

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No.: 09-109134

Employee: James T. Travis, Jr.
Employer: Rexam (Settled)
Insurer: Hartford Insurance Company of the Midwest (Settled)
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. Having reviewed the evidence and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Second Injury Fund liability

Employee settled his claim against employer for back injuries resulting from a 2008 lifting event; he seeks herein permanent total disability benefits from the Second Injury Fund. In order to prove his entitlement to such an award, employee must establish that: (1) he suffered 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. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 RSMo requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Mihalevich Concrete Constr. v. Davidson*, 233 S.W.3d 747, 754 (Mo. App. 2007). If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Id.* "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We note and defer to the administrative law judge's finding that employee's testimony is not persuasive regarding the nature and extent of his work-related trauma. We write this supplemental opinion to make clear that even if we credited employee's evidence, the expert medical and vocational testimony he provided supports a finding that he is permanently and totally disabled as a result of the primary injury considered in isolation. While Dr. Volarich framed his ultimate opinion regarding permanent total disability as stemming from a "combination" of disabling conditions, Dr. Volarich also identified a number of restrictions as specifically stemming from the primary low back injury alone, including a need to rest in a recumbent fashion; both of employee's vocational experts, Ms. Gonzalez and Mr. England, opined that this restriction, considered alone, renders employee permanently and totally disabled.

Employee: James T. Travis, Jr.

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Where employee's testimony is deemed unpersuasive and his own experts have provided opinions suggesting that he is permanently and totally disabled as a result of the primary injury considered alone, there is simply no basis for an award of Second Injury Fund liability in this case.

Conclusion

We affirm and adopt the award of the administrative law judge with this supplemental opinion.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued August 2, 2013, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 25th day of July 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: James T. Travis, Jr. Injury No.: 09-109134
Dependents: N/A Before the
Employer: Rexam (Settled) **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Hartford Insurance Company of the Midwest (Settled) Jefferson City, Missouri
Hearing Date: June 5, 2013 Checked by: EJK/lsn

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: August 11, 2009 (alleged)
5. State location where accident occurred or occupational disease was contracted: Franklin 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? No
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 claimant, a machine operator assistant, suffered a low back L4-6 spondylosis and foraminal stenosis.
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: None
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$552.92
- 19. Weekly compensation rate: \$368.61
- 20. Method wages computation: By evidence submitted

COMPENSATION PAYABLE

- 21. Amount of compensation payable: Settled
- 22. Second Injury Fund liability: No None
- TOTAL: None
- 23. Future requirements awarded: None

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: James J. Sievers and Melanie Adams, Attorneys at Law

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James T. Travis, Jr.	Injury No.: 09-109134
Dependents:	N/A	Before the
Employer:	Rexam (Settled)	Division of Workers' Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Hartford Insurance Company of the Midwest (Settled)	Jefferson City, Missouri Checked by: EJK/lsn

This workers' compensation case requires a determination of Second Injury Fund liability arising out of a work related injury in which the claimant, a machine operator assistant, suffered a low back L4-6 spondylosis and foraminal stenosis. The issues for determination were: (1) Medical Causation, (2) Rate, (3) Date of maximum medical improvement, and (4) Second Injury Fund liability. The evidence compels an award for the defense.

At the hearing, the claimant testified in person and offered depositions from David T. Volarich, D.O., James M. England, and Delores E. Gonzalez, and medical records from Peter K. Yoon, M.D., and Jennifer L. Scheer, M.D. The defense offered medical records from Jennifer L. Scheer, M.D., and St. Johns Mercy Medical Center.

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 August 11, 2009, this forty-nine year old claimant, a machine operator assistant, had an L4-5 decompression and bilateral facetectomy, posterior lumbar interbody fusion, and autologous bone graft with pedicle screw fixation at L4-5 and ceased working for this employer. See Exhibits D, IV. The claimant had a long history of low back pain. The claimant testified that sometime in June 2008, he felt a pop in his low back and immediate pain in his right side while lifting a box overhead at work. He testified that his accident was witnessed by two employees, who helped him back to his feet following the injury. The claimant did not offer testimony or statements from either of the two witnesses to which he made reference. The claimant testified that he declined immediate medical attention because according to his employer's point policy, had he left work, he would have acquired enough points that he would be fired.

On June 24, 2008, the claimant went to Dr. Scheer, his primary care physician, for back pain in the lower back without radiation. See Exhibit II.

