

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
With Corrections)

Injury No.: 08-100667

Employee: James Wurth  
Employer: Commercial Electronics, Inc. (settled)  
Insurer: Travelers Indemnity Co. of America (settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, we find that the award of the administrative law judge (ALJ) denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion, as corrected herein.

Corrections

The ALJ award at page 8, refers to a November 2011 work-related injury. We correct that reference as we believe it is a typographical error in that no other reference to a November 2011 work-related injury is apparent to us. The injury which is the subject of this claim occurred in November 2008. We correct the Summary of Facts as follows:

Page 8, Paragraph 2, beginning, "Based on the entire record..." Sentence 5 - Reads as:

Dr. Volarich and Mr. England opined that the claimant's permanent and total disability is a direct result of the disability from the November 2011 work-related injury when combined with the claimant's preexisting permanent partial disabilities.

This sentence should read, and is corrected as follows:

Dr. Volarich and Mr. England opined that the claimant's permanent and total disability is a direct result of the disability from the November 2008 work-related injury when combined with the claimant's preexisting permanent partial disabilities.

Page 13, 1<sup>st</sup> Paragraph under Conclusion, Sentence 2 – Reads as:

However, the weight of the evidence is that the claimant's prior employment was not so heavily accommodated that the position was not employment in the open labor market.

The second correction relates to the issue of whether claimant's job was so heavily accommodated before the November 2008 injury, that he was not employable in the open labor market. This sentence should read, and is corrected as follows:

Employee: James Wurth

However, the weight of the evidence is that the claimant's prior employment was so heavily accommodated that the position was not employment in the open labor market.

We also note that the ALJ Award at page 2, contains language suggesting compensation payments should begin immediately, and subjecting the award of compensation to a lien of 25% in favor of claimant's attorney, David G. Plufka. This appears to be a typographical error. There is no basis in the administrative law judge's Findings of Fact and Rulings of Law to support payment of compensation to claimant. Likewise, where there is no compensation, there is no basis for an attorney lien.<sup>1</sup> Accordingly, we disclaim these erroneous statements under the "Compensation Payable" heading on page 2 of the ALJ Award.

With these corrections, we affirm the ALJ Award, denying employee's claim against the Second Injury Fund, because § 287.220 RSMo does not authorize any Second Injury Fund permanent disability benefits if the claimant is unemployable in the open labor market prior to the work related injury.

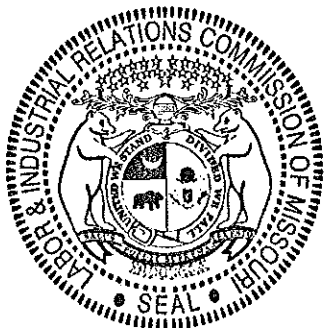
**Decision**

We affirm and adopt the award of the ALJ as corrected herein.

The award and decision of Administrative Law Judge Edwin J. Koehner is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 12<sup>th</sup> day of October 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION



*R. Coe*

Robert W. Coe, Chairman

*Reid K. Forrester*

Reid K. Forrester, Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

*Pamela Hoffmann*  
Secretary

<sup>1</sup> Claimant settled with the employer and insurance company previously and an attorney fee was approved at that time in connection with the settlement amount. That attorney fee is not affected by our correction as stated herein.

Employee: James Wurth

**DISSENTING OPINION**

The majority has voted to affirm the administrative law judge's (ALJ) findings and conclusions that employee<sup>2</sup> was not eligible for additional benefits from the Second Injury Fund. I respectfully dissent and would reverse the ALJ's decision.

**Discussion**

The parties do not dispute that employee is permanently totally disabled. What they dispute is when that level of disability arose. This matter turns on whether the evidence supports that employee was so disabled prior to the November 2008 work-related injury, that he was unemployable in the open labor market. The ALJ found that even prior to that injury, employee was so accommodated at the job he held from 2002 – 2012, that he was not able to compete in the open labor market.

