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

Employee: Kenneth Weber

Employer: Kraft Foods, Inc. (settled)

Insurer: Indemnity Insurance Company of North America (settled)

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

Injury No.: 08-124473

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 (ALJ). We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The ALJ heard this matter on November 9, 2016. The parties stipulated as follows:

- The Missouri Division of Workers' Compensation had jurisdiction over this case;
- Venue for the evidentiary hearing was proper in Boone County;
- The claim for compensation was filed within the time allowed by the statute of limitations, § 287.430, RSMo;
- Both employer and employee were covered under the Missouri Workers' Compensation Law;
- Employee's average weekly wage is $677.90, resulting in compensation rates of $451.93/$404.66;
- Employee sustained an accident or occupational disease arising out of and in the course of his employment with Kraft Foods, Inc., on or about October 26, 2008;
- The notice requirement of § 287.420 was not a bar to employee's claim for compensation herein.

A hearing was held to determine:

- Whether the work-related accident or occupational disease of October 26, 2008, was the cause of any or all of the injuries and/or conditions alleged by the employee.
- Liability, if any, of the Second Injury Fund for permanent partial disability (PPD) benefits or permanent total disability (PTD) benefits.
Employee: Kenneth Weber

The ALJ found as follows:

1. The work accident of October 26, 2008, was the prevailing factor in the cause of injury to the employee’s lumbar spine.
2. The December 30, 2008, surgery consisting of discectomy and fusion with instrumentation at L4-5 was reasonably required to cure and relieve employee of the effects of the injuries sustained in the work accident of October 26, 2008.
3. The November 3, 2009, surgery consisting of anterior cervical discectomy and fusion from C3 to T1 was reasonably required to cure and relieve employee of the effects of the injuries sustained in the work accident of October 26, 2008.
4. As a direct result of the injuries employee sustained in the work accident of October 26, 2008, employee has sustained PPD of 15% of the body as a whole rated at the lumbar spine and additional PPD of 15% of the body as a whole rated at the cervical spine, resulting in 120 weeks of PPD.
5. As of the time the last injury was sustained, employee had a preexisting PPD of the lumbar spine which disability meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 22% PPD of the body as a whole (88 weeks).
6. As of the time the last injury was sustained, employee had a preexisting PPD of the right elbow which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 10% PPD of the right elbow (21 weeks).
7. Employer terminated employee’s employment after the December 30, 2008, back surgery.
8. The test for PTD is whether the employee can compete in the open labor market.
9. Despite his significant disabilities, employee has been working five days a week, four hours a day, at a car wash establishment, for the past five years.
10. Employment in the open labor market can include part-time work.
11. Employee obtained his position at the car wash by applying and interviewing for the job.
12. Employee has proven his ability to compete in the open labor market.
13. Employee is not permanently and totally disabled.
14. The credible evidence establishes that the last injury, combined with the preexisting permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. A 20% loading factor is required to compensate employee for the synergistic combination of these disabilities. The Second Injury Fund liability for PPD benefits is thus calculated as follows: 120 weeks for the last injury + 109 weeks for preexisting disabilities = 229 weeks X 20% load = 45.8 weeks. 45.8 weeks times $404.66 equals $18,533.43.
Employee: Kenneth Weber

Employee filed an application for review alleging the ALJ erred in concluding that employee's informal, accommodated part-time work constituted the ability to compete in the open labor market and therefore erred in denying claimant PTD benefits.

For the reasons stated below, we modify the award of the ALJ referable to the issue of nature and extent of the employee's permanent disability and liability of the Second Injury Fund. In all other respects, we affirm and adopt the award and decision of the ALJ.

Discussion

Second Injury Fund Liability

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

Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a “hindrance or obstacle to employment”:

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

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

Section 287.220 requires us to first determine the compensation liability of the employer for the last injury, considered alone. Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 248 (Mo. 2003). The ALJ found that employee sustained PPD of 15% of the body as a whole rated at the lumbar spine and additional PPD of 15% of the body as a whole rated at the cervical spine as a direct result of the injuries he sustained in the work accident of October 26, 2008. We affirm these findings and agree with the ALJ's conclusion that employee sustained only a permanent partial disability as a result of the work injury. 1 We must next determine the nature and extent of the employee's disability as a result of the effects of his work injury in combination with his preexisting disabilities.