James T. Travis complains today of back pain. The pain is located in the left lower back without radiation. Symptoms have been present for 1 week and have been worsening since onset. He denies an acute injury. He denies overuse, but

doing more swimming. Pain is described as intermittent and sharp and stabbing. Severity of pain is moderate. Aggravating factors: standing, walking, bending forwards, bending sideways, sitting too long. Alleviating factors: None. ... Previous lower back problems: Pain like this about once or twice a year. Past evaluation showed muscle problem. See Exhibit II.

Dr. Scheer recommended rest and Ibuprofen and prepared an off work note. See Exhibit II. On November 3, 2008, the claimant returned to Dr. Scheer with right shoulder pain that had been present for 2 years, but had been waxing and waning since onset. See Exhibit II. The claimant denied acute injury, change in activity or overuse. Examination of shoulder was largely normal. See Exhibit II. On November 5, 2008, an MRI of the neck and shoulder revealed cervical spine degenerative changes with moderate canal stenosis. See Exhibit II.

The claimant returned to Dr. Scheer in November 2008 with severe nonradiating shoulder pain that had been present for two years, waxing and waning since onset, and "comes on for no apparent reason." See Exhibits E, II. Dr. Scheer referred the claimant to Dr. Yoon for a neurosurgery consult for the claimant's neck and shoulder pain. See Exhibit II. On January 29, 2009 an MRI of the lumbar spine revealed sacralization at L5 on S1 and a moderate diffuse bulge at L4-5 with a central herniation, annular fissure, and canal stenosis. The EMG showed a mild sensory neuronal right carpal tunnel syndrome.

On December 18, 2008, Dr. Yoon examined the claimant for neck and lower back pain radiating down his right leg into the bottom of the foot. Physical examination revealed some numbness in the L5-S1 distribution. On January 29, 2009, a lumbar spine MRI revealed sacralization at L5 and S1 and a moderate diffuse bulge at L4-5 with a central herniation, annular fissure, and canal stenosis. See Exhibit.III. Following three series of epidural injections which provided limited relief, Dr. Yoon recommended surgery. On August 11, 2009, Dr. Yoon performed a posterior lumbar discectomy and fusion at L4-5. In his admission history, Dr. Yoon reported that symptoms had been present for two years with no mention of a work related occurrence. See Exhibit.III.

The claimant returned to Dr. Scheer on November 19, 2009, and reported that he had not progressed well after the surgery. See Exhibit II. The claimant reported daily low back pain and daily neck pain for which he consumed Percocet and Vicodin. Dr. Scheer concluded that the claimant had not gotten good relief after his surgery and recommends physical therapy. She noted that the claimant was taking both Percocet and Vicodin but at different times. See Exhibit II.

On February 24, 2010, a repeat MRI of the lumbar spine revealed areas of soft tissue density at L4-L5 and slightly increased canal stenosis at the L2-L3 level. See Exhibit III. On March 4, 2010, Dr. Moore administered a right L4-L5 transforaminal epidural steroid injections and a right sacroiliac joint steroid injection and discussed placement of a spinal cord stimulator. See Exhibit III. The claimant only experienced temporary relief following the injections, and was diagnosed with sacroilitis, lumbar radiculopathy, lumbar degenerative disc disease, lumbar post laminectomy syndrome, and lumbago.

Pre-existing Conditions

The claimant testified that prior to 2008 he had stiffness, aches, and pain in his back at work. He also testified that he had to be very careful with lifting and reaching because of having been slowed down somewhat by previous strain injuries. See Exhibit A, Exhibit B, Page 5. The claimant testified that he continues to have low back pain and numbness which shoots down to the right leg to the knee and has had to modify many of his daily activities. The claimant testified that bending aggravates his symptoms. The claimant testified that since the back surgery he has gained weight and feels lopsided when he walks.

The claimant also sustained an injury to his right shoulder in 1989 and received injections, physical therapy, and medication. He also strained his right shoulder in 2001 when he was moving a 55 gallon drum. He was treated with muscle relaxers. The claimant testified that he continues to have right shoulder pain and that he modified many of his daily work activities because he had difficulty using it overhead. He testified that the right shoulder felt weaker when using it away from his body.

David T. Volarich, D.O.