I find claimant's testimony credible concerning his ability to work full-time prior to the November 2008 accident including his denial that he was allowed to lay down while at work. I believe the ALJ placed too much emphasis on the notation in Dr. Volarich's report, reflecting his impression of a conversation with employee about the level of accommodation he was receiving at work as early as January 2008. Employee denied that he was able to lay down on the job at his deposition in 2015 and his testimony at hearing. Employee's explanation that he would sit in his reclining office chair on occasion is more believable to me, when considering the circumstances of his workplace. A modest accommodation such as this is not tantamount to total disability.

The approved legal standard for determining permanent total disability is whether the worker is able to compete in the open labor market. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 48 (Mo. App. 2007). "The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition." *Id.* (internal citations omitted) Dr. Volarich's January 2008 report did indicate he believed if employee lost his job, it would be "extremely difficult" *Transcript*, 314, for him to find employment in the open market. However, no vocational rehabilitation study was done at that time that corroborates this conclusion. In fact, the evidence of employee's work situation prior to November 2008 shows he was working at full capacity prior to the final work accident. It does not support the conclusion that he was totally disabled prior to that event.

Total disability means "the employee is unable to perform the usual duties of the employment...in the manner that such duties are customarily performed by the average person engaged in such employment." *Kowalski v. M.G. Metals & Sales, Inc.*, 631 S.W. 2d 919, 922 (Mo. App. S.D. 1982) I am convinced by the evidence that employee's work leading up to the November 2008 accident, while sedentary, was neither limited, sporadic or highly accommodated. He worked full time for five to six years before the accident, working eight to ten hours a day. It was after the November 2008 accident that his situation was adjusted in order to allow more time off as needed. His job prior to the accident was not a 'make-work' position created for him. He worked alongside several other technicians repairing headsets. There is no credible evidence that employee performed these duties in a manner that was significantly different from the way the work was performed by his co-workers or that his work product was inferior. He was employable in the open market, albeit in a sedentary position.

Because I would find that the last work injury from November 2008, combined with employee's preexisting conditions to make him totally disabled, I would find under § 287.220 RSMo, that

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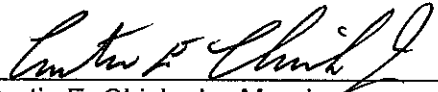
<sup>2</sup> I note that the ALJ consistently used the term claimant in his decision. I generally reserve that term for one who is claiming on behalf of the injured worker, and refer to the injured worker as employee. In this matter, those terms are interchangeable.

Employee: James Wurth

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the Second Injury Fund is liable for the difference in the level of disability, after subtracting the amount attributable to the employer for the last injury.

I would reverse the ALJ Award and grant the claim for additional permanent disability benefits from the Second Injury Fund. Because the majority finds otherwise, I respectfully dissent.

  
Curtis E. Chick, Jr., Member

## AWARD

Employee:	James T. Wurth	Injury No.:	08-100667
Dependents:	N/A	Before the	
Employer:	Commercial Electronics, Inc. (Settled)	Division of Workers'	Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial	Relations of Missouri
Insurer:	Travelers Indemnity Company of America (Settled)	Jefferson City, Missouri	
Hearing Date:	January 2, 2018	Checked by:	EJK

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: November 4, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
The claimant, a manufacturing manager, suffered a low back disc injury while carrying heavy cable boxes.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 25% Permanent partial disability to the low back.
15. Compensation paid to-date for temporary disability: \$6,178.44
16. Value necessary medical aid paid to date by employer/insurer: \$16,746.03

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: James T. Wurth

Injury No.: 08-100667

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$964.00
- 19. Weekly compensation rate: \$642.66/\$404.66
- 20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Settled

22. Second Injury Fund liability: No

None

**TOTAL:**

None

23. Future requirements awarded: None

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: David G. Plufka, Esq.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James T. Wurth	Injury No.: 08-100667
Dependents:	N/A	Before the
Employer:	Commercial Electronics, Inc. (Settled)	Division of Workers' Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Travelers Indemnity Company of America (Settled)	Jefferson City, Missouri
		Checked by: EJK

This workers' compensation case requires a determination of Second Injury Fund liability arising out of a work-related injury in which the claimant, a manufacturing manager, suffered a low back disc injury while carrying heavy cable boxes. The sole issue for determination is Second Injury Fund liability. The evidence compels an award for the defense.

