9,

¹⁴ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

¹⁵ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

¹⁶ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

¹⁷ *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹⁸ Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.¹⁹

The fact finder is encumbered with determining the credibility of witnesses.²⁰ It is free to disregard that testimony which it does not hold credible.²¹

The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."²²

An "injury" is defined to be "an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."²³ An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.²⁴

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.²⁵ The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.²⁶ A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.²⁷ It is the duty of the ALJ to weigh the medical evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.²⁸

Section 287.020.7, RSMo, provides that "total disability" is the inability to return to any employment and not merely the inability to return to the employment in which the employee was

¹⁸ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

¹⁹ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

²⁰ *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo.App. E.D. 2008).

²¹ *Id.* at 908.

²² Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.

²³ Section 287.020.3(1).

²⁴ Section 287.020.3(c).

²⁵ *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587, 594-595 (Mo.App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo.App. S.D. 1999).

²⁶ *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo.App. W.D. 2001).

²⁷ *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo.App. E.D. 1998).

²⁸ *Rana* at 626.

engaged at the time of the accident.²⁹ The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.³⁰ The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.³¹ When the claimant is disabled by a combination of the work-related event and pre-existing disabilities, the responsibility for benefits lies with the Second Injury Fund.³² If the last injury in and of itself renders a claimant permanently and totally disabled, the Second Injury Fund has no liability and the employer is responsible for the entire compensation.³³

Various factors have been considered by courts attempting to determine whether or not an employee is permanently totally disabled. It is not necessary that an injured employee be rendered, or remain, wholly or completely inactive, inert or helpless in order to be entitled to receive compensation for permanent total disability.³⁴ An employee's ability or inability to perform simple physical tasks such as sitting,³⁵ bending, twisting,³⁶ and walking³⁷ may prove that the employee is permanently totally disabled. An employee's age may also be taken into consideration.³⁸

In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as the result of the last compensable injury, and that the disability has combined with a prior permanent partial disability to result in total disability.³⁹ Where a pre-existing permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the disability resulting from the work-related injury.⁴⁰ In determining the extent of disability attributable to the employer and the Second Injury Fund, an administrative law judge must determine the extent of the compensable injury first.⁴¹ If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made.⁴² Therefore, it is necessary that the employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability.

²⁹ See also *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).

³⁰ *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

³¹ *Id.*

³² Section 287.200.1, RSMo.

³³ *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

³⁴ *Maddux v. Kansas City Public Service Co.*, 100 S.W.2d 535 (Mo. 1936); *Grgic v. P & G. Const.*, 904 S.W.2d 464 (Mo.App. E.D. 1995); *Julian v. Consumers Markets, Inc.*, 882 S.W.2d 274 (Mo.App. S.D. 1994); *Groce v. Pyle*, 315 S.W.2d 482 (Mo.App. 1958).

³⁵ *Brown v. Treasurer of Missouri*, 795 S.W.2d 479 (Mo.App. E.D. 1990).

³⁶ *Sprung v. Interior Const. Service*, 752 S.W.2d 354 (Mo.App. E.D. 1988).

³⁷ *Keener v. Wilcox Elec. Inc.*, 884 S.W.2d 744 (Mo.App. W.D. 1994).

³⁸ *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo.App. S.D. 1997); *Reves v. Kindell's Mercantile Co., Inc.* 793 S.W.2d 917 (Mo.App. S.D. 1990). See also *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919 (Mo.App. S.D. 1982).

³⁹ Section 287.220.1, RSMo.; *Brown* at 482; *Anderson* at 576.

⁴⁰ *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 366 (Mo.App. 1992).

⁴¹ *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-743 (Mo.App. 1996).

⁴² *Id.*

Employee: Troy Schroer

Injury No. 09-068337

On September 1, 2009, claimant sustained a compensable injury by accident. This injury occurred during the course and scope of his employment with the employer. Claimant contends that he is permanently and totally disabled due to this work accident alone. The employer/insurer argues claimant is not permanently and totally disabled.

Dr. Sher, one of claimant's treating doctors, determined that claimant is totally disabled based on the severe headaches that resulted from the 2009 work injury. Both Dr. Shuter and Dr. Daniel agree claimant is permanently and totally disabled based on the primary (work) injury alone. Vocational expert Gary Weimholt opined claimant would not be employable in the open labor market based on the primary injury.

Dr. Selhorst examined claimant on behalf of the employer/insurer. Dr. Selhorst does not give an opinion as to whether claimant is employable. Dr. Selhorst diagnosed claimant with post-traumatic stress disorder, but he did not clearly identify the cause of that PTSD. Dr. Stillings disagreed that claimant had PTSD, and he opined that claimant did not have *any* neurological or psychiatric disability from the primary injury.

