

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

Injury No.: 00-153572

Employee: Joseph Banks
Employer: Bridgford Foods (Settled)
Insurer: Legion Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: September 13, 2000
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 7, 2008. The award and decision of Administrative Law Judge Suzette Carlisle, issued January 7, 2008, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 9th day of July 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Joseph Banks Injury No.: 00-153572
Dependents: N/A Before the

Employer: Bridgford Foods (Previously Settled)
Additional Party: Second Injury Fund
Insurer: Legion Insurance Company (Previously Settled)
Hearing Date: October 2, 2007

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

Checked by: SC: JHP

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 13, 2000
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: Claimant was involved in a motor vehicle accident while working, and injured both shoulders and his neck.
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: Bilateral shoulders and cervical spine
14. Nature and extent of any permanent disability: Permanent Total Disability against the Second Injury Fund
15. Compensation paid to-date for temporary disability: \$18,646.00
16. Value necessary medical aid paid to date by employer/insurer? \$17,754.00

Employee: Joseph Banks

Injury No.: 00-153572

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$701.74
19. Weekly compensation rate: \$467.83/\$314.20
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:

Weekly differential of \$153.63 payable by SIF for 188.4 weeks beginning October 7, 2002 through May 19, 2006, and thereafter, the sum of \$467.83 for Claimant's lifetime

Total: TO BE DETERMINED

22. Future requirements awarded: As outlined in this award

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Daniel Walkenhorst

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Joseph Banks	Injury No.: 00-153572
Dependents:	N/A	Before the
Employer:	Bridgford Foods (Settled)	Division of Workers' Compensation Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Legion Insurance Company (Settled)	Checked by: SC: JHP

PRELIMINARIES

A hearing was held for a final Award on October 2, 2007 at the Missouri Division of Workers' Compensation (DWC) St. Louis Office at the request of Joseph Banks ("Claimant"), pursuant to Section 287.450 RSMo. 2000. Attorneys Daniel Walkenhorst and Ellen Morgan represented Claimant. Assistant Attorney General Kay Osborne represented the Second Injury Fund ("SIF"). The record closed after presentation of the evidence. Venue is proper, and jurisdiction properly lies with DWC.

Claimant settled his claim against Bridgford Foods ("Employer") and Legion Insurance Company ("Insurer") prior to the hearing for 23.9% of the body for the cervical spine, 25% of the right shoulder, and 15% of the left shoulder.

At the hearing, Claimant submitted evidence relating to injury numbers 99-176885 and 00-153572. Although separate awards were issued, the body of each award contains similar issues and facts.

STIPULATIONS

The parties stipulate that on or about September 13, 2000;

1. Claimant was employed by Employer.
2. Claimant sustained an accident which arose out of and in the course of employment in St. Louis County, Missouri.

3. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation Law.
4. Employer's liability was fully insured by Insurer.
5. Employer had notice of the injury.
6. A Claim for Compensation was filed within the time prescribed by law.
7. Claimant's average weekly wage was \$701.74. The rate for Temporary Total Disability (TTD) and Permanent Total Disability (PTD) was \$467.83, and the rate for Permanent Partial Disability (PPD) was \$314.20.
8. Claimant received \$18,646.00 in TTD benefits, representing 39 6/7 weeks (from February 21, 2001 to November 28, 2001).
9. Employer paid \$17,754.00 in medical benefits.
10. SIF has a subrogation interest in a third party action arising out of Claimant's work accident and is entitled to a portion of the funds held in escrow totaling \$54,930.48. [1]
11. Claimant attained maximum medical improvement (MMI) on October 7, 2002.

ISSUES

The issues to be decided are:

1. The nature and extent of SIF liability, if any, for either PPD or PTD benefits, and
2. Whether the SIF is entitled to any portion of the \$54,930.48 third party settlement?

EXHIBITS

Claimant's Exhibits A-BB were admitted without objection. The SIF offered no Exhibits. Any notations contained in the records were present when admitted into evidence.

