FINAL AWARD ALLOWING COMPENSATION

Injury No. 10-066236

Employee: Douglas Hahs

Employer: Missouri Highway & Transportation (Settled)

Insurer: Self-Insured (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. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this award allowing compensation.

Preliminaries

The parties asked the administrative law judge to determine the following issues: (1) whether all of employee's neck complaints are medically causally related to the accident; (2) whether employer is liable to provide future medical care; (3) nature and extent of permanent partial disability; (4) whether employee is permanently and totally disabled; and (5) Second Injury Fund liability.

The administrative law judge rendered the following determinations: (1) employee's work accident of August 17, 2010, resulted in an injury to employee's left shoulder, lumbosacral spine, and cervical spine; (2) employee is entitled to future medical treatment to cure and relieve from the effects of his work accident; (3) employee sustained a 30% permanent partial disability of the left shoulder, a 15% permanent partial disability of the body as a whole referable to the cervical spine, and a 20% permanent partial disability of the body as a whole referable to the lumbar spine; (4) employee is not permanently and totally disabled; and (5) the Second Injury Fund has no liability because there is no evidence employee had a preexisting condition that was a hindrance or obstacle to employment that combined with the primary injury to result in greater overall disability.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred in finding employee is not entitled to permanent total disability benefits from either the employer or the Second Injury Fund.

While employee's application for review was pending before the Commission, employer/insurer and employee submitted a stipulation for compromise settlement on October 9, 2015. On November 5, 2015, the Commission issued an order approving the stipulation for compromise settlement. Consequently, the only issue pending before the Commission is that of Second Injury Fund liability. For the reasons stated below, we conclude the Second Injury Fund is liable for permanent total disability benefits.

Discussion

The administrative law judge thoroughly summarized the evidence and, for the most part, we agree with her findings of fact. Accordingly, we hereby adopt the administrative

law judge's findings to the extent not inconsistent with our findings, analysis, and conclusions set forth below.

Permanent total disability

The administrative law judge determined that employee is not permanently and totally disabled, based on a finding that the restrictions placed by the treating physicians were more persuasive than those assigned by employee's evaluating expert Dr. David Volarich, and that employer's vocational expert James England provided more persuasive testimony than the competing testimony from Delores Gonzalez. After careful consideration, we disagree with the administrative law judge's finding that employee is not permanently and totally disabled, for the following reasons.

First, we note that the administrative law judge's choice to credit employee's own testimony regarding his physical limitations does not comport with her rejection of the restrictions from Dr. Volarich. This is because employee's testimony about what he is able to do substantially mirrors Dr. Volarich's restrictions. For example, the administrative law judge relied on employee's testimony to find that, on a good day, employee is able to stand for 30 minutes, and can sit for 15 to 30 minutes at most. Dr. Volarich opined that employee should avoid prolonged sitting and standing, and should avoid remaining in a fixed position for more than 30 minutes at a time. It is unclear to us why Dr. Volarich's restrictions are lacking persuasive value where employee credibly endorses nearly identical limitations in his abilities.

It is further unclear to us which of the treating physicians' restrictions the administrative law judge credited, as there is a significant disparity between, for example, Dr. Milne's opinion that employee can return to work without restriction at least with regard to the left shoulder, Dr. Chabot's opinion that employee should observe a 35 pound lifting restriction and avoid repetitive bending and twisting, and Dr. Boutwell's opinion that employee should not lift more than 25 pounds, should not stand or walk more than two hours per day, and should be permitted to alternate sitting and standing. In any event, we will defer to the administrative law judge's (implied) finding that employee credibly described his physical limitations.

Second, and more importantly, after a careful review of the evidence, we cannot envision a prospective employer that would reasonably be expected to hire employee over virtually any other job applicant.

> The determination of whether a claimant is permanently and totally disabled is based upon the claimant's ability to compete in the open labor market. The primary determination is whether an employer can reasonably be expected to hire the employee, given his or her present physical condition, and reasonably expect the employee to successfully perform the work.

Blackshear v. Adecco, 420 S.W.3d 678, 681 (Mo. App. 2014)(citations omitted).

Employee did not graduate high school and does not have a GED. The vocational experts agree that he is most likely physically precluded following the work injury from returning to the type of roadway maintenance work he was performing for employer, or to the truck driving work he performed previously. Employee lacks any specialized or vocational training for any other job that he could physically perform. Employee takes muscle relaxers and Oxycodone regularly to manage unrelenting left shoulder, neck, and low back pain. As noted above, employee's sitting and standing abilities are severely limited to, at most, 30 minutes at a time. Employee currently weighs about 400 pounds and the vocational experts agree that employee's morbid obesity will make it very difficult for him to compete for work, because prospective employers will hold employee's weight against him, even if he possesses the relevant skills and physical abilities to perform a job.

Taken together, this evidence compels a determination (and we so find) that as of the stipulated date of maximum medical improvement on April 30, 2012, employee was unable to compete for work in the open labor market.

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.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

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

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

Dr. Chabot rated a preexisting 5% permanent partial disability of the body as a whole referable to morbid obesity. Dr. Volarich, on the other hand, opined that there may be some disability referable to employee's preexisting morbid obesity, but suggested this condition did not amount to a hindrance or obstacle to employment, because employee denied that his weight caused problems in his prior work. To the extent Dr. Volarich premised this opinion on the extent to which employee's preexisting morbid obesity caused difficulty in the past, his opinion is not particularly relevant, because it fails to apply the "potential to combine" test as identified by the Missouri courts.

Dr. Volarich did testify that employee would have been precluded from a number of occupations prior to the work injury, simply because of his size. As recognized by the administrative law judge, employee avoided work in the construction industry, as a police officer or firefighter, or as a factory or retail worker because he knew his size would

prevent him from performing those kinds of jobs. We deem this persuasive evidence of preexisting disability, regardless whether employee's morbid obesity affected the performance of his duties in his past work as a truck driver or maintenance worker.

Ultimately, we are convinced that employee's morbid obesity constituted a preexisting permanent disability that was serious enough to constitute a hindrance or obstacle to employment for purposes of § 287.220.1 RSMo. This is because we are convinced employee's preexisting morbid obesity had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of this preexisting condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995). It appears to us that this potential was borne out by the very facts of this case, in that the doctors agree employee's weight was detrimental to his recovery from the work injury, and contributes to his present physical limitations. Specifically, as Dr. Chabot explained, employee's great weight and attendant lack of core strength results in excessive strain on the sacroiliac joint, contributing to employee's continual problem with that joint painfully "popping out" following the primary injury.