1 On August 8, 2013, employee agreed to a compromise lump sum settlement of his claim against the employer/insurer related to his October 26, 2008, injury. Claimant's Exhibit 15, Tr. 483-489. The settlement provided for payment of $20,233.00, based on permanent partial disability of approximately 12.5% of the body as a whole and a compromise of all other disputes. Employee's settlement with employer/insurer prior to hearing does not preclude the ALJ or the Commission from independently determining the disability attributable to the employee's work-related injury for purposes of resolving his remaining claim against the Second Injury Fund.
The ALJ found that at the time of the primary injury employee had the following preexisting disabilities:

1. PPD of the lumbar spine of 22% of the body as a whole (88 weeks)
2. PPD of the right elbow of 10% of the right elbow (21 weeks)

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


We agree with the ALJ’s conclusion that employee’s preexisting disabilities were serious enough to constitute a hindrance or obstacle to employment and that each of employee’s preexisting disabling conditions combined with his work injury to result in worse disability than would have resulted in the absence of the preexisting conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620. (Mo. App. 1995). We disagree with the ALJ’s conclusion that the employee has proven his ability to compete in the open labor market and is therefore *not* permanently and totally disabled.

As of the date of this award, the employee is sixty-five years of age. His wife of forty-four years accompanied him to the hearing. The ALJ described employee as “very pleasant.” Employee has trouble with comprehension and retention. He believes his low birth weight of two pounds and eight ounces adversely affected his development. He was held back in school and attended special education classes. Employee recalls being diagnosed with attention deficit disorder as a child. He graduated from high school in 1971. For the next thirty-seven years he worked almost exclusively in jobs that required the performance of heavy labor. His work for employer involved lifting and loading fifty pound bags of meat cure for seven hours with no assistance and no breaks. Employee tried unsuccessfully to pass the test to become a commercial driver. He was unable to obtain higher than a grade “C” license from the state relating to work in the field of water treatment. He was forced to drop out of a course in radio and television repair because he fell behind in his lessons. Employee has no computer skills. When the employee attempted to return to work after his 2008 work injury, his employer told him that due to his medical restrictions “I couldn’t work there any longer, that they were afraid I would get paralyzed.” *Transcript*, 25. As a result of disability attributable to his multiple injuries, the employee cannot do any physical work. He is unable to do heavy lifting. He relies on a friend to perform needed home repairs. He is no longer able to work in a garden. In 2009, after employer’s discharge, the employee successfully applied for social security disability.
In 2010, the employee learned about a part-time job at a local car wash through his grandson. The car wash owner interviewed employee and hired him to work Monday through Friday, from 8:00 a.m. until noon. Employee characterizes his position as a manager. He testified that he greets customers, collects money out of machines in the car wash bays, takes deposits to the bank, and cleans up the car wash bays using a power wash.

The car wash owner learned about employee through a former worker at his car wash facility. Owner testified he hired employee knowing that employee’s abilities are very limited, that the employee has had a rough time in life, and that it would be difficult for employee to find employment in the local labor market. Owner testified he hired employee in part because he “felt bad for him.” Owner allows employee freedom to leave the premises off and on during his 8:00 a.m. to noon shift. He explained “[The employee is] not really tied down. I’m not upset if I show up and he’s not there because I know at some point he’ll be back.” Transcript, 499. Employee routinely leaves the carwash premises to have coffee with a group of other seniors (whom owner refers to as “the board”) at McDonald’s and/or to take his granddaughter to school. Owner considers employee’s main job customer service. Employee greets customers, makes them feel comfortable and helps relieve their anxiety about entering the car wash. Owner does not expect employee to handle any problems that arise at the car wash. He testified he is past the point of frustration because even “simple things that we’ve done over and over and over and over again. . . he still can’t remember.” Id. 500. If anything goes wrong at the car wash, employee calls him and owner comes back to the car wash to handle the problem.