FINDINGS OF FACT

All evidence was reviewed but only evidence supporting this award is referenced below. Any objections not expressly ruled on in this award are overruled. Based upon a preponderance of the evidence, I find the following facts:

1. Claimant was fifty-five years old on October 13, 2000 when the work accident occurred. Claimant completed high school and earned 30 college credits in the 1960's but did not graduate. Claimant served in the reserves from 1965-1971, but sustained no combat injuries.
2. During Claimant's career, he worked as a route salesman/driver for the following employers:
 - 1972 -1975 - Stewart Sandwiches -Claimant delivered boxed sandwiches.
 - 1975 -1989 - Household Research - Claimant delivered rug shampoo and refilled stock in grocery stores.
 - 1989- 2001 - Bridgford Foods - Claimant loaded and delivered products to stores, and set up in-store displays. Claimant was paid on commission and set his own hours.
3. Claimant last worked in February 2001.
4. Claimant used a laptop to retrieve information for work. He did not know how to program, use word processing, or access internet services. Claimant does not own a computer. Claimant has no supervisory experience.
5. On September 13, 2000, Claimant was injured while sitting in his car at a red light. Claimant injured both shoulders and his neck. A cervical spine x-ray revealed C5-6 degenerative disc disease, spurring, and foraminal encroachment. In November 2000, a sonogram revealed bilateral partial thickness rotator cuff tears.
6. Dr. Galatz repaired a partial thickness tear of the right rotator cuff on April 19, 2001. The left rotator cuff tear was not surgically repaired.
7. A cervical MRI in September 2001 revealed abnormalities at C3-4 and C4-5 and defects at C5-6 with encroachment. On October 1, 2001, Dr. Lange diagnosed bilateral surgical pathology and multilevel degeneration of the neck with spurs at C3-4, C4-5, and C5-6. Dr. Lange recommended conservative treatment. Claimant was unable to complete physical therapy due to neck and bilateral shoulder pain.
8. Claimant did not improve after surgery, physical therapy and injections. On October 2, 2001, Dr. Galatz ordered a

functional capacity evaluation (FCE).

9. On October 16, 2001, Claimant refused to complete parts of the FCE, and exerted a sub-maximal and inconsistent effort on the completed sections. During the test Claimant complained of neck and right shoulder pain, dizziness and headache. Results revealed Claimant's active range of motion was inconsistent with his refusal to lift at shoulder height.

10. Dr. Galatz noted muscle weakness, shoulder pain, and tenderness. Based on FCE results and examination, Dr. Galatz concluded she could not provide additional help for Claimant's right shoulder and recommended he seek a neck evaluation or a rating.

11. In March 2002, Dr. Lange did not recommend cervical spine surgery. Noting no clear nerve root pattern, multi level degeneration, and symptom magnification, Dr. Lange placed Claimant at MMI.

12. Dr. Matthew Gornet is an orthopedic spine surgeon. He initially examined Claimant on April 2, 2002 for neck and bilateral shoulder pain. X-rays revealed loss of disc height at C5-6 with spurring. A repeat cervical MRI revealed a herniated disc at C5-6.

13. Dr. Gornet performed a cervical microdiscectomy and anterior fusion at C5-6 on May 8, 2002 and opined the injury was work related.

14. Diagnostics revealed a solid fusion by October 7, 2002; however, Claimant was given the option of a foraminotomy to address stenosis, but Claimant declined. Dr. Gornet released Claimant from care in October 2002 with no specific work restrictions.

15. On January 29, 2007, Claimant settled the case with Employer and Insurer for 23.9% PPD of the cervical spine, 25% PPD of the right shoulder, and 15% PPD of the left shoulder. Employer retained a subrogation interest in the third party claim.

16. Claimant cannot work with his arms because of difficulty lifting. He has left shoulder pain and difficulty performing overhead work, loading or stacking boxes.

17. Claimant cannot drive for work because sudden movements cause pain. He has difficulty sleeping, arm numbness, hard muscles, increased pain with lifting more than five pounds, inability to work a full day, difficulty driving due to limited cervical range of motion, neck and elbow pain when driving, and headaches twice a day. He uses heat and ice on a daily basis, and takes Aleve as needed. Certain medications cause stomach problems; and make him feel like a 'zombie.' Claimant has to lie down every two hours due to fatigue caused by inability to sleep. He naps three to four times a day.

18. Claimant has difficulty buttoning his shirt. He stopped wearing pullover shirts due to shoulder and neck pain. Claimant's knees have gone out while getting in and out of the shower. His girlfriend cleans house and handles laundry. He pays someone to perform yard work.

19. A day in the life: Claimant sleeps off and on in a recliner. He drives a short distance to transport his granddaughter to and from school. Claimant naps when he returns. Claimant works with his granddaughter after school. Claimant meets friends at a local restaurant once a week to socialize.