After considering all of the evidence, I find that claimant is permanently and totally disabled. Further, I find claimant is permanently and totally disabled due to the last injury alone. The opinions of Dr. Shuter, Dr. Daniel, Dr. Sher, and Mr. Weimholt were credible and persuasive on this issue. In addition, claimant was a credible and convincing witness.

At trial, the parties agreed that if the employer/insurer is found liable for permanent total disability benefits, the benefits should begin on January 21, 2010. Consistent with this stipulation, I find that the liability of the employer/insurer for permanent total disability benefits begins on January 21, 2010. As the employer/insurer has been found liable for permanent total disability benefits, the Second Injury Fund bears no liability in this case.

Issue 5: Unpaid medical bills

Issue 6: Future medical treatment

Subsection 1 of RSMo Section 287.140 states, in pertinent part, as follows:

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.

As for future medical care, the employee need only show that he is likely to need additional treatment "as may reasonably be required . . . to cure and relieve . . . the effects of the injury . . . that flow from the accident [or disease]."⁴³ This has been interpreted to mean that an employee is entitled to compensation for care and treatment that gives comfort, i.e., relieves the employee's work-related injury, even though a cure or restoration to soundness is not possible, if the employee establishes a reasonable probability that he or she needs additional future medical

⁴³ *Sullivan v. Masters and Jackson Paving*, 35 S.W.2d 879, 888 (Mo.App. 2001).

Employee: Troy Schroer

Injury No. 09-068337

care.⁴⁴ “Probable” means founded on reason and experience that inclines the mind to believe but leaves room for doubt.⁴⁵ Claimant need not show evidence of the specific nature of the treatment required, but only that treatment is going to be required.⁴⁶

Claimant requests that the employer/insurer be directed to pay him \$1,916.20 for a medical bill for medical treatment with Boone Hospital Center on July 14, 2010. Claimant testified that on July 14, 2010, he went to Boone Hospital Center for a migraine, as he has done a number of times over the last five years or so. Claimant testified the migraine was from his work injury. The emergency room records noted “constant HA, worse today after difficult meeting with attorneys.”⁴⁷ The total unpaid charges for the emergency room visit are \$1,916.20, as shown in Exhibit 20. I find the employer/insurer is liable to claimant for the unpaid medical bill in the amount of \$1,916.20.

Claimant also requests he be awarded future medical care. Dr. Daniel opined claimant should be provided future medical care so he could undergo treatment for his anxiety, including medication management and cognitive retraining. Dr. Daniel recommended treatment with an antidepressant such as Zoloft or Wellbutrin. The doctor indicated the medication’s purpose is to help claimant deal with his anxiety and depression and to help him cope with his psychiatric problem. Dr. Daniel was persuasive on the issue of future medical care. Claimant has met his burden of proof regarding his need for additional medical treatment and the employer/insurer is ordered to provide future medical care to cure and relieve claimant from the effects of the work injury.

Summary

The issues and their resolution are as follows:

- Issue 1: Medical causation** – Claimant prevails on the medical causation issue.
- Issue 2: Whether claimant is permanently and totally disabled** - Yes, claimant is permanently and totally disabled based on the work injury alone. Thus, the employer/insurer is liable for permanent total disability benefits.
- Issue 3: Nature and extent of permanent partial disability** – N/A.
- Issue 4: Liability of the Second Injury Fund** – None.
- Issue 5: Unpaid medical bills** – The employer/insurer is liable to claimant for unpaid medical bills in the amount of \$1,916.20.
- Issue 6: Future medical treatment** – The employer/insurer is liable for future medical treatment to cure and relieve the claimant from the effects of the work injury.

Any pending objections not expressly ruled on in this Award are overruled.

⁴⁴ *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo.App. W.D. 2001); *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418 (Mo.App. W.D. 2000).

⁴⁵ *Rana* at 622, citing *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995).

⁴⁶ *Aldredge v. Southern Missouri Gas*, 131 S.W. 3rd 786 at 833 (Mo. App. D. D. 2004).

⁴⁷ Exh. 18.

Employee: Troy Schroer

Injury No. 09-068337

This Award is subject to a lien in the amount of 25% of the payments hereunder in favor of claimant's attorney, Robert Hines, for necessary legal services rendered to the claimant.

Made by: _____

Vicky Ruth

Administrative Law Judge

Division of Workers' Compensation