At the hearing, the claimant testified in person and offered depositions of David T. Volarich, D.O., and James M. England, Jr., three different claimant's Workers' Compensation settlements, and various medical records. The defense offered depositions of the claimant and Gary Weimholt.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2016, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

### SUMMARY OF FACTS

On November 4, 2008, the claimant, a manufacturing manager, suffered a low back disc injury while carrying heavy cable boxes, and he came under the care of Dr. Lange. The claimant experienced radiating pain down both legs to his feet. Dr. Lange reviewed the claimant's medical records and noted three prior low back operations: a left sided lumbar discectomy at L4-5, a left sided microdiscectomy and fusion at L4-5 and exploration of L5-S1, and a revision fusion at L4-5. Reviewing diagnostic films of the claimant's low back, Dr. Lange found the post-operative changes, but also observed a new herniation at L5-S1 to the right. In December 2008, Dr. Lange reported that the claimant's right leg symptoms were getting worse, and proposed a right sided laminectomy and discectomy at the L5-S1 level. In January 2009, Dr. Lange performed those procedures. Dr. Lange was surprised by the size of the herniation and the amount of scar tissue present at the L5-S1 level. He released the claimant to return to work in March 2009. See Exhibit 6.

The claimant testified that when he returned work in March 2009, there were many changes. He became a salaried employee, and became an electrical tech supervisor, allowing the claimant to come and go as his low back, neck, and foot pain allowed, and took him away from the production line, where his productivity mattered more. On November 17, 2009, the claimant

settled his workers' compensation claim with the employer relating to the 2008 work-related accident on the basis of a 25% permanent partial disability to the low back. See Exhibit 7.

In December 2009, the claimant injured his right thumb while trying to repair a headset, was treated conservatively, and did not miss any time from work. He testified that his thumb is still weak and stiff at times. Other than effecting his grip at times, he testified the thumb injury did not substantially contribute to his inability to work.

In January 2012, this employer dismissed the claimant from employment, and the claimant's last day of work for this employer was January 23, 2012. In the months leading up to the dismissal, after his release from Dr. Lange, the claimant frequently missed work. He suffered pain in both legs, his low back, his neck, radiating shoulder pain, and pain in his left foot and ankle. He needed to alternate between sitting and standing throughout the day, could not climb, could not sit for longer than an hour, and could not drive long distances without stopping to stand and walk around.

After his discharge from employment from this employer, the claimant attempted to look for work using the retraining benefit from his former employer. He applied for security jobs but was unsuccessful. He received a favorable award for Social Security disability benefits in 2015.

The claimant testified that he has still difficulty driving for more than an hour, cannot walk for more than half an hour without having to rest, cannot stand for longer than an hour, cannot sit for more than ninety minutes, and cannot climb. When lifting, the claimant does not attempt more than ten pounds at a time. His sleep is frequently interrupted. He does not sleep more than a few hours at a time. The claimant was asked whether he could work if given a sedentary job that required minimal lifting and allowed him to sit or stand as needed. The claimant responded that he doubted he could do so. His major concern was being able to sustain such a job for days or weeks in a row. He now takes narcotic pain medication daily, and consults a pain management physician quarterly and believes that the pain medication and physician visits will be lifelong.

#### Preexisting Conditions

Prior to 2002, the claimant worked for Allied Gear and Machine Company as a machinist. He ran two types of lathes that made rollers for printing presses. It was heavy work. The claimant testified he would regularly lift fifty pounds and more.