Dr. Volarich examined the claimant on May 12, 2010, and January 26, 2011, and reviewed numerous records including x-rays, operative reports, and treatment records. With respect to the 2008 injury, Dr. Volarich diagnosed a disc herniation at L4-5 that required posterior lumbar fusion with instrumentation, development of epidural fibrosis requiring pain management and ongoing laminectomy syndrome causing low back pain, lost motion, and ongoing right lower radicular symptoms. As a result of the 2008 accident, Dr. Volarich opined that the claimant suffered a 50% permanent partial disability of the lumbosacral spine. He also opined that the claimant suffered a 15% pre-existing permanent partial disability of the lumbosacral spine due to chronic lumbar syndrome, and a 20% pre-existing permanent partial disability of the right shoulder due to the impingement and rotator cuff tendonitis. Dr. Volarich also opined that the claimant was able to participate in most activities of self care and may be able to perform some activities on a limited basis with the following restrictions: (1) avoid all repetitive bending, twisting, lifting, pushing, pulling carrying and other similar tasks (2) not handle any weight greater than 15-20 pounds, on occasional basis (3) not handle weight overhead or away from his body and not carry weight over long distances or uneven terrain (4) avoid remaining in fixed position for more than 20 minutes at a time (5) frequent change of positions with rest as needed (6) pursue appropriate stretching, strengthening and range of motion exercise program in addition to non-impact aerobic conditioning such as walking, biking or swimming to tolerance daily.

Dr. Volarich opined that the claimant was permanently and totally disabled as a direct result to the June 2008 work injury in combination with his pre-existing medical conditions and psychiatric disorders. See Dr. Volarich deposition, Exhibits C and D. Based on his findings and conclusions, Dr. Volarich opined that if vocational assessment was unable to identify a job then the claimant is permanently and totally disabled as a result of the June 2008 work related injury in combination with pre-existing medical conditions including his psychiatric disorders.

Dr. Volarich testified that prior to the June 2008 work related injury; the claimant was under no restrictions for his back or shoulders. See Dr. Volarich deposition, page 14. Dr. Volarich testified he reviewed no medical treatment records for the shoulder that were dated before June 2008. See Dr. Volarich deposition, page 19. He further conceded that the claimant did not tell him he was depressed or anxious, nor did he interview the claimant regarding any pre-existing depression, or review any medical records for treatment of depression See Dr. Volarich deposition, pages 15, 16, 21.

Dr. Volarich agreed that the claimant was performing all of his job activities without restrictions leading up to June 2008, and that he was under no self-imposed or self-imposed restrictions. He opined that the claimant had no disc herniations or radiculopathy; and that he had no problem with his neck or right hand prior to June 2008. See Dr. Volarich deposition, page 20. Regarding the restrictions he placed on the claimant, Dr. Volarich opined that all six of his restrictions are due to the June 2008 injury by itself.

Robert J. Bernardi, M.D.

Dr. Bernardi reviewed the claimant's medical records and examined the claimant on July 19, 2011. The claimant denied any prior history or medical treatment of neck/low back pain. The claimant reported that in late 2008 he was working when he heard a loud pop in his back and reported his symptoms to the lead man, who had since been fired, and a co-worker who witnessed the incident, had also since been fired. Dr. Bernardi diagnosed: 1) multilevel cervical degenerative disc disease, 2) congenital/degenerative cervical stenosis, 3) neck and right arm numbness, 4) lumbosacral segmentation abnormality, 5) L4-5 degenerative disc/facet disease, 6) L4-5 stenosis, 7) status L4-5 decompression and fusion, and 8) low back pain and right leg numbness of uncertain etiology. The claimant complained of poor sleep, inability to participate in activities like jogging, swimming, or playing with his children. The claimant reported that he could not go back to work. He relayed getting dizzy, and having numb hands and feet if he stood for any length of time.

Dr. Bernardi opined that neither the repetitive nature of the work nor a single incident were responsible for the degenerative disease in the claimant's cervical and lumbar spine. Dr. Bernardi opined that the medical records did not support a causal relationship between his symptoms and his employment. Dr. Bernardi testified that the claimant's records between June 23, 2008 and February 24, 2010 make no mention of any injury occurring at work. Dr. Bernardi opined that the claimant's employment was not the prevailing factor in his spinal symptoms and that the claimant had a 15% non-work related permanent partial disability. Dr. Bernardi testified that the imaging studies did not show any abnormalities that he considered acute or post-traumatic. See Dr. Bernardi deposition, page 12.

Dr. Bernardi testified that he did not review any witness statements of any witnesses to the claimant's injury. See Dr. Bernardi deposition, page 10. He testified that if the claimant was lifting a box and felt a pop in his back and immediate onset of pain that radiated into his right leg that could have caused permanent partial disability. See Dr. Bernardi deposition, page 11.

Delores Gonzalez

On March 14, 2011, Delores Gonzalez, a licensed vocational rehabilitation counselor, performed a vocational rehabilitation evaluation and opined that the claimant's impairments have severely compromised his ability to either return to his past relevant jobs or to perform any job on a sustained basis, that the claimant is not a candidate for vocational rehabilitation, and that the claimant is not currently capable of competitive work for which there is a reasonably stable job market as a result of his primary injury in combination with his pre-existing mental and physical disabilities/conditions. See Gonzalez deposition, Exhibit 2, page 14.