We turn now to the question whether employee has proved Second Injury Fund liability for his permanent total disability. The Second Injury Fund argues that if employee is permanently and totally disabled, it must be deemed a product of the primary injury considered alone, citing the opinion in the case of *Loven v. Greene County*, 63 S.W.3d 278 (Mo. App. 2001). The Second Injury Fund argues that, pursuant to the *Loven* decision, employee's preexisting morbid obesity cannot be deemed a preexisting disability that combines with the primary injury, because, like the employee in *Loven*, employee testified his morbid obesity did not cause him problems performing his past work.

We disagree for several reasons. First, we note that the *Loven* analysis seems to depart from the long line of Missouri cases, such as *Knisley* and *Wuebbeling* cited above, holding that the "proper focus" of our inquiry is not on the extent to which the preexisting condition caused difficulty in the past, but rather on the potential for the condition to combine with a later work injury. See also *Concepcion v. Lear Corp.*, 173 S.W.3d 368, 371 (Mo. App. 2005); *E.W. v. Kan. City Sch. Dist.*, 89 S.W.3d 527, 538 (Mo. App. 2002); and *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997). This line of cases stands for the (in our view) unimpeachably logical proposition that an otherwise-qualified disability is not negated merely because the employee is able to find alternative work he or she is able to successfully perform notwithstanding the disability.

Second, we note that the *Loven* court assumed that, in the context of a permanent total disability analysis, it was necessary for the employee to demonstrate that his preexisting obesity constituted an "actual and measurable" disability at the time of his primary injury, relying on the decision in *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206 (Mo.App. 1999). See *Loven*, 63 S.W.3d at 292. But the more recent decision in *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144 (Mo. App. 2014), makes clear that this requirement is only applicable in claims for permanent *partial* disability:

> [T]he Fund, citing Messex, 989 S.W.2d at 214, argues that the preexisting disability must also be "actual and measurable" to trigger Fund liability for

> PTD benefits. This Court disagrees because this language from Messex refers exclusively to the calculation of PPD benefits. …
>
> When read in context, the "actual and measurable" language from Messex clearly applies to cases involving Fund liability for PPD benefits, as such calculation requires the knowledge and consideration of the degree or percentage of disability of the preexisting disability while the PTD benefits calculation does not.

Lewis, 435 S.W.3d at 160.

Especially following the *Lewis* decision, we question the precedential value of *Loven* in cases where the employee is alleging Second Injury Fund liability for permanent total disability benefits.

In any event, we are of the opinion that the question of the nature and extent of employee's permanent disability referable to the combination of his preexisting obesity and primary work injury is within the "unique province" of this Commission to decide, rather than a question of law. See *Cardwell v. Treasurer of Mo.*, 249 S.W.3d 902, 907 (Mo. App. 2008). Accordingly, in answering that question, we will rely on the relevant evidence at hand, rather than any (purported) per se rule from the case law regarding preexisting obesity.

The *Lewis* court stated the following test for determining whether the employee is entitled to permanent total disability benefits from the Second Injury Fund:

> 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.

Lewis, 435 S.W.3d at 157.

We first consider the nature and extent of the primary injury considered alone and in isolation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). Dr. Volarich opined that if employee is permanently and totally disabled, it is a result of the primary injury considered alone. We find this opinion from Dr. Volarich unpersuasive. As noted above, Dr. Volarich focused on whether employee's preexisting obesity caused problems performing his past work, a focus which the courts have declared to be improper; his resultant opinion with regard to the cause of employee's permanent total disability thus fails in our view to properly take into account employee's preexisting obesity.

Similarly, we are not persuaded by the opinion from employee's vocational expert, Delores Gonzalez, that the effects of the work injury considered alone are sufficient to render employee permanently and totally disabled, because at her deposition she made

clear that she relied on Dr. Volarich's opinion in reaching that determination. Rather, after careful consideration, we find that the effects of the work injury, considered in isolation, do not render employee permanently and totally disabled. Instead, we deem reasonable and hereby adopt the administrative law judge's findings and ratings with regard to the nature and extent of permanent partial disability resulting from the effects of the work injury.

The only question remaining is whether employee is permanently and totally disabled as a result of the combination of the effects of his primary injury with his preexisting morbid obesity. As noted above, Dr. Chabot opined that employee's preexisting morbid obesity hindered his recovery from the primary injury, and suggested this ultimately led employee to suffer a worse outcome than he would have absent that condition. Dr. Chabot explained that carrying around so much extra weight puts increased stress on the tissues, especially in the lowest part of the back, and contributes to employee's recurrent (and, it appears to us, primary) complaint of right SI joint instability and pain. In other words, Dr. Chabot suggests employee's present pain levels are the product of a combination of the effects of the work injury and employee's preexisting morbid obesity; we deem Dr. Chabot's opinion on this point to be persuasive and we so find.

Employer's vocational expert, James England, opined that even under Dr. Chabot's restrictions, employee would be limited to retail sales, courier positions, light assembly, or cashier work. Mr. England further opined that employee's extreme obesity plays a negative role in his ability to find employment even in these limited areas, because employers are very reluctant to hire people that are tremendously overweight over people who are normal weight. Mr. England recalled that when he worked for the Missouri Division of Vocational Rehabilitation, the state had a policy that seriously overweight individuals must agree to lose weight to even participate in the program. Mr. England explained that, otherwise, there was no point spending money putting such individuals through school or training, because in the end it would still be unlikely such individuals would find work even if they had the relevant skills and abilities, because their weight would be held against them. We find this testimony from Mr. England to be very persuasive and we deem it supportive of a finding that when employee's preexisting morbid obesity is considered in combination with the effects of the work injury, employee is permanently and totally disabled by the combination.

Mr. England also agreed that if, as documented by Dr. Boutwell, employee had consistent pain complaints of 8 out of a possible 10 in severity, employee would be unable to sustain employment on a regular basis. We have adopted the administrative law judge's finding that employee credibly endorsed recurrent complaints of severe low back and SI joint pain reaching levels of 8 or 9 out of 10. We have also found that employee's present pain levels are the product of a combination of the effects of his work injury and his preexisting morbid obesity. Accordingly, we deem Mr. England's testimony on this point to once again be supportive of a finding that employee is permanently and totally disabled when the effects of the work injury are combined with employee's preexisting morbid obesity.