In 1987, the claimant injured his left foot when a tire he was working on exploded. He suffered a comminuted fracture of his calcaneus. Dr. Banton treated him for ten months. His left foot was casted, and he walked using crutches during that time. Since that time, and leading up to the accident in 2008, the claimant continued to experience constant pain in the left foot and ankle. He has trouble walking on uneven ground. His left foot has remained a larger size than the right, requiring the claimant to buy two different sets of shoes. He testified that he has trouble climbing ladders, running, and jumping because of the pressure it puts on the bottom of his left foot.



In 1999, the claimant injured his low back while carrying a heavy piece of metal to his lathe. In April 1999, Dr. Backer performed a left L4-5 microdiscectomy and prescribed post-operative physical therapy. Because the claimant still complained about pain on the top of his left foot at times, Dr. Backer put the claimant on a twenty-pound lifting restriction permanently, beginning in October 1999. The claimant testified he continued to experience left foot pain, radiating pain into his left leg, and tightness in his low back. When he returned to work, his then employer moved him to a C&C lathe, which processed smaller metal parts. The claimant settled his workers' compensation claim with the employer on the basis of a 27 ½% permanent partial disability to his low back.

In January 2001, the claimant slipped on ice at work and landed on his right side, injuring his low back a second time. Dr. Mirkin provided several months of conservative care and then performed a microdiscectomy at L4-5 and L5-S1. A month later, Dr. Mirkin performed a discectomy and fusion at C6-7. The claimant testified that even after Dr. Mirkin released him in late 2001, he continued to suffer low back pain, radiating pain into his left leg, and numbness and tingling in his left toes. He also complained of stiffness in his neck that radiated to his left shoulder. He found he could not drive or sleep as well as before. Allied would not take the claimant back as a machinist and discharged him from employment.

The claimant began working for this employer in 2002 or 2003 as a computer technician and assembling small parts. The employer serviced headsets used by fast food workers at drive through windows. The claimant's father was the president of the corporate employer. The claimant described the job for this employer as far less strenuous than his job as a machinist. He initially worked with several other small part assemblers. The employer sought to repair and ship all headsets on the day they received them. This turn-around time required the claimant and the other assemblers to work quickly, identifying the problem, fixing, and returning the repaired headset to the customer.

The claimant continued to complain of low back and left sided pain. He sought relief on his own through Dr. Page, who provided pain medication and injections to diminish the pain. Although he experienced temporary relief, the pain would always return. Dr. Page's records reveal that the claimant discussed a disc replacement surgery with Dr. Gornet. Instead, the claimant later consulted Dr. Coyle.

Despite this ongoing treatment and symptoms, the claimant continued to work as an assembler. He became manager of the assembly group, and testified that he continued to work without missing time from his job. He testified he was not reprimanded during this period and believed he could continue the work, which he reiterated was less rigorous than the work he did as a machinist for Allied Gear.

On March 10, 2006, Dr. Coyle evaluated the claimant's medical condition. He reviewed the records of Dr. Mirkin, Dr. Gornet, and Dr. Wagner. Dr. Coyle diagnosed multi-level disc disease. In August 2006, Dr. Coyle reviewed a new MRI and opined that the claimant's L4-5 disc space was obliterated. He recommended that the claimant undergo a revision decompression at L4-5, and a fusion at that level. In September 2006, Dr. Coyle performed the surgery.

Dr. Coyle released the claimant without restrictions, advising him to follow normal safety precautions. In May 2007, Dr. Coyle noted the claimant's leg and back symptoms significantly improved. The claimant testified that Dr. Coyle's surgery improved his leg pain, and that he continued to suffer the same symptoms already described in his neck, shoulder, and left foot and ankle. He returned to full time work for this employer as an hourly employee. On November 17, 2009, the claimant settled his workers' compensation with the employer relating to the 2001 injury on the basis of a 25% permanent partial disability of the neck and a 35% permanent partial disability of the low back. See Exhibit 7.

The claimant testified that during the twenty months between Dr. Coyle's release in March 2007 and the November 2008 low back injury, he had difficulty walking, standing, and lifting. He would sit in a reclining chair in his office at times in an effort to alleviate low back and leg pain. However, he continued to work ten hours a day, starting early every morning, taking pain medication, and working until mid to late afternoon. This was his regular shift still being paid by the hour. He testified he was doing his job, but it was painful every day.