20. Injury after 2000: Claimant injured his left elbow and neck in a motor vehicle accident in January 2003. Claimant's neck was surgically repaired. On redirect, Claimant testified the surgery moved a nerve at the top of his right shoulder, but he received no treatment to his neck. Before the 2003 accident, he rated the neck pain four out of ten. Following the 2003 accident, the pain temporarily increased to seven, but returned to a four after treatment.

21. Claimant filed a claim against the insurance company of the driver that hit him. The case settled for \$100,000.00. Mr. John Anderson, Claimant's attorney, received a fee of \$40,000.00. Expenses totaled \$5,069.52. Claimant has not received any of the remaining balance totaling \$54,930.48. The money is being held in an account by Mr. Anderson.

Pre-Existing Conditions

22. In 1972, Claimant injured his neck in an automobile accident at work. He missed nine months from work but did not have surgery. Complaints include muscle tension with activity. Claimant developed cervical arthritis. Limited movement interfered with his ability to sleep. Claimant has on-going pain and spasms with sitting too long. After returning to work he occasionally missed work due to his neck. Claimant settled the case with Employer and Insurer for 14% PPD of the body for the cervical spine injury.

23. In 1981 Claimant injured his left knee. Dr. Hawk removed medial shelf plica on February 24, 1983. At work, the knee was stiff, popped, and buckled. Claimant worked slower and took more breaks. It took longer to complete the work day. Claimant played less softball due to pain and began wearing a stretch brace to work or run. He stopped bass fishing as overhead casting was painful.

24. In 1984, Claimant felt a pop in his right elbow while lifting at working. Dr. Manske diagnosed medial/lateral epicondylitis. Claimant missed nine months from work. Surgery was recommended, but not performed. The elbow became stiff and painful. Claimant started wearing an elbow brace. It was difficult to write or load boxes at work. Claimant settled the case with the Employer and Insurer for 40% percent of the right elbow. Dr. Volarich rated 40% PPD of the right elbow.

25. In 1994 Claimant slid on ice, injuring his right big toe. Dr. Evans removed multiple osteophytes from the big toe during surgery on January 17, 1995. After surgery, the toe did not bend, which made it difficult to walk or run. The toe became painful in winter or with pressure. Claimant began wearing tennis shoes most of the time. Pain increased with walking or stepping onto the work van. Occasionally, Claimant fell due to loss of balance. Claimant settled the case with Employer for 83% PPD of the right big toe, and for 21.4 % PPD of the right ankle with the SIF.

26. On October 18, 1999, Claimant injured both wrists while moving boxes. He treated with Dr. Thomas Hawk. A fusion was recommended, but not performed. Claimant began wearing wrist guards for support. He obtained help when loading the truck. He paid a helper to unload the truck. Claimant's hands continue to hurt, the right more than the left. He stopped playing golf due to wrist and elbow pain. Claimant settled the case with Employer and Insurer for 10% PPD of each wrist.

27. On November 3, 1999, Claimant jumped off the door of a loading dock and felt his right knee pop. An MRI revealed a tear of the posterior horn of the medial meniscus. Surgery was performed. After surgery, Claimant continued to experience knee locking and pain. Claimant worked longer hours due to decreased ability to walk. However, Claimant was not disciplined or reprimanded for slow movement.

28. Dr. Speiser, a rheumatologist, examined Claimant on May 8, 2000. Dr. Speiser diagnosed degenerative arthritis of the right knee, both hands and both feet. Dr. Speiser recommended pain medication until Claimant was ready for surgery.

29. On December 28, 2000, Dr. Thomas Hawk rated 25% PPD of the right knee and opined Claimant would need a total knee replacement in the future. Claimant settled his case with Employer/Insurer for 30% PPD of the right knee.

Expert Medical Opinion

Dr. David Volarich, D.O. is a board certified independent medical examiner, who testified by deposition on Claimant's behalf. Dr. Volarich evaluated Claimant on February 23, 2003. Dr. Volarich found Claimant to be PTD due to a combination of the primary and pre-existing injuries.

Dr. Volarich found the October 18, 1999 injury was the substantial factor which caused bilateral wrist strains and aggravation of degenerative arthritis. Dr. Volarich rated 20% PPD of the right wrist, 20% PPD of the left wrist, and 10% PPD of the body for multiplicity.

Dr. Volarich found the November 3, 1999 injury was the substantial factor which caused the right knee injury and need for surgery. Dr. Volarich rated 40% PPD of the right knee.

Dr. Volarich found the September 13, 2000 automobile accident was the substantial factor which caused the need for C5-6 surgery and aggravation of degenerative disc and joint disease, and bilateral shoulder injuries, which required right shoulder surgery. Dr. Volarich rated 40% PPD of the body for cervical injury, 35% PPD of the right shoulder, 25% PPD of the left shoulder, and 20% PPD of the body for multiplicity.

Dr. Volarich testified Claimant reported no permanent work or driving restrictions prior to September 2000, received no help lifting, and played softball three times a week. After September 2000, Claimant reported he could only sit 30 minutes, stand less than 30 minutes, lift 10 pounds, and could not work overhead.

Dr. Volarich diagnosed and rated the following pre-existing conditions:

- 1) Chronic cervical syndrome and degenerative disc and joint disease at C3-4, C4-5, and C5-6 – 15% of the body,
- 2) Right shoulder strain - 7.5% PPD,
- 3) Left knee derangement - 30% PPD,

- 4) Right elbow medial and lateral epicondylitis - 40% PPD,
- 5) Right great toe - 20% PPD of the foot, and
- 6) Bilateral wrist strains – 20% PPD of each wrist, plus 10% for multiplicity
- 7) Right knee – 40% PPD

Dr. Volarich found the combination of Claimant's disabilities created substantially greater disability than the simple sum of each injury and a loading factor should be applied.

Dr. Volarich set the following work restrictions:

- 1) Hands - Minimal repetitive activities, limit weight to 5 pounds away from the body or 10 pounds close to the body, avoid vibratory trauma to hands.
- 2) Lower extremities - Limit repetitive stooping, squatting, crawling, kneeling, pivoting, climbing and impact activities, use caution on uneven ground, limit standing or walking to 30 minutes.
- 3) Spine - Limit repetitive bending, twisting, lifting, pushing, pulling or carrying, occasional lifting to 20 pounds, no overhead lifting, avoid fixed positions over 45 minutes.

Dr. Volarich diagnosed aggravation of cervical syndrome and left elbow lateral epicondylitis from the 2003 automobile accident. Dr. Volarich distinguished disability from the September 2000 injury from the January 2003 injury based on Claimant's complaints. Prior to 2003, Claimant's last neck treatment was in 1986. After the January 2003 injury, Claimant treated for one month and reported transient pain, which returned to baseline after treatment. Claimant was under active treatment for his left elbow at the time of Dr. Volarich's' evaluation in February 2003.

Vocational Expert Opinion

Mr. James England Jr. is a rehabilitation counselor who examined Claimant on August 13, 2003 at his attorney's request. Claimant wore wrist braces when he arrived for the interview.

Mr. England concluded Claimant's academic ability did not prevent him from performing alternative work. Mr. England found Claimant had transferable knowledge.

However, Mr. England found Claimant to be PTD due to a combination of his medical conditions. He also found the September 2000 injury produced a hindrance to employment or reemployment. Mr. England included Claimant's complaints from the January 2003 accident when determining Claimant's ability to work in the open labor market because Claimant did not mention different symptoms after the 2003 accident.

RULINGS OF LAW

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After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant is PTD due to a combination of pre-existing and primary injuries based on the following.

Burden of Proof: In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of [his] claim, including Second Injury fund Liability. ***Meilves v. Morris***, 422 S.W.2d 335, 339 (Mo. 1968).

Liability for PTD Benefits: Claimant seeks permanent total disability compensation from the SIF. To establish SIF liability for PPD or PTD, Section 287.220 RSMo (2000) requires the [fact finder] make three findings regarding disability:

- 1) There must be a determination that the employee has permanent disability resulting from the last injury alone, and
- 2) There was a pre-existing permanent disability that was serious enough to constitute a hindrance or obstacle to employment or re-employment which combines with the disability from the compensable work related injury to create a greater overall disability to the employee's body as a whole than the simple sum of the disability from the work injury and the pre-existing disability considered separately, and

- 3) To determine permanent total disability, there must be a determination that all of the injuries and conditions combined, including the last injuries; have resulted in the employee being permanently and totally disabled.

Section 287.020.7 defines "total disability" as...the inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. Any employment means any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition. **Kowalski v. M-G Metals and Sales, Inc.** 631 S.W.2d 919, 922 (Mo. App. 1982) (*Citations omitted*).

The test for permanent total disability in Missouri is a claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. **Searcy v. McDonnell Douglas Aircraft Co.** 894 S.W.2d 173, 178 (Mo.App. 1995) (*Overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121, S.W.3d 220, 223 (Mo. banc 2003)).

If a claimant's last injury in and of itself rendered him permanently and totally disabled, then the [SIF] has no liability and the employer is responsible for the entire amount. **Hughey v. Chrysler Corp.** 34 S.W.3d 845, 847 (Mo. App. 2000). Therefore, the inquiry begins with the Employer's liability.

1. The Last Injury Alone

I find Claimant has disability from the last injury alone. Claimant's injuries resulted in a cervical fusion and a right rotator cuff repair. The left rotator cuff was also torn, although not surgically repaired. Claimant experienced decreased range of motion in both shoulders and his neck, impairing his ability to drive and perform his usual occupation.

Dr. Volarich rated 40% PPD of the body for the cervical injury, 35% PPD of the right shoulder, 25% of the left shoulder and 20% for multiplicity for the September 13, 2000 injuries. Claimant settled the case with Employer and Insurer for 23.9% PPD of the cervical spine, 25% PPD of the right shoulder, and 15% PPD of the left shoulder. However, the SIF is not bound by settlements between other parties. **Totten v. Treasurer of State**, 116 S.W.3d 624, 628 (Mo.App. 2003). Based on medical evidence, the settlement, and Claimant's credible testimony, I find Claimant sustained 23.9% PPD of the cervical spine, 25% PPD of the right shoulder, and 15% PPD of the left shoulder as a result of the September 13, 2000 work accident.

2. Hindrance or Obstacle to Employment or Reemployment

"To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, the fact finder should focus on the potential that the pre-existing injury may combine with a future work related injury, and result in a greater degree of disability than would have resulted if there was no such prior condition." **E.W. v. Kansas City, Missouri, School District**, 89 S.W.3d 527, 537 (Mo.App.2002) (*overruled on other grounds, by Hampton*, 121 S.W.3d at 223) (*citations omitted*).

Claimant has significant pre-existing disabilities. After the 1972 neck injury, Claimant experienced decreased range of motion. Claimant has on-going pain since the accident, which interferes with sleep. He missed nine months from work. When he returned to work he occasionally missed days because of his neck.

Claimant began wearing a stretch brace after the 1981 left knee injury. After surgery, Claimant experienced stiffness, popping and buckling at work. His pace slowed and he took more breaks. His flexible work schedule enabled him to work longer hours to complete tasks.

Right elbow surgery was recommended but not performed in 1984. Writing invoices and loading boxes became difficult. Claimant began wearing an elbow brace following the accident.

Surgery on Claimant's right big toe resulted in inability to bend the toe. At work, pain increased with walking and stepping into the van.

A fusion was recommended for both wrists, but not performed. Claimant began wearing wrist guards for support at work. Claimant sought help loading the truck and paid a helper to unload the truck because of pain.

Claimant's right meniscus was repaired after the November 1999 accident. His knee began locking. Claimant worked longer hours and decreased time spent walking. A total knee replacement is expected in the future.

On May 8, 2000, Claimant was diagnosed with degenerative arthritis of the right knee, bilateral hands and feet.

I find that as of September 13, 2000, Claimant continued to suffer from foregoing injuries and medical conditions. I find the above pre-existing injuries have the potential to combine with a future work related injury, resulting in a greater degree of disability than would have resulted if there were no prior conditions. I find Claimant's pre-existing disabilities are serious enough to constitute a hindrance or obstacle to employment or re-employment. I find the pre-existing disabilities combine with the September 13, 2000 disabilities and create greater overall disability to Claimant's body than the simple sum of the disability from the work injury and the pre-existing disabilities considered separately.

3. Permanent Total Disability

I find the opinions of Dr. Volarich and Mr. England are credible that Claimant is PTD. Dr. Volarich found Claimant PTD due to a combination of the current work injuries and pre-existing conditions. He concluded Claimant was "unable to engage in gainful activity or perform ongoing work in the future, for eight hours per day, 5 days per week throughout the work year." Dr. Volarich also determined Claimant was unable to return to his prior employment or a similar employment on a full time basis.

Based on Dr. Volarich's restrictions, Mr. England found Claimant was unable to sustain sedentary work on a "consistent, day-to-day basis." Mr. England found poor sleep habits may cause fatigue and nodding, which could interfere with Claimant's attention to detail. Mr. England concluded Claimant was not a good candidate for employment or vocational rehabilitation.^[2]

Mr. England listed Claimant in the advanced age group at age 59; and found Claimant unable to return to route sales. Mr. England concluded, although academically sound, Claimant could not perform sedentary work because of attendance requirements and repetitive use of both upper extremities. He also noted Claimant's limited experience with computers.

Although Mr. England considered Claimant's January 2003 motor vehicle when he found Claimant to be PTD, Claimant provided no new or different symptoms following the 2003 accident. Claimant treated for one month for his neck after the 2003 accident. Claimant testified that following the 2003 accident, his neck pain rose temporarily to 7 out of 10 before returning to the pre-accident level of 4.

Claimant testified credibly that he cannot drive for work because of neck pain. Lifting more than 5 pounds causes shoulder pain and Claimant is chronically fatigued due to lack of sleep. Claimant testified he needs to lie down three to four times per day. I observed Claimant yawn throughout the three hour hearing. Claimant appeared stiff while sitting. He stood and moved around once while testifying.

Taking into account Claimant's age, educational background, employment history, lack of transferable skills, disabilities caused by the preexisting and primary injuries, the credible opinions of Dr Volarich and Mr. England, medical records, and Claimant's credible testimony, I find Claimant to be PTD due to the combination of the disabilities before September 2000 and the disabilities from the September 13, 2000 work accident.

Commencement Date for Permanent Total Disability Payments

The obligation to pay permanent disability compensation commences under Section 287.160.1 RSMo (2000) on the date claimant's permanent disability begins. **Kramer v. Labor & Indus. Rel. Com'n**, 799 S.W.2d 142, 145 (Mo. App. 1990) (*overruled on other grounds by Hampton*, 121 S.W.3d at 223). The parties stipulate Claimant achieved MMI on October 7, 2002.

Where, as in this case, the rates of compensation for PPD and PTD are different, the SIF is liable for the difference between what should have been paid by the Employer and Insurer for PPD under Section 287.190, and what Claimant should receive for PTD under Section 287.200. **Kowalski v. M-G Metals and Sales, Inc.**, 631 S.W.2d 919, 923 (Mo. App. 1982).

I previously found Claimant sustained 23.9% PPD of the cervical spine, 25% PPD of the right shoulder, and 15% PPD of the left shoulder for the September 13, 2000 work accident. The disability totaled 188.4 weeks.

I find Employer's liability for PPD should have commenced on October 7, 2002 and ended on May 19, 2006. SIF is liable to pay Claimant the sum of \$153.63 (\$467.83 PTD rate less \$314.20 PPD rate) per week for 188.4 weeks, retroactive as of October 7, 2002, and thereafter (beginning May 20, 2006), the sum of \$467.83 per week for the remainder of Claimant's lifetime. **Laterno v. Carnahan**, 640 S.W.2d 470, 471 (Mo. App. 1982).

Second Injury Fund Right to Subrogation

The parties stipulated that Claimant settled the third-party tort claim for \$100,000.00, and the net recovery, after attorney's fees and expenses, totaled \$54,930.48. The parties further stipulated the SIF has a subrogation interest in the net recovery.

However, in post-hearing briefs, Claimant contends DWC has no jurisdiction to determine SIF subrogation rights. SIF asserts a right to a portion of the \$54,930.48 recovery as an advance toward future PTD payments.

Prior to the start of the hearing, Employer/Insurer's attorney, Mary Lou Calzaretta, objected by telephone to the hearing proceeding without representative for Employer and Insurer being present. However, Employer and Insurer did not participate in the proceeding and no determination was made regarding Employer's subrogation interest.

Section 287.150 provides in pertinent part:

1. Where a third person is liable to the employee ...for the injury...the employer shall be subrogated to the right of the employee... against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee... would have been entitled to recover. Any recovery by the employer against such third person shall be apportioned between the employer and employee... using the provisions of subsections 2 and 3 of this section.

3. Whenever recovery against the third person is effected by the employee..., the employer shall pay from his share of the recovery a proportionate share of the expenses of the recovery, including a reasonable attorney fee. After the expenses and attorney fee have been paid, the *balance of the recovery shall be apportioned between the employer and the employee... in the same ratio that the amount due the employer bears to the total amount recovered, if there is no finding of comparative fault on the part of the employee, or the total damages determined by the trier of fact if there is a finding of comparative fault on the part of the employee...* Any part of the recovery found to be due to the employer, the employee ... shall be paid forthwith and any part of the recovery paid to the employee...under this section shall be treated by them as an advance payment by the employer on account of any future installments of compensation in the following manner:

(1) The total amount paid to the employee...shall be treated as an advance payment if there is no finding of comparative fault on the part of the employee; or

(2) A percentage of the amount paid to the employee...equal to the percentage of fault assessed to the third person from whom recovery is made shall be treated as an advance payment if there is a finding of comparative fault on the part of the employee.

4. In any case in which an injured employee has been paid benefits from the second injury fund *as provided in subsection 3 of section 287.141*, and recovery is had against the third party liable to the employee for the injury, the second injury fund shall be subrogated to the rights of the employee against said third party *to the extent of the payments made to him from such fund*, subject to provisions of subsections 2 and 3 of this section. (Emphasis added)

The Missouri Supreme Court in ***Cole v. Morris***, 409, S.W.2d 668, 671 (Mo. 1966), recognized that Section 287.150 RSMo did not provide SIF subrogation rights. However, the court held that the Second Injury Fund has a right to subrogation against a third party who is responsible for the injury to the claimant. This right arises by operation of law. ***Id.*** The goal was to prevent an unjust enrichment by the employee retaining compensation and damages.

I find Claimant did not receive an unjust enrichment. There is no evidence Claimant was paid rehabilitation benefits under Section 287.141 or uninsured employer benefits under Section 287.220.5.

At the hearing, no evidence was presented regarding the date the third party settlement was reached. Nor was evidence presented about the amount Employer paid prior to the third party settlement. No evidence was presented regarding comparative fault.

Even assuming Claimant settled his claim with Employer prior to the third party settlement, there would be no net recovery to Claimant. (Assuming Employer paid \$136,114.88^[3] divided by the \$100,000.00 third party settlement equals a 1.36 ratio or \$74,768.56 Employer maybe entitled to recover under Section 287.150). This amount is greater than the \$54,930.48 net recovery. Under this scenario, Claimant would receive no recovery, and therefore no unjust enrichment.

In post hearing briefs the SIF acknowledged Employer is entitled to the \$54,930.48 net recovery. However, the SIF did not subtract attorney's fees and expenses totaling \$45,069.52 from the \$100,000 recovery. After deducting fees and expenses, no net recovery would remain for the payment of any SIF subrogation claim.

While the SIF may have a theoretical subrogation interest in the \$54,930.48, I am not able to determine the actual amount of its interest, if any, since the amount of the employer's subrogation interest has not been determined.^[4]

CONCLUSION

Claimant is found to be permanently and totally disabled as of October 7, 2002. The Second Injury Fund is to pay a weekly differential of \$153.63 per week from October 7, 2002 through May 19, 2006. Thereafter the Second Injury Fund is to pay permanent and total disability benefits of \$467.83 per week for the remainder of Claimant's lifetime. Second Injury Fund liability for PPD is moot. The Second Injury Fund is not awarded a subrogation interest in the third party net recovery. Claimant's attorney is entitled to a 25% lien for legal services rendered.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

[1] These funds represent the remaining balance after attorney fees of \$40,000 and expenses of \$5,069.52 were paid. The third party claim settled for \$100,000.00.

[2] Dr. Volarich placed restrictions on repetitive activities involving Claimant's hands, legs and spine. He limited lifting to 5 pounds per hand with arms extended, 10 pounds close to the body, and an occasional 20 pound lift. He advised Claimant to avoid impact tools, limit weight bearing to 30 minutes, no overhead lifting, avoid fixed positions for more than 45 minutes, and rest as needed.

[3] The \$136,114.88 assumed payment by Employer is based on the following: PPD- \$99,714.88, TTD- \$17,754.00, and Medical - \$18,646.00. $\$136,114.88 \text{ Employer payments} / \$100,000.00 \text{ third party recovery} = 1.36 \text{ ratio}$. $1.36 \text{ ratio} \times \$54,930.48 = \text{a payment of } \$74,768.56 \text{ possibly owed to Employer from the net recovery}$.

[4] The SIF should join any action filed by the Employer and Insurer for a determination of their subrogation interests.