In light of the foregoing considerations, we find that employee is unable to compete for work in the open labor market as a result of his primary injury in combination with his

preexisting disabling condition of morbid obesity. We conclude, therefore, that the Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

The Second Injury Fund is liable for weekly permanent total disability benefits beginning 209.6 weeks after the stipulated date of maximum medical improvement on April 30, 2012, at the stipulated weekly permanent total disability benefit rate of $389.91. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued April 24, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an 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 2nd day of December 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed. Therefore, I adopt the decision of the administrative law judge, in its entirety, as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

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James G. Avery, Jr., Member

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Douglas Hahs

Dependents: N/A

Employer: Missouri Highway & Transportation

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: January 26, 2015

Injury No.: 10-066236

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: MDL

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: August 17, 2010
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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 was driving a tractor when it flipped over.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Cervical and lumbar spine and left shoulder
14. Nature and extent of any permanent disability: 30% PPD of the left shoulder, 15% PPD of the body as a whole – cervical spine, and 20% PPD of the body as a whole – lumbar spine
15. Compensation paid to-date for temporary disability: $890.77
16. Value necessary medical aid paid to date by employer/insurer? $119,701.82

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: $584.57

19. Weekly compensation rate: $389.91/$389.91

20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

209.6 weeks of permanent partial disability from Employer	$81,725.14
TOTAL:	$81,725.14

22. Second Injury Fund liability: No

23. Future requirements awarded: Future medical treatment to be provided by Employer

Said payments to begin 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: Mr. Thomas J. Gregory

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Douglas Hahs

Injury No.: 10-066236

Dependents: N/A

Employer: Missouri Highway & Transportation

Additional Party: Second Injury Fund

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Insurer: Self-Insured

Checked by: MDL

PRELIMINARIES

A hearing was held on January 26, 2015 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Douglas Hahs ("Claimant") was represented by Mr. Thomas Gregory. Missouri Highway & Transportation ("Employer") which is self-insured was represented by Mr. George Floros. The Second Injury Fund ("SIF") was represented by Assistant Attorney General Kevin Nelson. Mr. Gregory requested a fee of 25% of Claimant's award.

The parties stipulated that on or about August 17, 2010 Claimant sustained an accidental injury arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Employer received proper notice of the injury; the claim was timely filed; Claimant's average weekly wage at the time of the injury was $584.57 which resulted in a rate of $389.91 for both Permanent Total Disability ("PTD") benefits and Permanent Partial Disability ("PPD") benefits; Employer paid Temporary Total Disability ("TTD") benefits of $890.77 and $119,701.82 in medical benefits; Claimant reached Maximum Medical Improvement ("MMI") on April 30, 2012; and in the event Claimant is found to be PTD benefits shall commence on May 1, 2012.

The issues for determination are medical causation with respect to Claimant's neck; whether Employer is liable for future medical treatment; whether Claimant is PTD; nature and extent of PPD; and liability of the SIF.

Any markings contained in the exhibits were present at the time they were received, and were not placed on the exhibits by the Court.

SUMMARY OF EVIDENCE

Claimant is a 48 year old right handed male with an 11th grade education. Claimant has never attempted to obtain a GED. Claimant is 6'2" and weighs approximately 400 pounds. In August 2010 Claimant weighed approximately 375 pounds, and has gained approximately 25 pounds since his injury.

Claimant left school in the 11th grade because his father was ill, and he needed to help take care of his family. Claimant is a slow reader, and testified he was in special classes in

school. He can read the newspaper, and a few magazines. He has no specialized training or vocational training. Claimant worked as an over the road truck driver for various companies from 1988 to 1998. He was required to load and unload trucks by hand, and lifted from 50 to 100 pounds. From 1998 to 2000 Claimant worked as a truck driver delivering parts to the Chrysler Plant. He unloaded parts weighing from 10 to 75 pounds. From 2000 to 2005 Claimant worked as a local truck driver loading and unloading doors, cabinets, and boxes of nails.

On April 1, 2005 Claimant began working for Employer. Claimant worked as a Maintenance Highway Worker, and his job duties included picking up trash, mowing grass, patching potholes, removing debris from highways, and traffic control. Claimant's job duties included lifting from 50 to 75 pounds, and frequent kneeling, bending, twisting, and climbing. In addition to his job with Employer, Claimant and his wife mowed 13 lawns for neighbors and church friends for which they received cash.

Before August 17, 2010, Claimant had high blood pressure, which was under control with medication. He also had sleep apnea, and was prescribed a CPAP machine and a mouth piece. Claimant testified his sleep apnea did not affect him at work. In 2002 Claimant had cellulitis, and had surgery which caused him to miss one week of work. Claimant testified his medical problems did not interfere with performing his job duties.

Claimant pulled a muscle in his back in 2006 at work. He had one visit to Barnes Care, no physical therapy or diagnostic studies, missed a day or two of work, and was released from treatment. He had no problems with his low back after he was released from treatment.

Claimant's weight has been close to 400 pounds since he has been in the work force. Because of his weight Claimant avoided the construction industry, and police, firefighter, factory, or retail work. As an over the road truck driver he spent 8 to 10 hours a day sitting. 50 to 60% of his work for Employer was seated.

On August 17, 2010, Claimant was mowing a hillside with a tractor that had a 15' brush hog attached. When he was backing up, the tractor jackknifed, and flipped over. Claimant was hanging upside down, and was restrained by his seat belt. When he flipped over, he struck his left shoulder, neck, and head on the roll bar which jammed his neck and caused a laceration above his left eye. The sudden stop with the lap belt caused a jerking injury to his back. Claimant's co-workers were concerned that the tractor might catch fire, and cut his seatbelt which caused him to fall to the ground. After he fell, Claimant's left elbow and hand were bleeding, and he had pain in his head, low back, neck, and left elbow and shoulder.