David T. Volarich, D.O.

Dr. Volarich evaluated the claimant on four different occasions (in 2000, 2001, 2008 and 2009), and testified that after each injury the claimant's spine got worse. In 2001, Dr. Volarich noted increasing left-sided leg complaints and he testified he increased the claimant's restrictions.

At the January 2008 exam, eleven months prior to the November 2008 low back injury, Dr. Volarich testified he saw a worsening of the claimant's low back condition. While the neck symptoms were largely unchanged from the claimant's 2001 evaluation, the claimant's low back was causing him constant pain. Dr. Volarich testified that the claimant could continue working in his father's company but needed to be in a sedentary environment that allowed him the ability to move around. He also opined that finding other employment in the event that job was eliminated would be difficult.

After the November 2008 injury, Dr. Volarich again examined and evaluated the claimant. His low back complaints had become more severe, and now included right leg radiating pain. Dr. Volarich testified he thought it even less likely than in 2008 that the claimant could medically compete in the open labor market for employment. He testified that the severity of the claimant's problems, and the worsening of his symptoms after the November 2008 accident now made him concerned for the claimant's overall wellbeing. He concluded that the claimant was medically permanently and totally disabled and unemployable in the open labor market. See Dr. Volarich deposition, pages 30, 31. Dr. Volarich opined that the claimant "is permanently and totally disabled as a direct result of the work-related injuries of November 4, 2008, low back injury in combination with his preexisting medical conditions." See Dr. Volarich deposition, page 31.

James M. England, Jr.

In March 2010, a year and a half after the accident, Mr. England, a vocational rehabilitation counselor, evaluated the claimant and concluded that the claimant's job at his father's company was highly accommodated and, should he lose that position, he would be unemployable in the open labor market. He opined that the pain in the claimant's neck, foot, and low back all played a role in the claimant's unemployability.

Gary Weimholt

In January 2017, Gary Weimholt, a vocational rehabilitation counselor, reviewed the medical records of the treating doctors and reports from Dr. Volarich, the claimant's deposition, depositions from Dr. Volarich and Mr. England, and concluded that the claimant has been unemployable in the open labor market since December 26, 2001. See Weimholt deposition, page 29. Mr. Weimholt testified that in rendering his opinion he made several assumptions about the claimant from reading the reports and the claimant's deposition. He assumed that the claimant was lying down at work prior to November 2008, because of intractable back pain. See Weimholt deposition, page 37. He testified that the assumption was contradicted by the claimant's deposition testimony.

### **SECOND INJURY FUND**

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in '[a]ll cases of permanent disability where there has been previous disability.'" For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ... the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined..."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 236 S.W.3d 43, 50 (Mo.App. W.D. 2007).

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

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

1. The employer's liability is considered in isolation- "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability."
2. Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered;
3. The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and
4. The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

Based on the entire record, the claimant suffered a compensable work-related injury in 2008 resulting in a 25% permanent partial disability to the low back (100 weeks). See Exhibit 7. At the time the last injury was sustained, the claimant had a 25% preexisting permanent partial disability to the cervical spine (100 weeks), a 35% preexisting permanent partial disability to the low back (140 weeks), and a 45% preexisting permanent partial disability to the left foot (67.5 weeks). The permanent partial disability from the last injury combines with the preexisting permanent partial disability to create an overall disability that exceeds the simple sum of the permanent partial disabilities. The forensic medical expert, Dr. Volarich, and both vocational experts opined that the claimant is unemployable in the open labor market and permanently and totally disabled. Dr. Volarich and Mr. England opined that the claimant's permanent and total disability is a direct result of the disability from the November 2011 work-related injury when combined with the claimant's preexisting permanent partial disabilities. Mr. Weimholt opined that the claimant was unemployable in the open labor market well before the November 2008 work-related injury, that he held his position at work due to heavy accommodation due to his father's good will, and that he lay down at work for extensive periods before the November 2008 work-related injury.

This is a critical point, because the text of the statute that authorizes additional permanent disability benefits from the Second Injury Fund states that:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. *If any employee who has 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.  
... § 287.220 (emphasis added).

By the section's plain language, it applies to a claimant who has a "preexisting permanent *partial* disability," not to claimants who are already permanently and totally disabled. Schussler v. Treasurer of State-Custodian of Second Injury Fund, 393 S.W.3d 90, 98 (Mo.App. WD 2012).

Consequently, the Division cannot apply the methodology of section 287.220, if the claimant is already permanently and totally disabled before the accident that causes additional disability. The Courts have enunciated a test for determining whether the claimant's work in outside of employment in the open labor market:

Missouri courts have made clear that the Commission is not prevented from finding that a claimant is permanently and totally disabled simply because he or she holds limited, sporadic and/or highly accommodated employment. "Certainly the ability to perform some work is relevant to th[e] [total disability] determination, but it is not dispositive. To the contrary, a number of cases have recognized that a claimant can be totally disabled even if able to perform sporadic or light duty work." *Cooper v. Med. Ctr. of Indep.*, 955 S.W.2d 570, 575 (Mo.App. W.D.1997). Molder v. Missouri State Treasurer, 342 S.W.3d 406, 412 (Mo. Ct. App. 2011)

The question in this case turns on when the claimant stopped being able to compete in the open labor market. The defense contends this occurred as of January 2008. The medical reports at that time contain restrictions on his work. By 2002, Dr. Backer recommended a twenty-pound lifting restriction. Dr. Mirkin provided no restrictions, and Dr. Volarich limited lifting to ten to fifteen pounds and limited fixed positions while also recommending that the claimant avoid repeated bending, twisting, lifting, etc.

After the 2001 accident, the claimant found a position with his father's company with lighter physical exertional requirements and continued working. The claimant testified that he worked for six years and during that time span was a supervisor, managing seven employees, training them, and leading them as they repaired broken headsets. See claimant deposition, page 17. There is no testimony that he missed work during this period, except for recovery from surgery in September 2006. He testified that during this period he got up at 4:30 am, took pain medication, went to work at 6:00 am, worked until 3:00 pm, and occasionally took a break for lunch. See claimant deposition, page 53.

He testified that he continued in that capacity for six years until suffering the November 2, 2008, low back injury at work. While the prior injuries mainly affected his left side, the 2008 work-related injury caused radiating pain and numbness on his right. The claimant testified that when he returned to work after the 2008 work-related injury: (1) His job became a salaried position; (2) He could lie down during the day; and (3) He could come and go as he pleased. Unquestionably, at that point he stopped being able to compete in the open labor market by any measure.

The difficulty in this case is that some snippets of the testimony from each expert can be used to support the claimant's position, while other snippets of the testimony from each expert can be used to support the defense position. Dr. Volarich, the only medical expert to testify, opined that the combination of all of the claimant's injuries, including the 2008 injury, rendered him medically permanently and totally disabled. On the other hand, Dr. Volarich examined the claimant in January 2008 and opined that the claimant would be unable to be employed in the open labor market without the accommodations that he had with this employer and that he would have difficulty obtaining other employment if he lost the position with this employer. See Dr. Volarich deposition, page 35. He testified that the restrictions after the November 2008 injury were more restrictive than the prior restrictions. See Dr. Volarich deposition, page 36. Dr. Volarich did not recommend a vocational assessment until 2009. "After I saw him in 2009, I thought if he did not have that job, he was unemployable." See Dr. Volarich deposition, page 42. Missouri courts have explicitly noted that an employee can still be rendered permanently and totally disabled even if he or she holds "limited, sporadic and/or highly accommodated employment." Molder v Missouri State Treasurer, 342 S.W.3d 406, 412 (Mo. App. 2011). All of the experts are in agreement that the claimant's job position for this employer both before and after the primary injury afforded considerable accommodations for the claimant.

It is not uncommon for employers to accommodate American workers with disabilities, and it is actually required by federal and state law. The issue is one of fact and consideration of forensic vocational evidence as to whether the claimant's accommodations are so restrictive as to result in unemployability in the open labor market.

The claimant submitted evidence that his work prior to the November 2008 work-related injury was not severely limited or highly accommodated. He so testified at the hearing. The claimant denied he needed to lie down throughout the day prior to the last spine injury in November 2008. See claimant deposition, page 46. He testified that prior to 2008 he would sit at times in his office chair, which had a back that would recline. He testified that he was not lying down during the day. The claimant testified that up to November 2008, he worked ten-hour days, was paid by the hour, did not miss work, did not use a cane to walk, could lift more weight, could walk longer distances, and was able to run. The claimant testified that after the November 2008 surgery, he started arriving late and leaving early from work, laid down during the day, started using a cane, and further reduced the amount of weight he lifted. The employer also changed the claimant's compensation to a salary so they could be more flexible about his hours, and moved him to a tech position that took him out of production. The claimant testified that he did not have to lie down at work prior to the November 2008 accident:

Q: You mentioned needing to lay down multiple times throughout the day. Were you needing to lay down before the 2008 injury?

A: No. See claimant deposition, page 46.

In addition, Mr. England, a vocational counselor, opined that the claimant's condition deteriorated over time:

Q. And so he's been working in this position since 2003 that gave him the flexibility with hours and attendance and even lying down or going home or coming in late, correct?

A. Well, the impression I got from him was that it wasn't that—at the beginning he didn't need that degree of flexibility. It was only after the last injury that it got to the point where it was to the degree that he was having as far it just continually got worse. See England deposition, page 13.

However, the claimant provided a prior inconsistent statement to Dr. Volarich in January 2008 as reflected in Dr. Volarich's January 15, 2008, medical report, "I asked him how his injury affected his ability to work and he replied that he has pain with climbing stairs and being on his feet for long periods of time. He takes breaks when needed and often lies down in his office. He can't do any heavy lifting now and has slowed down considerably." See Dr. Volarich deposition, Deposition Exhibit E, page 3. Dr. Volarich opined at that time, "Should he lose his job, I believe it would be extremely difficult for him to find employment in the open labor market in the future." See Dr. Volarich deposition, Deposition Exhibit E, page 9. Dr. Volarich's report from January 2008 is probably more credible than the claimant's recollection in his 2015 deposition or at the hearing in 2018, many years after the events occurred. While the claimant is probably sincere in his testimony, events that occurred many years ago can be blurred by the passage of time. The claimant's past recorded recollection prior to the November 2008 accident is thus more credible than his testimony at the hearing nine years after the accident.

Dr. Volarich opined in his deposition:

Q: So as of the time of your January 15, 2008, report, you believed that Mr. Wurth has 115 percent disability of his lumbar spine total, correct?

A: That's correct.

Q: And with that being the case, 115 percent disability to his lumbar spine, and the restrictions that you provided referable to the spine, would you have an opinion within a reasonable degree of medical certainty as to whether or not Mr. Wurth was employable in the open labor market at that time?

A: Without the accommodations, he probably would not have been. But because he was being accommodated, I told him to continue working and be careful.

Q: On page nine of your 2008 report you stated that plainly, correct?

A: Yes.

Q: You felt if he lost his job it would be difficult for him to find employment in the open labor market?

A: Yes. See Dr. Volarich deposition, page 35.

Mr. England testified:

Q: Okay. Page ten of your report, I think the bottom two paragraphs are restrictions from Dr. Volarich in 2001, is that correct?

A: Correct.

Q: Now, observing these restrictions that Dr. Volarich provided at that time, are there positions in the open labor market that Mr. Wurth would be able to compete for?

A: Not normally, no.

Q: Okay. And, again, those are restrictions provided as far back as 2001, correct?

A: That's correct.

Q: And after his 2001 injury, Mr. Wurth was without work for a period of time, correct?

A: Correct.

Q: He had looked for positions and been unable to find anything in the open labor market, correct?

A: Until he finally got the last job, correct.

Q: And that was in 2003 with the company that his father was the president of?

A: That's true.

Q: And so he's been working in this position, since 2003 that gave him flexibility with hours and attendance and even lying down or going home or coming in late, correct?

A: Well, the impression I got from him was that it wasn't that -- at the beginning he didn't need that degree of flexibility. It was only after the last injury that it got to the point where it was to the degree that he was having as far it just got continually worse. I mean that he had quite a bit of accommodation but it had become even more and more accommodated after the last injury. See England deposition, pages 12, 13.

The evidence supports a finding that the claimant's employment with this employer from January 2008 to November 2008 was heavily accommodated regarding exertional requirements



and opportunities to recline at work. However, the question in this case is whether the claimant was employable in the open labor market from January 2008 until the November 2008 accident given the claimant's age (39), education (high school graduate), past relevant work history (machinist, manufacturing management), his transferable skills, and the restrictions and limitations set forth by Dr. Volarich. Dr. Volarich opined that if the claimant lost his job it would be difficult for him to find employment in the open labor market. See Dr. Volarich deposition, page 35. Mr. England opined that the position that the claimant held at that time was accommodated. See England deposition, pages 12, 13. Mr. Weimholt opined that Dr. Volarich's restrictions "from January 15, 2008, were sufficient in and of themselves to have resulted in Mr. Wurth's total loss of employability and place-ability as of that time." See Weimholt deposition, Exhibit II, page 15.

Unquestionably, after the November 2008 work-related injury, the claimant was unemployable in the open labor market. The claimant testified that after he returned to work after the November 2008 accident, his employment with this employer was even more accommodated. The claimant moved to a salaried pay system, arrived at work late and left work early, and reclined during the day. In his brief, he contended that these accommodations were not put in place until after the last spine injury in November 2008. On the other hand, Dr. Volarich's restrictions in January 2008 and September 2009 were substantially similar. The only difference is that the claimant's restrictions from remaining in a fixed position was reduced to 15 minutes from the 20-30 minutes in the January 2008 evaluation. See Dr. Volarich deposition, Deposition Exhibits D, E. This employer terminated the claimant's employment in 2012. Having unsuccessfully sought other employment thereafter, all the experts agree that the claimant was unemployable at that point, based on the claimant's limited hours at work. The first reference to coming and going during the employer's work hours was on the first page of Dr. Volarich's September 2009 report. He described the claimant's work situation as heavily accommodated insofar as his father lets him come in late or leave early as needed to deal with his low back pain. See Dr. Volarich deposition, Deposition Exhibit E, page 2. If this accommodation were in effect before the injury in November 2008, the claimant would be considered unemployable in the open labor market, without doubt.

Given the level of accommodations extended by the claimant's employer described by Dr. Volarich in January 2008 and the testimony of the vocational experts in respect to those conditions, the evidence compels a conclusion that the claimant's accommodations at work in January 2008 were sufficient to reduce his employability to characterize his employability as not in the open labor market and conclude that he was permanently and totally disabled at that time.

### CONCLUSION

The claimant submitted extensive evidence that he suffered a compensable work-related injury in 2008 resulting in a 25% permanent partial disability to the low back (100 weeks) that combined with his preexisting permanent partial disabilities to his cervical spine, low back, and left foot. See Exhibit 7. However, the weight of the evidence is that the claimant's prior employment was not so heavily accommodated that the position was not employment in the open labor market. Therefore, the claim for additional permanent disability benefits from the Second Injury Fund is denied, because Section 287.220, RSMo 2016, does not authorize any Second

Injury permanent disability benefits if the claimant is unemployable in the open labor market prior to the work related injury.

I certify that on March 29, 2018,  
I delivered a copy of the foregoing award  
to the parties to the case. A complete  
record of the method of delivery and date  
of service upon each party is retained with  
the executed award in the Division's case file.

By MP

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