Dr. Garth Russell, an orthopedic surgeon, evaluated the employee on June 21, 2011. Dr. Russell testified, “It’s my opinion, looking at the advanced degeneration of the intervertebral disk of his entire back including the neck and his lower back and the two levels of fusion upon two occasions in his lower back, that he would be unable to pursue any gainful employment.” Transcript, 315-316. Dr. Russell considered the employee credible because in recounting the history of his injury the employee did not embellish facts and described only what he could remember. Id. 325. Dr. Russell found employee to be a person who tends to minimize his disability and who “just lives with pain.” Id. 358, 364. As an example, despite the fact that employee can’t move his surgically fused neck, has difficulty looking to the right or left and is constantly hurting, he told Dr. Russell “I can live with it.” Id. 364-365.

Dr. Russell’s opinion as to the nature and extent of the employee’s disability was influenced by his assessment of the employee’s inherent abilities and aptitudes, which he found preclude the employee from performing sedentary “mental work.” Transcript, 360-361. Dr. Russell did not consider claimant’s part-time work at the car wash to be “an employable situation.” Id. 362. Dr. Russell further testified that if the employee “does anything” on a prescribed scheduled basis then he’s going to have further difficulty faster, and it will become really more physical and life-threatening to him (emphasis added).” Id. 364. Dr. Russell warned that this would occur even if the employee was only using his lower back in a sedentary job. Id. 363. He concluded, “I can testify
without any question that [the employee] is permanently and totally unable to pursue any gainful employment.”  *Id.*  333.

Vocational rehabilitation consultant Gary Wiemholt interviewed the employee on September 23, 2013.  Mr. Weimbold testified that his own testing showed the employee had significant deficits in word reading and math, such that would indicate a person who would be primarily associated with manual labor or production level work that could be learned fairly quickly.  Employee’s test results did not suggest he could move to higher levels of work.  Wiemholt noted the employee was unable to pass a test to become an advanced wastewater treatment operator.  Employee cannot perform any work that requires regular computer recordkeeping because he lacks computer skills.  He cannot dump bags of trash, use a weed trimmer, or shovel snow.  Even using a vacuum cleaner bothers employee’s back.  Because he cannot move his neck, employee is not even able to change a light bulb.  Due to problems with his back, employee does not go up and down the stairs in his home.  During a functional or work hardening evaluation on July 13, 2009, claimant was unable to continue a test, involving dynamic lifting from floor to waist and from waist to shoulder when the weight was increased to 40 pounds, due to “biomechanical factors.”  *Transcript,* 419, 455.  Mr. Wiemholt testified the employee cannot be expected to be hired in a normal course of business for any job that he’s ever been qualified for.  The employee lacks any type of transferable skills or any other marketable skill sets.  Mr. Wiemholt further opined that employee is not a candidate for any type of retraining education.  Mr. Wiemholt did not consider claimant’s part-time carwash work to constitute full employment in the open competitive labor market.  Mr. Wiemholt concluded that the employee “has a total loss of access to the open competitive labor market.”  *Id.*  456.

The only other opinion regarding whether the employee’s disability is permanently and totally disabled came from James England, a certified rehabilitation counselor.  Mr. England testified he did not see any specific restrictions from the employee’s treating doctors “that would have prevented him from going back to his past work or a variety of other entry-level types of work activity.”  *Transcript,* 559.  He concluded “there really wouldn’t have been any contraindication to [employee] doing essentially whatever work he did before.”  *Id.*  573.  Mr. England had no information regarding the employee’s duties or accommodations in his work at the car wash, was not aware that the employee received special education during school and had no knowledge of test results relating to employee’s intellectual capacity.

As noted in the ALJ’s award, part-time work in and of itself does not demonstrate an employee’s inability to compete in the open labor market.  *Brashers v. Treasurer of the State of Missouri as Custodian of the Second Injury Fund,* 442 S.W.3d 152, 161 (Mo. App., 2014).  In *Brashers* the court determined that an employee’s part-time work schedule resulted from the nature of the work itself and was not an accommodation made for the employee’s physical conditions.  The court concluded that the employee’s part-time work, obtained through normal employment channels, did not demonstrate permanent and total disability.  *Id.*  161.  The case of *Stewart v. Zwiefel,* 419 S.W.3d 915 (Mo. App. 2014) also supports the ALJ’s finding that employment in the open labor market may include part-time work.  *Stewart* held that an employee who performed the
regular duties of numerous part-time positions over a period of eleven years, and who obtained all of her jobs by answering ads or making applications, was not permanently and totally disabled.