Claimant went to the Emergency Room where the physician noted a laceration over his left forearm and forehead, and abrasions on his left hand, as well as complaints of pain in his left shoulder, forehead, left hand and wrist, and left elbow. X-rays of his hands, left elbow, left shoulder, and chest were all negative for fracture. A CT of his head was read as normal. A CT scan of his cervical spine showed mild degenerative disc disease at C5-6. His lacerations were sutured, and he was diagnosed with a forehead laceration, neck pain, and a hand abrasion, and was instructed to follow up at BarnesCare.

Claimant was examined at Concentra on August 18, 2010, and was diagnosed with a left shoulder strain. Claimant returned to Concentra on August 23 and August 25, 2010 with ongoing complaints, and was prescribed physical therapy and work restrictions.

Claimant was referred to Dr. Michael Milne, a board certified orthopedic surgeon who specializes in knee and shoulder surgeries. Dr. Milne evaluated Claimant on August 31, 2010. Dr. Milne diagnosed left shoulder pain and a possible rotator cuff injury, and ordered an MRI.

Dr. Michael Chabot, a board certified orthopedic spine surgeon examined Claimant on September 10, 2010. Claimant was complaining of pain in his posterior neck, left shoulder, and low back pain radiating in to his left leg. X-rays of Claimant's cervical spine revealed evidence of degenerative changes involving the C5-6 level, with mild loss of cervical lordosis. X-rays of the lumbar spine revealed satisfactory alignment with no evidence of a fracture, spondylolysis, or spondylolisthesis. Dr. Chabot's impressions were neck pain/strain, back pain/strain, and sacroilitis. He opined Claimant needed additional treatment, and his complaints were causally related to his August 17, 2010 injury. Dr. Chabot performed bilateral SI injections, prescribed physical therapy, medication, and limited duty of no lifting more than 10 pounds. He indicated Claimant could drive a van.

Claimant followed up with Dr. Milne on September 14, 2010. Dr. Milne interpreted Claimant's left shoulder MRI as showing mild supraspinatus tendinopathy, no rotator cuff tears, and a small paralabral cyst. He diagnosed left shoulder impingement syndrome; left shoulder rotator cuff tendinosis; and left possible posterior labral tear. Dr. Milne injected Claimant's shoulder and recommended physical therapy.

On October 4, 2010 Dr. Chabot noted ongoing pain and tightness in Claimant's lower back and occasional radiating pain down his left leg, and ordered an MRI.

Claimant returned to Dr. Milne on October 5, 2010 for a follow up appointment for his left shoulder. Claimant reported slow and continuous shoulder improvement since his injection, and indicated most of his pain was associated with sleeping on his shoulder or rolling onto it. He had mild discomfort and popping in the acromioclavicular joint with abduction. Dr. Milne's impression was left shoulder rotator cuff tendinosis, and left shoulder possible labral tear. Dr. Milne released Claimant at regular duty and scheduled him for follow up in a month.

An MRI of Claimant's lumbar spine performed on October 18, 2010 showed multilevel posterior disc bulges with accompanying mild facet degenerative change at L4-5 and L5-S1. There was multilevel neural foraminal encroachment, most pronounced bilaterally at the L4-5 level, and no central canal compromise. Dr. Chabot reviewed the MRI on October 18, 2010 and diagnosed back strain/back pain, sacroilitis, and obesity. He continued physical therapy, medication, and work restrictions of no lifting more than 20 pounds. He encouraged Claimant to start on a weight loss program, and perform home exercises to improve core strength.

Claimant saw Dr. Milne on November 2, 2010 for a follow up visit. Claimant reported pain with lifting above the horizon and pain that woke him up at night. Upon examination, Claimant had full range of motion of the left shoulder and pain above the horizon and with empty can testing. He had adequate strength and a negative O'Brien's test and negative labral click.

Dr. Milne's impression was left shoulder rotator cuff tendinitis. Dr. Milne recommended Claimant continue to take the pain medication Dr. Chabot was prescribing, continue with his home exercise program, and allowed him to continue to work regular duty.

Claimant continued to treat with Dr. Chabot. On November 8, 2010 Dr. Chabot administered another SI joint injection, and continued physical therapy and work restrictions. Claimant returned on November 29, 2010, and Dr. Chabot noted minimal discomfort in the lumbosacral region. His lower extremity neurologic examination was grossly normal. His impressions were back strain/back pain and resolving sacroilitis. He recommended Claimant continue on his medications and physical therapy. He allowed Claimant to return to limited work duties with no lifting more than 30 pounds, and allowed him to operate a dump truck. He encouraged Claimant to lose weight and continue with his home exercise program.

On November 30, 2010 Claimant returned to Dr. Milne and reported he had a lot of popping in his shoulder with lifting away from his body. Dr. Milne reviewed Claimant's MRI which showed supraspinatus tendinopathy, but noted it was hard to discern labral pathology because of Claimant's size, and the study quality was not high. Dr. Milne recommended Claimant continue with his home exercise program and did not think he needed any work restrictions. He felt he was at MMI with respect to his shoulder.

A physical therapy note dated December 16, 2010 indicated Claimant drove a truck for 12 hours two weeks before which caused a flare up of his back pain. Dr. Chabot administered a right SI joint injection on December 17, 2010. On January 7, 2011 Dr. Chabot examined Claimant again. His lower extremity neurologic examination was grossly normal and straight leg raise testing was negative.

On January 25, 2011, Dr. Milne rated Claimant's left shoulder disability at 0% and indicated no further treatment was indicated.

On January 26, 2011, Dr. Chabot administered another SI injection. Dr. Chabot continued physical therapy and work restrictions on February 21, 2011, and released him to regular duty on February 27, 2011.

Dr. Milne re-evaluated Claimant on March 8, 2011. Claimant reported since being back at work his pain had recurred. He reported decreased range of motion and some weakness with his left shoulder. X-rays showed no abnormalities. Dr. Milne allowed Claimant to continue working full duty and recommended Claimant continue with Ibuprofen, physical therapy, and a home exercise program.

On March 21, 2011 Dr. Chabot evaluated Claimant and noted ongoing SI joint pain. Upon examination, there was no tenderness to palpation in the lumbar area and range of motion of the lumbar spine was mildly limited. His lower extremity neurologic examination was grossly normal and straight leg raise testing was negative. His diagnoses were back pain/back strain, sacroilitis, morbid obesity and recent excision of pilonidal cyst. Dr. Chabot could not account for Claimant's recurrent complaints. He recommended Claimant be evaluated by Dr. Wayne, a physiatrist. He allowed Claimant to return to regular work duty, and suggested he continue with weight loss and medications.