Ms. Gonzalez opined the claimant needs to be able to be in an upright position and on task in order to work competitively, and that the restriction from Dr. Volarich that the claimant has to lay down would render someone unemployable in the open labor market. See Gonzalez deposition, page 9. Ms. Gonzalez opined that if Dr. Volarich testified that that restriction (of having to lie down) arose from the claimant's work injury alone, that work injury by itself would render the claimant unemployable in the open labor market. See Gonzalez deposition, page 10.

James England

On July 11, 2011, Mr. England performed a vocational rehabilitation evaluation and reviewed medical records, obtained a family and social background, educational background, vocational history, and also performed a Wide Range Achievement Test, Revision Three. Mr. England opined that the claimant would not be able to sustain any type of work activity considering Dr. Volarich's restrictions along with the claimant's presentation and his description of his day-to-day functioning and that he is more likely to remain totally disabled from a vocational standpoint. See England deposition, Exhibit 2, page 10.

In his July 11, 2011 report, Mr. England opined that considering Dr. Volarich's restrictions along with the claimant's presentation and description of typical day-to-day functioning he did not see how the claimant could sustain any type of work activity. Mr. England noted that the claimant's presentation alone was that of an individual who was tired, depressed, and physically uncomfortable which would be problematic in a perspective job interview. More important was the fact that the claimant was not resting well at night, had difficulty staying focused during the day as a result, and needed to lie down during the day in order to deal with pain. Mr. England could not see how anybody with the claimant's problems could sustain a regular, full-time job even at sedentary to light level. He believed claimant was more likely to remain totally disabled from a vocational standpoint.

Mr. England testified that the claimant had no problems performing his job right before the injury. See England deposition, page 10. He further testified that there was no evidence the claimant was allowed to lie down during his workday in performing his job duties prior to the work injury. See England deposition, page 10. Mr. England testified that if Dr. Volarich testified that all of his restrictions were due to the claimant's primary work injury; that injury alone would render the claimant unemployable in the open labor market. See England deposition, page 11. Mr. England testified that there was no indication the claimant had to lay down prior to his injury because of the pain in his back, and if Dr. Volarich included restrictions in his report the claimant should be allowed to change positions frequently to maximize comfort

and rest when needed, included in a recumbent fashion, and that restriction was only from the last jury, the last injury alone would render him unemployable in the open labor market. See England deposition, page 13.

RATE AND MMI

The claimant testified his typical pay period included a two week work schedule that included forty-eight hours during one week and sixty hours during the other week. He testified that prior to his injury his wages were about twelve dollars an hour.

The claimant's average weekly wage was \$552.92 based on a 44-hour work week and his hourly rate of \$12.02 per hour. See Exhibit IV. The claimant testified that he received time and a half for all hours over 40 hours per week.

40 x \$12.02 = \$480.80

4 x \$18.03 = \$ 72.12

Average Weekly Wage \$552.92

The rate is therefore \$368.61.

Dr. Volarich opined that the claimant attained maximum medical improvement during his January 26, 2011, examination. There is no contrary or other evidence regarding this issue. Therefore, the claimant attained maximum medical improvement as of January 26, 2011.

MEDICAL CAUSATION

"The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job." Royal v. Advantica Rest. Group, Inc., 194 S.W.3d 371, 376 (Mo.App.W.D.2006) (citations and quotations omitted). "Determinations with regard to causation and work relatedness are questions of fact to be ruled upon by the Commission." Id. (citing Bloss v. Plastic Enters., 32 S.W.3d 666, 671 (Mo.App.W.D.2000)). Under the statute, "[a]n 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. § 287.020.2. On the other hand, "[a]n injury is not compensable because work was a triggering or precipitating factor." Id. Awards for injuries 'triggered' or 'precipitated' by work are nonetheless proper *if* the employee shows the work is the prevailing factor in the cause of the injury. Thus, in determining whether a given injury is compensable, a work related accident can be both a triggering event and the prevailing factor."

"[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence." Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, "logic and common sense," or an ALJ's personal views of what is "unnatural," cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) ("The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for

the uncontradicted testimony of a qualified medical expert.”). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

The claimant bears the burden of proving that not only did an accident occur, but it resulted in injury to him. Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman, supra. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Id. Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra. Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995) Silman, supra at 175, 176. This requires claimant's medical expert to establish the probability claimant's injuries were caused by the work accident. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Id.