On the other hand, Brashers, decided six months after Stewart, cautioned that the court’s holding in Stewart, “should not be interpreted so broadly as to suggest that all part-time employees would necessarily be found to be competing in the open labor market.” Brashers, supra, n. 5. Brashers further notes that whether an employee is permanently and totally disabled is “a fact issue within the special province of the Commission . . . and that when the record and support either of two opposed fact findings, the Commission’s determination binds this court.” Id. 164, citing Stewart, supra.

We find that employee’s current employer hired employee primarily because of his compassion for employee’s circumstances and knowledge that employee could not realistically expect to find any work in the local labor market. Employer accommodates employee by allowing him to come and go freely during his work shift. He relieves employee of responsibility for any problems that arise during his shift. These accommodations convince us that employee’s part-time work at employer’s car wash does not represent employment in the open labor market.

Our conclusion that the employee is permanently and totally disabled is supported by the employee’s credible testimony as well as the expert opinions of both Dr. Russell and vocational rehabilitation consultant Mr. Gary Weimholt. We did not credit the opinion of rehabilitation counselor James England, because Mr. England failed to consider the significant accommodations employee’s current employer allows that enable employee to work part-time and gave no weight to employee’s significant intellectual limitations.

As noted in Molder v. Missouri State Treasurer as Custodian of the Second Injury Fund, 342 S.W. 3d 406 (Mo App. 2011), citing Pavia v. Smitty’s Supermarket, 118 S.W.3d 228 (Mo. App. S.D. 2003) “‘total disability means the inability to return to any reasonable employment. It does not require that the claimant be completely inactive or inert. Id.’ (citations and internal quotations marks omitted).” Id. 413. Molder further noted that an employee’s limited activity does not mitigate against a finding of total disability, because to do so “would tend to encourage idleness of the part of injured employees and discourage them from making efforts to help themselves for fear that any activity on their part might furnish evidence against their right to the compensation which the law has provided for them.” Id., citing Grgic v. P & G Constr., 904 S.W.2d 464, 466 Mo. App. E.D. 1995).

Based on the credible and competent evidence in the record as discussed herein as well as the relevant case law, we find employee is permanently and totally disabled as a result of the effect of his work injury in combination with his preexisting disabilities.

We further find the employee reached maximum medical improvement on June 22, 2009, when Dr. Trecha released him “to return to work and do activities as tolerated” with caution as to “heavy bending [sic], lifting and twisting.” Transcript, 257.
Conclusion

We modify the award of the administrative law judge as to the issues of (1) the nature and extent of permanent disability; and (2) the liability of the Second Injury Fund.

The Second Injury Fund is liable to employee for the rate differential between weekly permanent total disability benefits and permanent partial disability benefits ($451.93 – $404.66 = $47.27 per week) beginning June 22, 2009, for 120 weeks. Thereafter, the Second Injury Fund shall pay to employee weekly permanent total disability benefits of $451.93 for employee’s lifetime, or until modified by law.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued December 14, 2016, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

We approve and affirm 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 7th day of September 2017.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

________________________________________
John J. Larsen, Jr., Chairman

_____________________________________
VACANT
Member

_____________________________________
Curtis E. Chick, Jr., Member

Attest:

_____________________________________
Secretary
AWARD

Employee: Kenneth Weber
Injury No. 08-124473

Dependents:

Employer: Kraft Foods, Inc. (settled)

Additional Party: Second Injury Fund

Insurer: Indemnity Insurance Co. of North America (settled)

Hearing Date: November 9, 2016

Checked by: RJD/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.

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

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

4. Date of accident or onset of occupational disease: October 26, 2008.

5. State location where accident occurred or occupational disease was contracted: Boone 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: Employee injured his low back lifting a heavy bag of materials. Employee injured his neck while rehabilitating his low back.

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: Lumbar spine and cervical spine.


15. Compensation paid to-date for temporary disability: Unknown.

16. Value necessary medical aid paid to date by employer/insurer? Unknown.

17. Value necessary medical aid not furnished by employer/insurer? Unknown.
18. Employee's average weekly wages: $677.90.


COMPENSATION PAYABLE

21. Second Injury Fund liability:

45.8 weeks of permanent partial disability benefits: $18,533.43

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:

Lake Law Firm LLC
FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Kenneth Weber

Dependents:

Employer: Kraft Foods, Inc. (settled)

Additional Party: Second Injury Fund

Insurer: Indemnity Insurance Co. of North America (settled)

Hearing Date: November 9, 2016

ISSUES DECIDED

The evidentiary hearing in this case was held on November 9, 2016, in Columbia. Claimant, Kenneth Weber, appeared personally and by counsel, Tom Pirmantgen; the Second Injury Fund appeared by counsel, Assistant Attorneys General Kirsten Dunham and Maggie Ahrenbach. The claim against Employer, Kraft Foods, Inc., was settled by stipulation approved on August 15, 2013. The parties requested leave to file post-hearing briefs, which leave was granted. The case was submitted on December 2, 2016. The hearing was held to determine the following issues:

1. Whether the work-related accident or occupational disease of October 26, 2008 was the cause of any or all of the injuries and/or conditions alleged by Claimant;
2. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers’ Compensation has jurisdiction over this case;
2. That venue for the evidentiary hearing is proper in Boone County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers’ Compensation Law at all relevant times;
5. That Claimant’s average weekly wage is $677.90, resulting in compensation rates of $451.93/$404.66;
6. That Claimant sustained an accident or occupational disease arising out of and in the course of his employment with Kraft Foods, Inc. on or about October 26, 2008;

7. That the notice requirement of Section 287.420 is not a bar to Claimant’s Claim for Compensation herein.

EVIDENCE

The evidence consisted of the testimony of Claimant, Kenneth Weber, as well as the deposition testimony of Claimant; the testimony of Claimant’s wife, Kathaleen Weber; the deposition testimony and report of Dr. Garth Russell; the deposition testimony and report of Dr. Peter Mirkin; the deposition testimony and report of Gary Weimholt, a vocational rehabilitation counselor; the deposition testimony and report of James England, a vocational rehabilitation counselor; the deposition testimony of Kevin Butner; certain records from the Missouri Division of Workers’ Compensation; report of injury in Injury No. 08-124473; stipulation for compromise settlement in Injury No. 08-124473; medical records; copies of x-ray films; certain of Claimant’s high school records.

DISCUSSION

Claimant was born on April 21, 1952. He has a 12th grade education and has been married for 44 years. Prior to working for Kraft Food (“Employer”), Claimant worked for the City of Macon for many years. Claimant’s first position with the City of Macon, which he held for approximately 17 years, was in the water treatment plant. Claimant’s job duties included testing water and adding chemicals, lifting 100 lb. bags of lime and pouring them into a hopper, unloading box cars, and general facilities maintenance (mowing, cleaning bathrooms, sweeping, mopping). After a year of recovery from back surgery, Claimant returned to work for the City of Macon for a few more years, performing mowing and janitorial work at the purchasing department’s building.

Claimant began working for Kraft Foods, Inc. in Columbia (“Employer”) in 2003. Claimant testified that this job required him to lift and carry 50 lb. bags of “cure” for the hot dogs, and grinding 100,000 lb. of meat per day.

Claimant is a very pleasant fellow who, unfortunately, has extremely limited intellectual ability. Vocational counselor Gary Weimholt noted that, while Claimant was in high school, testing showed his I.Q. to be 68. Weimholt’s testing showed Claimant’s reading and math skills at a third grade level, which Weimholt indicated to be consistent with a 68 I.Q.

Claimant has a long history of back problems, dating to 1984, when he was treated conservatively for acute work-related lumbar-dorsal strain. In 1991 Claimant injured his back lifting while working for the City of Macon, and subsequently underwent therapy, injections, and
ultimately a surgical fusion and laminectomy. He was off work for almost a year during this
injury; the claim settled for 22% permanent partial disability of the body as a whole. In 1995
Claimant suffered a work-related biceps rupture necessitating surgery; this claim settled for 10%
permanent partial disability of the right elbow.

As stipulated, Claimant sustained a work-related accident with Employer on October 26,
2008. Claimant testified that, on that date, he was lifting a bag and his back gave out. Claimant
kept working but later felt dizzy and passed out. On December 30, 2008, Dr. Randal Trecha
performed a discectomy and fusion with instrumentation at L4-5. A functional capacity
evaluation performed in July 2009 demonstrated the ability to perform in the medium physical
demand category for lifting and carrying. Because Claimant could not meet the requirements for
his job with Employer (which required Claimant to lift 50 pounds and occasionally squat),
Employer terminated Claimant’s employment.