Claimant was evaluated by Dr. Wayne on March 29, 2011. Dr. Wayne diagnosed a left lumbosacral/sacroiliac sprain/strain. He recommended Claimant continue with his home exercise program, and prescribed Flexeril for Claimant to take at night. He explained that Claimant's MRI showed some chronic degenerative changes, but there was nothing acute and nothing surgical for him with respect to his low back. He explored the possibility of recommending Prolotherapy treatment, but after investigating it, decided against it. He found Claimant to be at MMI for the low back, neck, and sacroiliac injury. He agreed with Dr. Chabot that Claimant could work at full duty without restrictions. He deferred to Dr. Milne regarding ongoing treatment for his shoulder. After Claimant saw Dr. Wayne, Dr. Chabot opined Claimant was at MMI and rated Claimant's disability at 3% PPD of the body as a whole.

Claimant returned to Dr. Milne on April 5, 2011 and complained of left shoulder pain and numbness that radiated down his left arm. Upon examination Claimant had tenderness over the rotator cuff. Dr. Milne thought Claimant's complaints might be coming from his cervical area, and recommended he return to Dr. Chabot. He had nothing further to offer Claimant with regard to his shoulder, and suggested Claimant might want a second opinion. He again placed Claimant at MMI.

Dr. Chabot re-evaluated Claimant on May 2, 2011. Claimant reported a flare-up of his neck and left upper extremity complaints. He described neck pain radiating into his left shoulder and arm. He did not have significant low back complaints, only mild aches and pains. X-rays of Claimant's cervical spine showed evidence of degenerative changes at the C5-6 level primarily with disc space collapse, spondylosis, and foraminal narrowing. Dr. Chabot diagnosed neck and back strains, history of sacroilitis, essentially resolved, shoulder bursitis/tendonitis, and neck pain. He recommended left shoulder injections and an MRI of the cervical spine to see if there were any acute changes that could be related to his work injury.

The MRI of his cervical spine performed on May 16, 2011 revealed mild degenerative disc changes at C5-6 with a slight kyphosis and lateralizing a little more severely to the left. Dr. Chabot reviewed the MRI on May 19, 2011 and interpreted it as revealing evidence of advanced degeneration at C5-6 with some evidence of spinal canal narrowing and definite foraminal narrowing. He recommended epidural steroid injections through his private insurance. He saw no indication for further treatment for his low back. He returned Claimant to limited work duties with no lifting over 35 pounds. Claimant returned on June 17, 2011 and complained of ongoing neck pain, left arm pain, and left hand swelling mostly in his left right and small fingers. Dr. Chabot added left ulnar nerve neuropathy at the elbow and history of cervical disc degeneration with questionable radiculopathy to the diagnosis, injected his left elbow, and ordered an MRI/arthorgram.

The MRI/arthrogram of his left shoulder on July 7, 2011 revealed moderate supraspinatus and infraspinatus tendinopathic change and partial undersurface tear without MR evidence of full thickness rotator cuff tear, mild to moderate AC and glenohumeral joint osteoarthritic change. The overall labral size was small without definite MR evidence of labral tear. Dr. Chabot reviewed the study on July 18, 2011 and diagnosed resolved back pain, lumbosacral strain, and sacroilitis; persisting left trapezius spasm; left shoulder bursitis/tendonitis; and partial rotator cuff tear, and recommended surgery.

On July 25, 2011 Dr. Milne performed a left shoulder arthroscopic subacromial decompression, arthroscopic distal clavicle resection, and arthroscopic glenohumeral and rotator cuff debridement including arthroscopic biceps tenotomy. The postoperative diagnoses were left shoulder impingement syndrome, acromioclavicular joint arthrosis, partial thickness rotator cuff tear and superior labral tear. Postoperatively Claimant was placed in a sling and progressed through a course of physical therapy and relaxed work restrictions.

Claimant saw Dr. Benjamin Crane for a second opinion on September 8, 2011. Claimant was complaining of neck and back pain. His neck pain was in the square of his neck without radicular symptoms, and was made worse by turning his head from side to side. His low back pain was in the square of his low back with pain radiating to his right buttock and the posterior aspect of his right thigh with nothing below the knee. Upon examination range of motion of the neck was full with pain when bringing his chin down to his chest, as well as looking over both shoulders. He had a negative Spurling's bilaterally. Motor strength of his upper extremities was 5 out of 5 in his deltoids, biceps, triceps, brachioradialis, wrist extensors, writs flexors and intrinsic muscles of the hand. Sensation was grossly intact. He had negative Tinel's at the cubital and carpal tunnels bilaterally. On inspection of the lumbar spine, Claimant had tenderness to palpation about the paraspinal muscles with pain localized to the lumbosacral junction bilaterally. There was no real midline tenderness. He was able to forward flex to the level of his thighs and hyperextend approximately 5 degrees. He had worse pain with forward flexion. Motor strength of his lower extremities was a 5 out of 5 in quadriceps and hamstrings. He had negative straight leg raise bilaterally with full, relatively pain free range of motion of both hips. Dr. Crane reviewed Claimant's MRIs. He interpreted the cervical spine MRI as showing degenerative changes at the C5-C6 level with no significant facet arthropathy, uncovertebral joint arthrosis or disc bulge causing significant central, lateral recess or foraminal stenosis. He interpreted the lumbar MRI as showing maintained lumbar lordosis, disc heights and hydration at all levels with the exception of L1-2 and L2-3 which has slight disc height loss and disc desiccation compared to the other levels. There was no bone on bone disease and there were definitely no Modic endplate changes. There were no significant disc bulges or facet arthropathy causing significant central, lateral recess or foraminal stenosis. Dr. Crane diagnosed neck pain and low back pain. He felt Claimant had exhausted all nonoperative management in the form of physical therapy, anti-inflammatories and injections. He recommended work hardening for his neck and low back three days a week for half days followed by a functional capacity evaluation. He indicated he would have to be fully recovered and released from his shoulder surgery before work hardening and the FCE could be done.

On November 3, 2011 Dr. Chabot noted Claimant had increased low back pain and numbness in his legs after sleeping in a recliner while recovering from his shoulder surgery. Dr. Chabot diagnosed back pain, obesity, sacroilitis, and history of back pain and administered an injection to his bilateral SI region.