The claimant testified that in June 2008 he was stacking skids at work when he heard a pop in his back, felt back pain, and went to Dr. Scheer, his primary care physician. Based on this history, Dr. Volarich examined the claimant and opined that the claimant's occurrence at work was the prevailing factor causing his low back condition. In contrast, Dr. Bernardi, a spine surgeon, examined the claimant and opined that neither the repetitive nature of the claimant's work nor a single incident was responsible for the degenerative disease seen in his cervical and lumbar spine. Dr. Bernardi opined that the claimant's cervical spinal stenosis is largely due to genetic factors. Regarding Claimant's L4-5 spinal stenosis, Dr. Bernardi opined that along with other genetic factors the claimant's congenital lumbosacral segmentation abnormality contributed to the degenerative and facet disease seen at L4-5 on his MRI scans. Regarding the etiology of the claimant's L4-5 spinal stenosis, Dr. Bernardi questioned whether it was symptomatic as individuals with this condition generally describe a paucity of back pain, instead they describe buttock pain. He opined, "At the very most, the incident that was described – and you have to assume that the surgery performed by Dr. Yoon was done to address the degenerative disc disease and stenosis at L4-5 – that work incident would not represent the prevailing factor in causing those symptoms since all of that was pre-existing. The work incident would have aggravated his pre-existing problems, but it wouldn't have been the prevailing factor in causing his symptoms." See Dr. Bernardi deposition, pages 12, 13.

The difficulty in this case is that the medical histories reflected in the claimant's medical records are somewhat inconsistent with the claimant's testimony. For instance, Dr. Scheer examined the claimant on June 23, 2008, but her medical history provided by the claimant contains no mention of an injury at work. See Exhibit II. While Dr. Scheer took a history of pain in low back present for one week, her medical records indicate that the claimant denied that the symptoms were the result of an injury or overuse. See Exhibit II. On November 3, 2008, Dr.

Scheer examined the claimant for right shoulder pain that had been present for two years and had been waxing and waning ever since. See Exhibit II. Again, the claimant denied any recent injury and overuse. See Exhibit II. On December 18, 2008, Dr. Yoon examined the claimant and reflected a medical history of low back pain radiating into his right leg with no mention of the symptoms being work related. See Exhibit III. On August 11, 2009, the admission notes before the claimant's back surgery reflect "low back pain for two years" with no mention of any work related accident. See Exhibit III. Dr. Yoon's post operative diagnosis was L4-6 spondylosis and foraminal stenosis. See Exhibit III.

The claimant received long term disability through an employer provided disability program. The employer's statement claim form describes the claimant going out on leave on August 10, 2009, for back surgery. The employer checked the claim as due to "injury." In the box asking whether the condition was work-related the employer checked "no." See Exhibit IV.

The claimant's legal counsel asserted that the alleged occurrence had two witnesses, but the claimant elected not to offer testimony from the witnesses or a deposition from the witnesses or even statements from witnesses that were otherwise not available. See Dr. Bernardi deposition, page 10.

In considering the relative weight of the two forensic medical experts, Dr. Bernardi appears to have the greater expertise based on his qualification as a spine surgeon. In addition, his conclusions are consistent with the medical records from the claimant's treating physicians and surgeons regarding the relationship between the alleged occurrence and the claimant's medical condition and disability.

While the claimant's testimony and that of his forensic expert present a prima facie case, the greater weight of the evidence including the inconsistency with the medical records from the treating physicians, the degenerative nature of the claimant's low back condition, and the weight of the defense forensic medical expert compel a finding for the defense on this issue.

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).

The test for permanent, total disability is the worker's ability to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. Id. at 48.

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

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

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 pre-existing 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).

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).

Based on the entire record, the claimant is unemployable in the labor market due to the progression of his degenerative L4-6 spondylosis and foraminal stenosis. Dr. Volarich’s expertise as a disability evaluator appears to be substantially greater than that of Dr. Bernardi and therefore carries more weight than that of Dr. Bernardi on the issue of the extent of the claimant’s disability. In addition, his conclusion on this issue is consistent with the findings of the forensic vocational experts. Therefore, the claimant is permanently and totally disabled as a result of his degenerative L4-6 spondylosis and foraminal stenosis. However, since the claimant’s work on August 11, 2009, was not the substantial factor or the primary factor causing his L4-6 spondylosis and foraminal stenosis or the disability resulting from this medical condition. In fact, the claimant has his surgical procedure from Dr. Yoon to repair this condition on the morning of August 11, 2009, the date of injury alleged in the claimant’s claim for compensation. See Exhibit III.

Therefore, the Second Injury Fund bears no liability for the claimant’s permanent and total disability.

CONCLUSION

Based on the entire record, the Second Injury Fund claim is denied.

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