In September 2009, Claimant reported neck pain to Dr. Trecha. After appropriate
diagnostic testing, Claimant underwent surgery on November 3, 2009, consisting of anterior
cervical discectomy and fusion from C3 to T1.

Claimant testified that Employer let him go after the back surgery because of the
restrictions that Dr. Trecha placed on him. Claimant testified that he cannot bend and do the jobs
that he used to, although the doctors said he should do more walking. He successfully applied
for Social Security Disability Insurance in 2009. Claimant has worked part-time for Butner’s
Auto Spa (car wash) in Macon for the last five years as a “manager”. Claimant testified that he
heard about the job from his grandson but went through an interview process. Claimant works
Monday through Friday. He greets and assists customers, supervises other workers, collects
money from the car wash stalls, fills out deposit slips and deposits the money in the bank.

Claimant hurt his back in 1991 while working for the City of Macon water treatment
plant. He was lifting heavy bags of chemicals and felt a pop in his back and could not walk. On
March 23, 1992, Dr. Joel Jeffries performed a bilateral L5-S1 fusion. On February 18, 1993, Dr.
J. Hart stated that he had no restrictions placed on Claimant, and he rated Employee’s disability
at 20% body as a whole at the lumbar spine. As noted above, this claim was settled for 22%
permanent partial disability of the body as a whole. Claimant testified that when he went back
to work, he was told that he couldn’t stay at the water treatment plant because of his back and he
was transferred to purchasing. In his March 13, 2015 deposition, Claimant testified that his
transfer from the water department to the purchasing department was not related to his back
surgery but rather because he could not get his water license.

Dr. Garth Russell conducted an evaluation of Claimant on June 21, 2011, at the request of
Claimant’s counsel. Dr. Russell opined that Claimant had a 15% permanent partial disability at
the lumbar spine as a result of the primary injury and also had a 15% permanent partial disability
at the lumbar spine due to his prior back condition and surgery. Dr. Russell also opined that the
neck injury occurred as a result of the lower back injury because it was injured while in
rehabilitation and was exacerbated when he returned to work. Dr. Russell rated the neck injury at
15% permanent partial disability at the cervical spine.
Employer sent Claimant to Dr. Peter Mirkin for an evaluation on April 25, 2012. Dr. Mirkin opined that Claimant’s condition in his lower back and neck was not due to a single traumatic episode and the objective evidence indicated that the condition causing the need for Claimant’s surgery was the degenerative process in Claimant lumbar spine and neck. He opined that work was not the prevailing factor causing Employee’s back and neck problems and the treatment Claimant received was necessary to address his underlying condition and not any injury.

Gary Weimholt conducted a vocational evaluation on September 23, 2013, at Claimant’s counsel’s request. Mr. Weimholt opined that Claimant has no transferable job skills to skilled or semi-skilled work at the light or sedentary levels. Mr. Weimholt gave his opinion that Claimant “has a total loss of access to the open and competitive labor market.” Mr. Weimholt noted that Claimant was working about 20 hours a week at a car wash, but Mr. Weimholt’s opinion was that the work did not constitute full employment in the open labor market.

At the request of the Second Injury Fund, James England evaluated Claimant’s employability in the open labor market. Mr. England opined that Claimant was not permanently and totally disabled from a vocational standpoint. He testified that Claimant’s work the past five years at the car wash constitutes participation in the competitive labor market. Mr. England testified that Employee was capable of jobs like cleaning offices, busing tables, washing dishes and other unskilled entry level jobs.

**Causation.** Regarding whether the October 26, 2008 work accident was the prevailing factor in causing Claimant’s lumbar back condition (resulting in the December 30, 2008 surgery), and in causing Claimant’s neck condition (resulting in the November 3, 2009 surgery), I find the opinions of Dr. Russell to be more persuasive than those of Dr. Mirkin. Therefore, I find these issues in Claimant’s favor.

**Permanent total disability.** The test for permanent total disability “is whether Claimant could compete in the open labor market.” *Brashers v. Treasurer*, 442 S.W.3d 152, 161 (Mo. App. S.D. 2014). While Claimant’s disability is profound, Claimant has proven his ability to compete in the open labor market. Therefore, I must agree with James England’s ultimate conclusions regarding Claimant’s ability to compete in the open labor market.

Specifically, Claimant has been working five days a week, four hours a day, at a car wash establishment, for the past five years. Employment in the open labor market can include part-time work. *Brashers, supra; Stewart v. Zweifel*, 419 S.W.3d 915 (Mo. App. S.D. 2014).

Claimant obtained his position at the car wash by applying and interviewing for the job. While the testimony of Kevin Butner (owner of the car wash), strongly suggests that he is making accommodations for Claimant in this position, there is no question that Claimant has procured employment in the open labor market and has held that employment for five years. Claimant has proven his ability to compete in the open labor market. Despite Claimant’s obvious significant disabilities, he is not permanently and totally disabled.
I find that Claimant is entitled to permanent partial disability benefits from the Second Injury Fund. I find that Claimant’s last injury (i.e., from the work accident of October 26, 2008) resulted in permanent partial disability of 15% of the body as a whole rated at the lumbar spine and 15% of the body as a whole rated at the cervical spine. I further find that Claimant had prior disabilities, consisting of 22% permanent partial disability of the body as a whole rated at the lumbar spine and 10% permanent partial disability of the right elbow. I find that the prior disabilities created a hindrance or obstacle to Claimant’s employment and reemployment. I find a synergistic effect between the prior disabilities and the last injury. I find that a 20% loading factor is required to compensate Claimant for the synergistic combination of these disabilities.

FINDINGS OF FACT AND RULINGS OF LAW

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

1. The work accident of October 26, 2008, was the prevailing factor in the cause of injury to Claimant’s lumbar spine.
2. The work accident of October 26, 2008, was the prevailing factor in the cause of injury to Claimant’s lumbar spine.
3. The December 30, 2008 surgery consisting of discectomy and fusion with instrumentation at L4-5 was reasonably required to cure and relieve Claimant of the effects of the injuries sustained in the work accident of October 26, 2008.
4. The November 3, 2009 surgery consisting of anterior cervical discectomy and fusion from C3 to T1 was reasonably required to cure and relieve Claimant of the effects of the injuries sustained in the work accident of October 26, 2008.
5. As a direct result of the injuries Claimant sustained in the work accident of October 26, 2008, Claimant has sustained permanent partial disability of 15% of the body as a whole rated at the lumbar spine and additional permanent partial disability of 15% of the body as a whole rated at the cervical spine, resulting in 120 weeks of disability.
6. As of the time the last injury was sustained, Claimant had a preexisting permanent partial disability of the lumbar spine which disability meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 22% of the body as a whole (88 weeks).
7. As of the time the last injury was sustained, Claimant had a preexisting permanent partial disability of the right elbow which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 10% of the right elbow (21 weeks).
8. Employer terminated Claimant’s employment after the December 30, 2008 back surgery.
9. The test for permanent total disability is whether Claimant can compete in the open labor market.
10. Despite his significant disabilities, Claimant has been working five days a week, four hours a day, at a car wash establishment, for the past five years.
11. Employment in the open labor market can include part-time work.
12. Claimant obtained his position at the car wash by applying and interviewing for the job.
13. Claimant has proven his ability to compete in the open labor market.
14. Claimant is not permanently and totally disabled.
15. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. I find that a 20% loading factor is required to compensate Claimant for the synergistic combination of these disabilities. The Second Injury Fund liability for permanent partial disability benefits is thus calculated as follows: 120 weeks for the last injury + 109 weeks for preexisting disabilities = 229 weeks X 20% load = 45.8 weeks. 45.8 weeks times $404.66 equals $18,533.43.

ORDER

The Second Injury Fund is ordered to pay Claimant the sum of $18,533.43 for permanent partial disability benefits. Claimant’s attorney, Lake Law Firm LLC, is allowed 25% of the benefits awarded herein as and for necessary attorney’s fees, and the amount of such fees shall constitute a lien on those benefits.

Made by _______________________
Chief Administrative Law Judge
Division of Workers’ Compensation