On November 22, 2011, Claimant returned to Dr. Milne for follow up for his left shoulder. Dr. Milne thought Claimant was doing well and recommended he continue his home exercise program and physical therapy. He did not believe Claimant would need any additional treatment on his shoulder and indicated Claimant could work at full duty. On November 28, 2011 Dr. Chabot administered SI joint injections and recommended a pain management referral.

On December 8, 2011, Dr. Milne placed Claimant at MMI for his left shoulder, and released him to work full duty. Dr. Milne subsequently rated Claimant's disability at 5% of the left shoulder. He opined Claimant would need no further treatment with regard to his work injury.

Claimant was examined by Dr. Kaylea Boutwell, a pain management specialist on December 16, 2011. Dr. Boutwell prescribed a TENS unit, medications, and aquatic therapy. Dr. Boutwell adjusted his medications and recommended radiofrequency ablation which was performed on January 18, 2012. Claimant reported some improvement by February 28, 2012 and Dr. Boutwell placed him at MMI and recommended a FCE.

The FCE performed on March 9, 2012 placed Claimant in the sedentary or light duty demand level; however, in order to return to his job, he needed to be in the heavy demand level. Dr. Chabot examined Claimant on March 21, 2012 and diagnosed neck strain/neck pain; status post left shoulder arthroscopic surgery; SI dysfunction; and morbid obesity. He opined Claimant was at MMI regarding his neck and pain complaints. He recommended Claimant continue with Naprelan, Flector Patches, and the TENS unit to moderate his sacroiliac complaints. He returned Claimant to limited work duties with no lifting more than 35 pounds. He indicated job duties that require frequent bending and lifting would not be tolerated by Claimant, and released him from care.

After Dr. Chabot placed Claimant on permanent work restrictions Employer was unable to honor those restrictions and he was granted long term disability benefits. Claimant's last day of work was April 30, 2012. Claimant has not worked anywhere since then. Claimant was subsequently granted social security disability benefits. From August 17, 2010 until April 30, 2012 Claimant was only off work for a few days. He was off work approximately two weeks at the maximum and was paid TTD benefits for the time he was off work. The rest of the time Claimant was working light duty, which involved doing paper work, shredding paper, and copying. In 2013 Claimant had bilateral carpal tunnel surgeries through his private insurance.

Currently, Claimant's left shoulder feels like it is under pressure. He is unable to perform tasks above his head. He is able to reach his arm up to shoulder level, but not overhead. He has a squeezing type pain that is present all the time. Lying on his shoulder makes it worse. He struggles with lifting a gallon of milk. He can lift five pounds with his left hand. He is unable to reach back to tuck his shirt in with his left hand. He has pain that radiates into his shoulder blade. His low back and SI joint in his right leg are very painful. He reports swelling on his right side that doesn't go completely away. His SI joint gives out and his pelvis twists. Sometimes the pain radiates down and it feels like electricity going down his leg. Sitting, standing, and lying down are painful. When his SI joint goes out his therapist is able to push it back into place. When it is out it allows his pelvis to move and he feels like he is walking crooked. He was prescribed an SI joint belt which he wears under clothes. His pain level in his low back/SI joint at rest is between a 3 and a 5. With movement or activity it can reach an 8 or 9. At the time of hearing he reported his pain was at an 8 or 9, and he reaches an 8 or 9 on a daily basis. The pain in Claimant's neck radiates down to his shoulder blades. It is stiff when he turns to the right. He still uses a TENS unit 3 to 4 times a week. Claimant's current medications include blood pressure medication, a muscle relaxant, Oxycodone as needed for pain, and Ibuprofen over the counter as needed for pain. He is able to sit for 15 to 30 minutes at the most,

depending on the firmness of the chair. On a good day he is able to stand for 30 minutes. He tries to walk for exercise and tries to mall walk 2 to 3 times a week for 15 to 20 minutes. He has difficulty driving, and can sit in a car about 30 minutes. He has difficulty climbing stairs. He can lift 20 to 25 pounds with his right arm, and cannot pick up anything from the floor. His most comfortable position is sitting in a firm chair. Lying down is painful. He has difficulty sleeping and is lucky to get 5 to 6 hours of sleep. He can sleep about one to one and one-half hours before waking up.

In an average day, Claimant does some research on the computer and visits some church members at their home. He does very little cooking, and no longer cuts the lawn. His wife mows their grass and a neighbor does the weed eating. He sometimes uses the leaf blower. He watches television and reads bible stories. He doesn't go to movies because he can't sit. He leaves the house 3 to 4 times a week. His medications are prescribed by his primary care physician. He no longer makes phone calls for his church. He goes to church in Columbia, Illinois for about 45 minutes to an hour, and stays in the back so he can get up. He is no longer involved in church activities.

Dr. David Volarich examined Claimant on October 1, 2012, and January 16, 2014, prepared reports, and testified on behalf of Claimant. As a result of Claimant's work injury of August 17, 2010, he diagnosed internal derangement of the left shoulder, which was a labral tear, impingement and partial tears of the rotator cuff and biceps, status post arthroscopic subacromial decompression, distal clavicle excision, rotator cuff debridement, biceps debridement, labral debridement, and biceps tenotomy. He also diagnosed cervical syndrome secondary to aggravation of disc osteophyte complex at C5-6 causing intermittent left shoulder girdle pain and paresthesias, and lumbar syndrome secondary to aggravation of degenerative disc disease and degenerative joint disease at L1 through L5-S1 with moderate severe right sacroiliac joint dysfunction, status post conservative care and pain management, and two centimeter scar. He testified Claimant's on the job injury on August 17, 2010 was the substantial contributing factor as well as the prevailing or primary factor in causing those conditions.

Dr. Volarich testified Claimant had pre-existing conditions of minor lumbar syndrome from his strain injury in 2006 that resolved, and morbid obesity. He felt Claimant was at MMI at the time of his initial examination, and rated his disability at 45% PPD of the left shoulder, 20% PPD of the body as a whole at the cervical spine, and 30% PPD of the body as a whole at the lumbar spine. With respect to his pre-existing conditions, Dr. Volarich did not find any disability with respect to Claimant's minor lumbar strain that had resolved. He testified there might be some disability with respect to Claimant's morbid obesity, but Claimant denied having any hindrance in his ability to work leading up to August 17, 2010 due to his size. He testified Claimant's morbid obesity was a hindrance in terms of his ability to recover from the injuries he sustained on August 17, 2010. Dr. Volarich wasn't sure if Claimant was employable in the open labor market so he recommended he undergo a vocational assessment to determine how he might best return to the open labor market. He testified if a vocational assessment could identify a job for which he was suited he had no objection with Claimant attempting to return to work based upon the limitations he imposed. He testified if a vocational assessment was unable to identify a job for which Claimant was suited, then he would be permanently and totally disabled as a result of the work related injury of August 17, 2010 standing alone. In terms of additional medical treatment, Dr. Volarich testified Claimant would need to continue with his ongoing pain

medications that included prescriptions for Meloxicam as well as over the counter Tylenol. If those did not work then narcotics, muscle relaxants, and other medications would be required. He testified Claimant would also need care for his chronic and lumbar pain syndromes including epidural steroid injections, foraminal nerve root blocks, trigger point injections, TENS units, radio frequency ablation procedures, and similar treatments indefinitely. He testified Claimant needed ongoing chronic pain management, and might need additional diagnostic studies.

Dr. Volarich placed the following restrictions on Claimant: avoid all overuse of the left arm and prolonged use of the left arm away from his body above chest level; minimize pushing, pulling, and particularly traction maneuvers with the left upper extremity; no handling of weights greater than 3 to 5 pounds with left arm extended from his body overhead and limit that as tolerated. He testified Claimant could handle weights to tolerance with the left arm assuming proper lifting techniques, but recommended 20 pounds with his left arm alone. He was advised to pursue appropriate stretching, strengthening and range of motion exercise program to tolerance. With respect to his spine, Dr. Volarich testified Claimant should avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing, and similar tasks as needed. He recommended Claimant limit handling weights to 20 to 25 pounds, assuming proper lifting techniques on occasional basis. He recommended Claimant not handle weights over his head or away from his body or carry that weight over long distance or uneven terrain. He was advised to avoid remaining in a fixed position for any more than 30 minutes at a time to include both sitting and standing. He recommended he change positions frequently to maximize comfort and also rest when needed, and he recommended a home exercise program to included stretching, strengthening and range of motion, in addition to a non impact aerobics conditioning program such as walking, biking, or swimming to tolerance.

Dr. Milne testified on behalf of Employer. Dr. Milne testified when he examined Claimant on December 8, 2011 he felt Claimant was at MMI and recommended no additional treatment for his shoulder. He testified Claimant had 5% PPD of the left shoulder with respect to his work injury. From the standpoint of his shoulder he saw no reason Claimant could not work within a sedentary to light physical demand level.

Dr. Chabot testified on behalf of Employer. Dr. Chabot examined Claimant on March 21, 2012. Dr. Chabot testified Claimant moved around the room without difficulty. His cervical examination revealed mild restriction to range of motion with mild tension. His lumbar examination revealed no tenderness to palpation, but some restriction in range of motion with forward flexion to 70 degrees, extension to 30 to 35 degrees, and side bending 35 to 40 degrees. Dr. Chabot testified he reviewed Claimant's FCE and did not feel it represented his full maximized effort. He noted the FCE reported muscle weakness in multiple muscle groups, but when he examined Claimant he did not note any muscle deficits. Dr. Chabot diagnosed neck strain, neck pain, status post left shoulder arthoscopic surgery, SI dysfunction, and morbid obesity. Dr. Chabot opined Claimant was at MMI, and recommended Claimant return to work with a lifting limit of 35 pounds. He recommended that jobs requiring frequent bending and twisting would not be tolerated by Claimant. He testified Claimant sustained 3% PPD of the body as a whole for his chronic cervical complaints associated with his chronic strain, and 4% PPD of the body as a whole as it related to his lumbosacral strain and chronic complaints associated with his injury. He testified Claimant's chronic obesity was playing a role in his ongoing complaints and response to treatment. He testified any time you carry substantially great

amount of weight you place the tissues under greater load. It puts stress on the low back and lumbosacral region which can make most activities, even simple activities such as turning and twisting more challenging, and may produce discomfort.

Dr. Boutwell testified on behalf of Employer. Dr. Boutwell testified she examined Claimant on February 28, 2012 and felt he had achieved the response they hoped for from his radiofrequency ablation, and had reached a stable therapeutic plateau. She did not feel any additional interventional treatment or active pain medication/management was necessary, and found Claimant was at MMI. Dr. Boutwell gave him another prescription for Baclofen, and told him to continue to take Naprelan, which could be obtained over the counter. She also refilled his Flector Patches. She testified she felt no further treatment was necessary at that point with the exception of a home exercise program. She gave Claimant restrictions of lifting a maximum weight to shoulder of 25 pounds, shoulder to overhead lifting of 15 pounds, carrying no more than 25 pounds, and avoiding all lifting floor to waist. She limited him in hours of the day as far as standing and walking, twisting, bending, reaching, and avoiding standard or manual transmissions. She testified Claimant should avoid squatting, kneeling, climbing, and jackhammering. Dr. Boutwell testified occupational placement at the sedentary or light demand level would be appropriate.

Ms. Delores Gonzales, a vocational rehabilitation counselor, testified on behalf of Claimant. Ms. Gonzales testified she evaluated Claimant on January 28, 2013 and prepared a report. Ms. Gonzales administered the Wide Range Achievement Test, and Claimant scored at the 5th grade level in word reading, 7th grade level in sentence comprehension, and 5th grade level in spelling. His math computation was at the 10th grade level. Ms. Gonzales testified she did not believe Claimant would perform well in an entry level clerical position. Ms. Gonzales testified Claimant did not have any transferable skills. Ms. Gonzales testified based upon Dr. Chabot's restrictions, there should be jobs Claimant should be able to do at the sedentary level, but if you assume Dr. Volarich's restrictions only Claimant would not be able to work at all. Ms. Gonzales testified in her opinion Claimant's impairments had severely compromised his ability to return to his past relevant jobs or perform any job on a sustained basis. She took into consideration Claimant's limited education, and the fact that Dr. Volarich indicated Claimant needed to change positions frequently and rest when he wanted to. She testified that accommodation would be unavailable in the open labor market. She testified Claimant was not a candidate for vocational rehabilitation, and was not currently capable of any competitive work in a reasonable stable job market as a result of the primary injury standing alone.

Mr. James England, a rehabilitation counselor, testified on behalf of Claimant. Mr. England met with Claimant on August 1, 2013, and prepared a report. Mr. England testified based upon the restrictions of Dr. Chabot or Dr. Volarich he would not be able to go back to the kind of work he was doing before, but he would still be able to do alternative service employment, and with some additional skill development could maybe get into some semi-skilled activity such as dispatching. He testified under the recommendation of Dr. Chabot, Claimant could do retail sales, courier positions delivering small parcels or packages, light assembly and packing work, and cashiering positions. He testified under Dr. Volarich's restrictions there would be some cashiering positions such as parking lot attendant where he could sit or stand, and some security positions, light assembly or packing. Those would be the things under the doctor's restrictions with the need to be able to get up and down through the

workday. He testified if Claimant were to take advantage of services though the Missouri Division of Vocational Rehabilitation, he could expand his options and by going back to get his GED that would enable him to do more. Dr. Volarich testified he did not believe Claimant was permanently and totally disabled. He testified based upon the medical restrictions, Claimant's presentation, and his personality he thought Claimant would still be able to compete for some types of employment, not the kinds of things he did before, but less physically demanding work.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

Claimant's work accident of August 17, 2010 resulted in an injury to Claimant's left shoulder, lumbosacral spine, and cervical spine. Dr. Chabot, the treating physician selected by Employer, diagnosed neck strain and neck pain, and assigned 3% PPD of the body as a whole as a result of this injury. Claimant did not have any pre-existing complaints to his neck, and had immediate neck pain and complaints after his work injury of August 17, 2010.

Claimant is entitled to future medical treatment to cure and relieve him from the effects of his August 17, 2010 work accident. Dr. Chabot, in his March 21, 2012 report, when he released Claimant at MMI recommended Claimant continue with Naprelan, Flector Patches, and the TENS unit to moderate his sacroiliac complaints. Dr. Volarich also testified Claimant will require ongoing care for his chronic cervical, left shoulder, and lumbar pain syndromes including epidural steroid injections, TENS units, radio frequency ablation procedures, and ongoing pain management. He testified Claimant also might need additional diagnostic studies.

Section 287.140 RSMo provides:

> 1. 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…

The evidence supports that Claimant has met his burden of proving he is entitled to medical care in the future to cure and relieve him from the effects of his injury.

The starting point for determining Second Injury Fund liability begins with the statutorily prescribed formula found in Section 287.220.1, RSMo (2000). This Section provides that:

> if the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for

> permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the Second Injury Fund.

Thus, to determine if Second Injury Fund liability exists, "the first determination is the degree of disability from the last injury considered alone." *Landman v. Ice Cream Specialties*, 107 S.W.3d 240, 248 (Mo. banc 2003). For this reason, "pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Id.* If the employee's last injury in and of itself rendered the employee permanently and totally disabled, the Second Injury Fund has no liability, and the employer is responsible for the entire amount of compensation. *Id.*

For Second Injury Fund liability, a preexisting disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the preexisting disability combined with the disability from the subsequent injury to create permanent total disability. *Uhlir v. Farmer*, 94 S.W. 3d 441, 444 (Mo. App. E.D. 2003).

According to Section 287.020.6, 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 engaged at the time of the accident. *Carkeek v. Treasurer*, 352 S.W.3d 604, 608 (Mo. App. W.D. 2011). The test for permanent total disability is, therefore, whether the employee is able to competently compete in the open labor market given his condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206, 210 (Mo. App. E.D. 1999). In order to receive permanent disability benefits from the Second Injury Fund, an employee must prove that their pre-existing medical conditions were of such seriousness so as to constitute an obstacle or hindrance to employment or reemployment. *Lammert v. Vess Beverages, Inc.*, 968 S.W.2d 720, 724-25 (Mo. App. E.D. 1998). The pre-existing disability must exist at the time of the work injury, and the Second Injury Fund is not responsible for the subsequent deterioration of pre-existing conditions or the development of new conditions that arise after and are unrelated to the work injury. *Id.* at 725.

Throughout this process the claimant bears the burden of proving all of the essential elements of their claim, including causation. *C.W. Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 276 (Mo. App. S.D. 1996). Where there is conflicting medical evidence, objective medical results control over subjective complaints. *Johnson v. Indiana Western Express, Inc.*, 281 S.W.3d 885, 891 (Mo. App. S.D. 2009); §287.190.6(2) RSMo 2013 Cum Supp.

Claimant sustained PPD of 30% of the left shoulder, 15% of the body as a whole referable to the cervical spine, and 20% of the body as a whole referable to the lumbar spine as a result of the work accident of August 17, 2010. Claimant has substantial continuing complaints as a result of the work accident, and the medical evidence and treatment records substantiate his complaints, and support that level of disability.

Claimant is not permanently and totally disabled. I find the testimony of Mr. England to be more persuasive than the testimony of Ms. Gonzales. I am more persuaded by the restrictions placed on Claimant by the treating physicians than those of Dr. Volarich. I find the treating

physicians who were more familiar with Claimant's treatment were in a better position to assess his ability to function. I am persuaded by the testimony of Mr. England who felt that Claimant would be employable given the restrictions imposed by the treating doctors. Ms. Gonzales agreed there were jobs Claimant could do at the sedentary level taking Dr. Chabot's restrictions into consideration.

The SIF has no liability in this case, because Claimant is not permanently and totally disabled, and there is no evidence Claimant had pre-existing conditions that were a hindrance or obstacle to employment that combined with the primary injury to result in greater overall disability.

CONCLUSION

Claimant met his burden of proving his work accident of August 17, 2010 caused an injury to his cervical spine. Claimant is awarded PPD benefits of 30% of the left shoulder, 15% of the body as a whole – cervical spine, and 20% PPD of the body as a whole – lumbar spine. Claimant is entitled to, and Employer is liable to provide future medical treatment for Claimant including, but not limited to treatment by a pain management and orthopedic specialist, prescription and over the counter medications, a TENS unit, Flector Patches, physical therapy, and diagnostic testing. The treatment is limited to his cervical and lumbar spine. Claimant is not permanently and totally disabled, and the claim against the SIF is denied.

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation