

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

Injury No.: 03-093090

Employee: Victor Barnhill
Employer: Yellow Freight System, Inc.
Insurer: Self-Insured
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, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to resolve the following issues: (1) whether employer is liable to provide employee with future medical care; (2) whether employee is entitled to recover temporary total disability benefits from the period of time beginning October 4, 2003, to October 11, 2005; (3) the nature and extent of employee's permanent disability; and (4) the liability of the Second Injury Fund.

The administrative law judge rendered the following findings and conclusions: (1) employee is entitled to temporary total disability benefits from October 4, 2003, to October 11, 2005; (2) employee is not entitled to future medical treatment to cure and relieve from the effects of his injuries; (3) as a result of the primary injury, employee sustained 27.5% permanent partial disability of the left shoulder, 15% permanent partial disability of the body as a whole referable to the lumbar spine, and 15% permanent partial disability of the body as a whole referable to the cervical spine, and employee's compensation for permanent partial disability is subject to a 10% multiplicity factor to account for cumulative disabilities resulting from his multiple injuries; and (4) the Second Injury Fund is liable for 82.75 weeks of permanent partial disability benefits. The administrative law judge also noted that the compensation she awarded to employee as against the employer is subject, per stipulation of the parties, to a credit in favor of the employer in the amount of \$17,298.64.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in finding employee is not permanently and totally disabled; (2) in sustaining employer's evidentiary objection to employee's Exhibit I; and (3) in finding employee is not entitled to future medical treatment.

Employer filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in awarding past temporary total disability benefits to employee; and (2) in determining the nature and extent of employee's permanent partial disability resulting from the work injury.

Employee: Victor Barnhill

- 2 -

On July 23, 2013, the Commission received a Motion to Submit Additional Evidence filed by employee. On October 3, 2013, the Commission denied employee's Motion to Submit Additional Evidence.

For the reasons stated below, we modify the award of the administrative law judge referable to the issues of: (1) the nature and extent of employee's permanent disability; and (2) the liability of the Second Injury Fund.

Discussion

Temporary total disability

We agree with the administrative law judge's determination that employee was unable to compete for work in the open labor market from October 4, 2003, to October 11, 2005, but discern a need for some clarifying comments and analysis. Accordingly, we hereby supplement the administrative law judge's findings pertinent to this issue as follows.

The administrative law judge stated, on page 10 of her award, that Dr. Emanuel, the treating surgeon, opined that employee was temporarily and totally disabled as a result of the accident on May 22, 2003, up until the date Dr. Emanuel performed surgery on employee's left shoulder on October 12, 2005, because of the physical restrictions from Dr. Kennedy combined with the restrictions Dr. Emanuel himself imposed. After a thorough review of the record, we were unable to locate an opinion from Dr. Emanuel referencing Dr. Kennedy's restrictions as affecting his own opinion regarding temporary total disability; accordingly we must hereby disclaim this finding by the administrative law judge.

Employer argues, in its brief, that Dr. Emanuel solely opined regarding employee's ability to work as a truck driver during the time period at issue, and did not provide an opinion whether employee would be unable to perform *any* job. After a careful review of the transcript, we find this characterization of Dr. Emanuel's opinion to be inaccurate. Although Dr. Emanuel did specifically opine that employee would be unable to return to work as a truck driver during the period at issue, he also opined that employee was temporarily and "totally" disabled during that time period. *Transcript*, page 122. Employer had an opportunity, at Dr. Emanuel's deposition, to ask Dr. Emanuel to clarify whether he was solely opining regarding employee's ability to work as a truck driver. But Dr. Emanuel was simply asked whether there was no doubt in his mind that employee could not go back to work as a truck driver during the period at issue; Dr. Emanuel agreed. Given these circumstances, we view Dr. Emanuel's testimony as supportive of an award of temporary total disability benefits.

We credit the testimony from employee's vocational expert, J. Stephen Dolan, (and so find) that employee would have been limited to unskilled, entry-level jobs given the restrictions from the treating physicians Dr. Kennedy and Dr. Emanuel during the time period at issue. We also credit the testimony from employee (and so find) that, during the time period at issue, employee attempted to find work at a number of unskilled, entry-level jobs, but was unsuccessful. When we consider these facts along with the opinion from Dr. Emanuel, we are persuaded that the administrative law judge correctly determined that employee was temporarily and totally disabled from October 4, 2003, to October 11, 2005. Accordingly, we affirm the award holding employer liable for temporary total disability benefits.

Employee: Victor Barnhill

- 3 -

Permanent total disability

After careful consideration, we deem appropriate and hereby affirm and adopt the administrative law judge's findings with respect to the nature and extent of permanent partial disability employee sustained as a result of the primary injury. The administrative law judge determined that employee is not permanently and totally disabled. We acknowledge that the record contains evidence to support this finding by the administrative law judge, but we disagree for the following reasons.

At the hearing, employee described his subjective complaints and limitations at length; his testimony is accurately recounted in the administrative law judge's award. While the administrative law judge found lacking in credibility a restriction from employee's primary care physician, Dr. Farmer, that employee must be permitted to lie down during the day, she did not indicate whether she believed employee's own testimony that he has a need to lie down during the day. After careful consideration, we find employee's testimony to be credible on this point. We note that employee cited pain as the primary factor motivating his need to lie down during the day; we note also employee's credible testimony that his pain stems from the effects of the primary injury as well as a preexisting right lower extremity injury. Employee also cited fatigue referable to his preexisting cardiac condition as contributing to his need to lie down during the day.

Considering these factors, and in light of the absence of any opinion from a treating or evaluating physician linking employee's need to lie down during the day to the effects of the primary injury considered in isolation, we find that employee's need to lie down during the day does not result solely from the effects of the primary injury, but instead from a combination of his pain resulting from the primary injury and his preexisting right lower extremity injury, as well as fatigue caused by his preexisting cardiac condition.

The administrative law judge accurately recounted the testimony from employer's vocational expert, Mr. England. We supplement her findings by noting that Mr. England credibly opined (and we so find) that the only transferable skills employee has from his past vocational history are his ability to drive trucks and his knowledge of the trucking industry. We note also that Mr. England appeared to focus on identifying jobs that employee could hypothetically perform within the physical restrictions imposed by the various treating and evaluating physicians, rather than the more relevant question (for our purposes, at least) whether employee could effectively compete for and obtain such jobs on the open labor market. Ultimately, Mr. England conceded that if Dr. Volarich's opinions were accepted by the fact-finder, employee would be considered permanently and totally disabled from a medical standpoint as a result of the primary injury in combination with his preexisting conditions of ill-being; Mr. England made clear that he wasn't arguing with Dr. Volarich's medical findings.

We supplement the administrative law judge's findings referable to the testimony from employee's vocational expert, Mr. Dolan, as follows. Mr. Dolan was seemingly unaware of the extent of employee's preexisting disability referable to the right lower extremity, and did not recall if he asked employee whether his preexisting cardiovascular issues affected his vocational abilities in the time period leading up to the primary injury. Given these deficiencies, we are not persuaded by Mr. Dolan's ultimate opinion assigning permanent total disability to the primary injury alone. We do, however, find Mr. Dolan's testimony persuasive to the extent he opined that it's very unlikely any employer would

Employee: Victor Barnhill

- 4 -

hire employee given the restrictions assigned by Dr. Volarich referable to the primary injury and employee's preexisting conditions of ill-being.

We note that both vocational experts agreed that a need to lie down during the day would preclude employee from securing work in the open labor market. In light of the foregoing considerations, we ultimately find most persuasive the opinion from Dr. Volarich (and so find) that employee is permanently and totally disabled as a result of the effects of the primary injury in combination with employee's preexisting disabling conditions of ill-being.

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).

We find appropriate and hereby adopt the administrative law judge's findings with respect to the nature and extent of permanent partial disability employee suffered as a result of his preexisting cardiac and right lower extremity conditions. We are convinced these conditions were serious enough to constitute hindrances or obstacles to employment at the time employee sustained the primary injury. This is because we are convinced employee's preexisting cardiac and right lower extremity conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of the conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Having found that employee suffered from a preexisting permanent partially disabling condition that amounted to a hindrance or obstacle to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. The Second Injury Fund is liable where the evidence demonstrates: (1) employee suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

Employee: Victor Barnhill

We have adopted the administrative law judge’s findings with respect to the nature and extent of permanent partial disability employee suffered as a result of the primary injury. We find that employee is not permanently and totally disabled as a result of the last injury considered in isolation. Rather, we conclude employee is permanently and totally disabled owing to a combination of his preexisting disability in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total disability benefits.

Correction

We note that the administrative law judge’s award includes two pages marked “Page 2” and that these pages reflect differing amounts as to employer’s liability for permanent partial disability benefits. We note that the correct amount is \$68,765.46.

Conclusion

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

The Second Injury Fund is liable for weekly permanent total disability benefits beginning January 3, 2006, at the differential rate of \$309.20 until November 19, 2009, and thereafter at the stipulated weekly permanent total disability rate of \$649.32. The weekly payments shall continue for employee’s lifetime, or until modified by law.

The award and decision of Administrative Law Judge Karla Ogradnik Boresi, issued June 21, 2013, 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 14th day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee:	Victor Barnhill	Injury No.: 03-093090
Dependents:	N/A	Before the
Employer:	Yellow Freight System, Inc.	Division of Workers' Compensation
Additional Party	Second Injury Fund	Department of Labor and Industrial Relations Of Missouri
Insurer:	Self C/O Gallagher Bassett Services	Jefferson City, Missouri
Hearing Date:	March 12, 2013	Checked by: KOB

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: May 22, 2003
5. State location where accident occurred or occupational disease was contracted: Evansville, Indiana
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 closing the terminal gate when it suddenly fell, wrenching his left arm and body.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left shoulder, neck, and low back
14. Nature and extent of any permanent disability: 27 ½% shoulder; 15% cervical; and 15% low back
15. Compensation paid to-date for temporary disability: \$19,114.59
16. Value necessary medical aid paid to date by employer/insurer? \$41,272.77

Issued by DIVISION OF WORKERS' COMPENSATION

- 17. Value necessary medical aid not furnished by employer/insurer? n/a
- 18. Employee's average weekly wages: \$1,122.45
- 19. Weekly compensation rate: \$649.32/\$340.12
- 20. Method wages computation: By Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

105 3/7 weeks of temporary total disability (or temporary partial disability):	\$ 68,456.88
202.18 weeks of permanent partial disability from Employer:	\$68,765.46
Less credits (see Award):	[\$17, 298.64]
Employer sub-total:	\$119,923.70

22. Second Injury Fund liability: Yes

82.75 weeks of permanent partial disability from Second Injury Fund:	\$ 28,144.93
--	--------------

TOTAL: \$ 148,068.63

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: Christopher Tucker

Issued by DIVISION OF WORKERS' COMPENSATION

- 17. Value necessary medical aid not furnished by employer/insurer? n/a
- 18. Employee's average weekly wages: \$1,122.45
- 19. Weekly compensation rate: \$649.32/\$340.12
- 20. Method wages computation: By Agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
 - 105 3/7 weeks of temporary total disability (or temporary partial disability): \$ 68,456.88
 - 202.18 weeks of permanent partial disability from Employer: \$69,765.46
 - Less credits (see Award): [\$17, 298.64]
 - Employer sub-total: \$120,923.70

- 22. Second Injury Fund liability: Yes
 - 82.75 weeks of permanent partial disability from Second Injury Fund: \$ 28,144.93
 - TOTAL: \$ 149,068.63

- 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: Christopher Tucker

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Victor Barnhill	Injury No.: 03-093090
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Yellow Freight System, Inc.	Department of Labor and Industrial Relations Of Missouri
Additional Party	Second Injury Fund	
Insurer:	Self c/o Gallagher Bassett Services	Jefferson City, Missouri
Hearing Date:	March 12, 2013	Checked by: KOB

PRELIMINARIES

The matter of Victor Barnhill ("Claimant") proceeded to hearing for a final determination. Attorney Christopher Tucker represented Claimant. Attorney Chris Patt represented Yellow Freight Systems ("Employer"), which is self-insured c/o Gallagher Bassett Services. Assistant Attorney General Caroline Bean represented the Second Injury Fund.

This case was previously submitted for a temporary or partial determination on the issue of additional medical treatment. On May 23, 2005, Claimant and Employer presented the case, and on July 8, 2005, the undersigned issued a Temporary or Partial Award ("2005 Temporary Award") ordering some, but not all, of the treatment Claimant sought. The 2005 Temporary Award is incorporated by reference into this Final Award.

The parties agreed that on May 22, 2003, Claimant sustained an accidental injury arising out of and in the course of his employment. At that time, Claimant earned an average weekly wage of \$1,122.45, which corresponds to rates of compensation of \$649.32 for permanent total disability ("PTD") and temporary total disability ("TTD") benefits, and \$340.12 for permanent partial disability ("PPD") benefits. Employer paid TTD benefits from May 23, 2003 through October 3, 2003, and from October 12, 2005 to January 17, 2006, or \$19,114.59 in TTD benefits. Employer paid medical benefits totaling \$41,272.77.

The parties also made the following stipulations: 1) Employer advanced Claimant \$10,000, which shall be a credit against this Award; 2) Employer shall have a credit of \$6,000 for unemployment Claimant received from December 26, 2003 to June 3, 2004; 3) Claimant reached MMI on January 3, 2006; and 4) Employer overpaid Claimant two weeks of TTD, and is entitled to an additional credit of \$1,298.64.

The issues to be determined are: 1) Is Claimant entitled to recover TTD benefits from October 4, 2003 to October 11, 2005; 2) Is Claimant entitled to future medical treatment to cure and relieve him of the effects of his injuries; 3) What is the nature and extent of Claimant's permanent disability; and 4) What is the liability of the Second Injury Fund? Claimant seeks to recover permanent total disability benefits.

The following exhibits were offered and admitted into evidence without objection, except for Claimant's Exhibit I as discussed below, and Second Injury Fund Exhibits I and II, which admitted over Claimant's objection at hearing:

Claimant's Exhibits

- A. Indexed Medical Records (2 folders indexed 1-16)
- B. Indexed Pre-Existing Medical Records (Indexed 1-3)
- C. Indexed Prescription Solution Records (Indexed 1-2)
- D. Dr. David Volarich Evidence Deposition with 5 exhibits 4.27.05
- E. Dr. David Volarich Evidence Deposition with 8 exhibits 12.21.07
- F. Dr. David Volarich Evidence Deposition with 1 exhibit 7.31.09
- G. J. Stephen Dolan Evidence Deposition with 4 exhibits 12.14.11
- H. Eleven (11) pages of photographs of Gate
- I. Dr. Robert Farmer Medical Source Statement 3.28.06
- J. Washington University B-J Hospital Pain Management Patient Questionnaire 6.25.12
- K. Dr. Robert Farmer Medical Records 11.29.12
- L. July 8, 2005 Temporary Award of Judge Boresi

Employer's Exhibits

1. Deposition transcript of Dr. Kennedy with exhibits
2. Deposition transcript of Dr. Haupt with exhibits
3. Deposition transcript of Dr. Emanuel with exhibits
4. Deposition transcript of Mr. England with exhibits
5. Deposition transcript of Dr. Mirkin with exhibits

SIF Exhibits

- I. 5.27.11 Deposition of Victor D. Barnhill
- II. 4.7.05 Deposition of Victor D. Barnhill

The objection to Claimant's Ex. I, the Medical Source Statement form of Dr. Farmer, as inadmissible hearsay is sustained. The rule against hearsay is not simply a procedural hurdle. It serves the purpose of ensuring documents admitted into evidence are trustworthy. *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 616 (Mo. 2006).

Exhibit I lacks the affidavit required by § 490.692, which allows for the admissibility of business records or copies reproduced in the ordinary course of business by any process which accurately reproduces the original upon affidavit of custodian, and §490.680 RSMo, which indicates a record is competent if the custodian testifies to its identity and the mode of its preparation, and if it was made in the ordinary course of business at or near the time of the act. Accordingly, Exhibit I constitutes inadmissible hearsay, and Claimant did not meet his burden to prove that it falls within a business records exception. Therefore, Claimant's Ex. I is not admitted into evidence.¹ *See Lenzini v. Columbia Foods*, 829 S.W.2d 482 (Mo. Ct. App. 1992). (Record lacking affidavit or evidence the record was prepared in the regular course of business was inadmissible hearsay).

¹ The same document is contained within Exhibit A, Index 9, which was admitted without objection. While the Medical Source Statement may technically be part of the record, there are still questions regarding its scope, purpose and method of preparation that impact the weight that can be given the document.

FINDINGS OF FACT

Claimant's Testimony and Medical Records

Claimant is a 59-year-old married man with four grown children. He and his wife live in a camper, and thus stay wherever he can park, usually in Florida for the winter. Despite telling previous employers he had a high school diploma, Claimant dropped out of school in the 9th grade and had no other education or training. He was ashamed of his lack of education and admitted to lying about it.

From 1988 to 2003, Claimant worked for Employer as an over the road truck driver. His job included driving long distances on a regular basis, delivering trailers and vehicles, hooking and unhooking vehicles from trailers, lifting heavy equipment (30-50 pounds), carrying mailbags, tire chains and other items, and operating heavy trailer doors. He was based in St. Louis with routes throughout the Midwest. He has no experience or training in supervision or computers.

Claimant worked with preexisting disabling injuries and conditions. As a teenager, Claimant was riding his bike when a car struck him from behind. He fractured his right femur and ankle, underwent surgical repair with hardware, and went to physical therapy. He reinjured his right leg in the Army. Thereafter, Claimant had problems with his right leg, both in his personal life and at work. Due to a malunion of the initial fracture, Claimant's foot was externally rotated, which caused him to limp and his foot to roll. He had problems with stairs, walking, running, and jumping. He had stiffness and pain. He avoiding many activities with his feet, and felt his leg slowed him down considerably. As of the date of final hearing, Claimant has pain and requires the use of a walker for ambulation.

Claimant's cardiovascular problems began in 2000 when a heart attack lead to quadruple bypass surgery. He missed work from June to October that year. As a result of his heart disease and COPD, Claimant got short of breath, had trouble with movement and lifting, had to be much more careful, and lost a great deal of his stamina. The symptoms intensified in cold. He was on several medications, including inhalers. He underwent more frequent DOT physicals after the heart attack, and failed a treadmill stress test on May 17, 2003 by 40 seconds. Since the 2003 accident that is the basis of this award, Claimant's heart symptoms have gotten worse, and he has had additional cardiac surgery, including angioplasty and implantation of a defibulator. As of the date of final hearing, Claimant complains of shortness of breath to the point he limits talking, low mobility, and extreme fatigue. He lies down now in part to deal with the fatigue from his heart, but there are no formal restrictions specifically tied to his cardiovascular disease or COPD.

Claimant had a prior injury to his back that occurred when he was driving a truck without a trailer, known as bobtailing, in March 2002. Because the truck had no weight in the back, it became airborne going over bumps, which caused Claimant's back to hurt. Claimant tried to live with the pain, but in September of 2002, Claimant went to see his family doctor, whose conservative treatment provided relief. He did not file a worker's compensation claim.

The accident that forms the basis of this claim occurred on May 22, 2003, when Claimant was closing a gate at the Evansville, Indiana terminal. The heavy gate suddenly dropped toward

the ground, jerking Claimant's right arm and causing injuries to his low back, neck, and left shoulder. The 2005 Temporary Award contains a detailed description of the accident.

Following the May 22, 2003 work accident, Employer authorized treatment at Concentra, with spine surgeon Dr. Kennedy, and pain specialist Dr. Graham. Claimant saw Dr. Kennedy with complaints of pain in his left neck, shoulder, hip, and lower back. Dr. Kennedy ordered an MRI of the low back and physical therapy. Claimant also saw Dr. Graham for trigger point injections and epidurals in the neck and trapizus. Initially, Dr. Kennedy prescribed restrictions of no lifting more than ten pounds. Claimant sat at a desk to do paperwork.

Claimant scored high on Waddell's signs and Oswestry tests, causing Dr. Graham to suspend treatment. On September 29, 2003, Dr. Kennedy reviewed a functional capacity exam, found Claimant at maximum medical improvement ("MMI"), and assigned permanent restrictions of lifting no more than 40 pounds occasionally, and 25 pounds frequently. Dr. Kennedy assigned PPD of 5% of the body referable to the cervical spine, with an additional 5% of the body referable to the lumbar spine. He did not feel Claimant was a surgical candidate and did not find him permanently and totally disabled.

Employer did not accommodate the permanent restrictions, and October 2, 2003, was the last day Claimant worked. Claimant drew unemployment from December 26, 2003 to June 3, 2004, taking in \$6,000 for which Employer is entitled to receive a credit. Claimant has since tried to find work at several gas stations and restaurants, but was not hired. When his wife was working at a vacation property, he occasionally answered the phone for her, but did not work.

The 2005 Temporary Award addressed the conflicting opinions as to whether Claimant required additional treatment for his shoulder. I previously found the opinion of Dr. Volarich to be supported by the facts and medical records, especially Dr. Farmer's reading of an MRI with referral to an orthopedic surgeon for treatment. I did not find Dr. Haupt's argument that Claimant did not have a significant rotator cuff tear compelling or credible. The findings regarding the shoulder treatment and expert opinions are more fully contained in the 2005 Temporary Award, and are incorporated herein by reference.

In compliance with the 2005 Temporary Award, Employer authorized additional shoulder treatment. Dr. Emanuel saw Claimant on September 19, 2005. Dr. Emanuel diagnosed impingement syndrome, and AC joint arthritis, and opined that Claimant was temporarily and totally disabled regarding his left shoulder as a result of the injury of May 22, 2003. On October 12, 2005, Dr. Emanuel performed surgery on Claimant's left shoulder. Additional diagnoses included partial thickness rotator cuff tear supraspinatous tendon, and partial thickness tearing of the glenoid labrum. Claimant had physical therapy on his left shoulder and neck from October 2005 to January 2006. He testified pain and stiffness in his neck and left shoulder did not improve. Dr. Emanuel found some tenderness of the upper and middle trapezius muscles on palpation, and released him at MMI on January 3, 2006.

Claimant testified that from October 3, 2003, the day after his last day of work, to October 11, 2005, the day before his shoulder surgery, he did not feel he was physically able to work in any capacity due to the pain in his shoulder, neck and low back. Claimant also testified

as of January 4, 2006, he was still experiencing pain, stiffness and limited mobility in his neck, low back and left shoulder. He did not feel he was capable of working.

Dr. Farmer was Claimant's primary care physician before and after the accident. From October 2003 to January 2006, Claimant only saw Dr. Farmer once for back pain (October 27, 2003) and twice for routine matters (August 19, 2004 and December 11, 2004, wherein Dr. Farmer noted "states not better from MVA-neck area."). Following his release from authorized treatment, Dr. Farmer directed treatment for pain and depression. Claimant complained of pain on the left side of the body that continued to worsen. Dr. Farmer provided including Fentanyl patch, Lyria, Lexapro and other prescription medications.

Dr. Farmer also directed Claimant to a string of several pain management professionals, beginning with Dr. Suada Spirtovic on January 31, 2007. Dr. Spirtovic documented Claimant's complaints were to the left side of his body from head to foot, and right hip pain. Dr. Spirtovic's examination revealed limited cervical range of motion, especially on the left, and multiple trigger points. Dr. Spirtovic diagnosed cervical degenerative disk disease, left shoulder osteoarthritis, and myofascial pain syndrome. Claimant received three epidural steroid injections from Dr. Spirtovic, but got no lasting relief.

Dr. Farmer referred Claimant to Dr. Stephen Burger for nerve conduction studies on June 28, 2007. Dr. Burger noted on July 16, 2007 that the EMG/NCS of left upper and lower extremity was "entirely normal with no evidence of radiculopathy, plexopathy, or neuropathy." Further, he noted "with a normal neurological assessment and normal neurophysiologic testing, I have explained to him that, beyond anti-inflammatories, perhaps some physical therapy and time, supportive care is otherwise indicated."

Dr. Farmer referred Claimant to pain management specialist Dr. Thom, who treated Claimant for pain in his neck, left shoulder, and low back between March 11, 2009 and sometime in 2011. He provided Claimant with trigger point and steroid injections, nerve ablation, intra-articular facet joint injections of the cervical spine, and physical therapy. On April 14, 2009, Dr. Thom performed a left shoulder arthrogram that he read as normal, and performed a left shoulder intra-articular injection. Claimant testified that he received "very temporary" relief from Dr. Thom's treatment.

Claimant consulted neurosurgeon Dr. Joseph Yazdi on December 24, 2010, who concluded Claimant was not a surgical candidate. Dr. Yazdi performed an examination, reviewed diagnostic studies showing C5-6 and C7-T1 degenerative disc disease, noted several conservative measures had been completed, and recommended a dorsal column trial. Dr. Thom also initially recommended a spinal cord stimulator. However, this was never implanted because Claimant failed the prerequisite psychological testing, and therefore, Dr. Thom no longer recommended the spinal cord stimulator.

Dr. Farmer also referred Claimant to Dr. Bottros at Barnes Jewish Hospital for pain management from July 6, 2012 through December 2012. By mid-2012, Claimant was using a wheelchair and scooter for ambulation. Despite rating his pain at 8 to 10, Claimant reported he slept well, and engaged in activities like guitar playing. Claimant reported pain in his entire left shoulder, left arm, left side of neck and back of neck, and his left side all connected to his left

shoulder, low back, left hip and at different times, left leg. He received nerve ablation, which set off his defibrillator, nerve blocks, and steroid and trigger injections into his shoulder and neck. Again, Claimant reported only temporary relief from the treatment provided by Dr. Bottros.

Claimant testified as to his current complaints he attributes to his primary injury. In his neck, he experiences stiffness, burning and throbbing. He has burning, stiffness and lacks mobility in his low back and left hip. He has burning, throbbing and lacks mobility in his left shoulder. Claimant takes the medications listed on Claimant's Exhibit K, including Codeine #3, Baclofen, Citalopram, Lexapro, Lyrica and Voltaren Gel for his neck, low back and left shoulder. The other medications are for his heart and lung problems. He testified that "anything and everything" makes him have pain, he uses a walker for mobility, driving is difficult, and he is depressed. Claimant feels he is not able to work due to pain, loss of stamina, poor concentration, the need to rest, and sleepiness from medications.

Claimant also has complaints and limitations that stem from preexisting conditions. As for his right lower extremity, Claimant has a lot of pain and limited mobility. He uses a walker in part due to his leg disability. At hearing, he alternated raising his legs onto his walker. The pain medications he takes for his spine and shoulder pain also address his leg pain. He always avoided stooping, squatting and crawling because of his right leg, and although he has no formal restrictions, he always self limited his activities to avoid symptoms in his right leg.

Regarding his cardiovascular disease, since his heart attack in 2000, Claimant experiences shortness of breath, trouble lifting and problems with stamina. Cold weather makes things worse, and he had to watch what he did. He failed a stress test in March 2003. While his cardiologist did not have specific restrictions, Claimant understood he had to limit his activities based on his capabilities on any given day. His cardio-pulmonary disability contributes to his need to lie down throughout the day. He underwent the implantation of a defibrillator in 2007

In a typical day, Claimant takes his pain medications in the morning, works out his stiffness, and sits or lies down throughout the day as needed. Some days he may not get out of bed. Claimant's sleep pattern is affected, and he tosses and turns to get comfortable. He takes medications before he goes to bed. His right lower extremity throbs and burns when he sleeps. He cannot lay on his left side or back while sleeping.

Expert Opinions-Medical

There are multiple experts who lent their opinions to this case. On the issue of additional treatment addressed in the 2005 Temporary Award, Drs. Volarich and Haupt testified, and the opinion of Dr. Volarich was found to be "the most credible, medically sound and well supported opinion." Employer has complied with the 2005 Temporary Award by providing the treatment with Dr. Emmanuel, as recommended by Dr. Volarich. The summary and findings regarding the opinions of these doctors are contained in the 2005 Temporary Award, and are now incorporated into this Award by reference.

Dr. David G. Kennedy treated Claimant's neck and low back from June 26, 2003 to October 26, 2003, and testified by deposition on behalf of the Employer for the 2005 Temporary Hearing. When Dr. Kennedy first examined Claimant, many of the findings were equivocal,

generalized, and not clear cut. He reviewed an MRI of Claimant's cervical spine that showed some mild degenerative changes and recommended an MRI of his lumbar spine and an EMG to get a better idea of the source of his arm symptoms. The EMG did not show any clear cut evidence of cervical nerve root impingement, and the MRI showed only mild degenerative changes at L4-5 and L5-S1 with no evidence of nerve root impingement. Based on the examination, Dr. Kennedy testified there was no finding serious enough to warrant surgical intervention. He recommended Claimant not lift more than 40 pounds occasionally and 25 pounds frequently related to the work accident of May 22, 2003, and he considered him to be at MMI. He rated Claimant's PPD at 5% of the cervical spine and 5% of the lumbar spine.

After the testimony considered in 2005 Temporary Award, **Dr. David Volarich** reexamined Claimant on October 3, 2006 and October 16, 2007, updated the history, generated reports and testified by deposition twice, on December 21, 2007 and July 31, 2009. The exam was notable for scars from his bypass, objective findings of fatigue-inducing COPD, up to 20% reduction in power or range of motion in various upper extremity maneuvers, restricted spinal and hip motion, and deformity/decreased range of motion of the lower right extremity.

Dr. Volarich listed and rated four diagnoses associated with the primary injury: 1) cervical syndrome including disc bulging at C5-6 and aggravation of degenerative disc disease ("DDD") and degenerative joint disease ("DJD")(25% PPD); 2) disc protrusions at L4-5 and L5-S1 and aggravation of DDD and DJD causing intermittent left lower extremity radicular symptoms (25% PPD); 3) left shoulder internal derangement in the form of impingement, partial rotator cuff tear and partial labral tear (40% PPD); and 4) myofascial pain syndrome associated with the cervical and lumbar spine (5% PPD).

Dr. Volarich described the injuries pre-existing May 22, 2003, and found the prior disabilities serious enough to be a hindrance and obstacle to employment. There was a 50% PPD of the right lower extremity at the hip due to the severely comminuted fracture that healed with malunion. The rating accounts for abnormal external rotation of the hip, moderately severe degenerative arthritis of the hip joint, all of which cause pain, lost motion and difficulties with prolonged weight bearing and impact activities. There was a 35% PPD of the right lower extremity at the knee due to the fractures of the tibia and fibula that healed with malunion. The rating accounts for the various deformity of the lower leg and ankle, as well as posttraumatic arthritis in the ankle, which also contributed to difficulties with prolonged weight bearing and impact activities. There was 25% PPD of the body as a whole rated at the cardiopulmonary system due to his coronary artery disease that required four-vessel coronary artery bypass grafting. The rating accounts for his chronic obstructive pulmonary disease, all of which contribute to easy fatigability, and shortness of breath with exertion leading up to May 22, 2003. Dr. Volarich found within a reasonable degree of medical certainty, that the combination of his disabilities created a substantially greater disability than the simple sum or a total of each separate injury, illness and that a loading factor should be applied. Based upon medical assessment alone, it was Dr. Volarich's opinion that Claimant was permanently and totally disabled as a result of the work-related injuries of May 22, 2003, in combination with his pre-existing medical conditions.

As of October 29, 2007, Claimant indicated his neck, shoulder, and back symptoms had increased over the prior year. Dr Volarich recommended additional care for the myofascial pain

syndrome similar to the treatments Claimant has had in the past with limited success. He provided two pages of reasonable restrictions concerning the combination of all injuries and disabilities. He made recommendations for treatment limited to the back and neck, including injections and a TENS unit. No further shoulder treatment was needed. He did not think DDD was the source of the pain, but rather myofascial muscle pain.

R. Peter Mirkin, M.D. testified by deposition on March 11, 2013, on Employer's behalf. He is a board certified orthopedic surgeon who treats patients and serves as an expert witness. Dr. Mirkin did not personally examine Claimant, but reviewed medical records and depositions relating to Claimant's May 22, 2003 injury, records of Dr. Thom, and Claimant's testimony. It was Dr. Mirkin's opinion that the treatment Claimant received after Dr. Kennedy's release at MMI was not reasonably required to cure or relieve the effects of his May 22, 2003 injury. While the treatment Dr. Kennedy gave was reasonable and necessary, the treatment Claimant received after MMI addressed episodic subjective complaints and his degenerative spine disease. Dr. Mirkin explained how the degenerative disease, specifically the large bone spur at C5-6, accounts for the objective findings of cervical radiculopathy on the EMG. Dr. Mirkin could not find any orthopedic reason to require Claimant to lie down throughout the day. He agreed Claimant had subsequent deterioration of conditions unrelated to the primary injury.

James Emanuel, M.D., a board-certified orthopedic surgeon specializing in shoulder surgery, treated Claimant from September 19, 2005 until he released him on January 3, 2006. He generated records and prepared reports in conjunction with his treatment of Claimant's left shoulder. He testified by deposition on January 24, 2011.

When Dr. Emanuel initially evaluated Claimant, he felt the symptoms were due to an arthritic acromioclavicular joint, and that Claimant was a candidate for arthroscopy of the shoulder with a subacromial decompression and distal clavicle resection, which was carried out on October 12, 2005. The diagnoses including subacromial bursitis with impingement, and aggravation acromioclavicular joint arthritis, which were related to the work accident, and chronic partial thickness tearing of the supraspinatus tendon and glenoid labrum, which were not causally related. Claimant eventually recovered quite well. Dr. Emanuel released Claimant at MMI on January 3, 2005 with no restrictions, and opined Claimant sustained five percent permanent partial disability rating of the upper extremity as it related to the shoulder due to the May 2003 accident. He did not feel Claimant's subsequent complaints of lower left arm numbness and pectoralis pain were related to the work injury or surgery.

Dr. Emanuel addressed the issue of Claimant's ability to work from the date of accident, May 22, 2003, and through the course of his treatment. During that time period, Dr. Emanuel would have recommended no lifting greater than 15 pounds from floor to waist, no lifting from waist to overhead, no pushing or pulling greater than 50 pounds on a four-wheel cart and no pushing or pulling greater than 15 pounds without a cart, and no repetitive shoulder height reaching. Considering these restrictions as well as the neck restrictions imposed by Dr. Kennedy, Dr. Emanuel felt that Claimant was temporarily and totally disabled as a result of the injury of May 22, 2003 up until the date he performed surgery on Claimant's left shoulder on October 12, 2005.

Expert Opinions-Vocational

The opinions of two competing vocational experts were of record, **Mr. James England** for Employer, and **Mr. J. Stephen Dolan** for Claimant. Both are vocational counselors who met with Claimant, reviewed his medical records, considered vocational test results, generated reports, and testified by deposition. Both counselors have comparable expertise by experience, and both considered a history consistent with the credible evidence of record, including Claimant's limited educational and vocational experience.

Mr. England concluded that, assuming the restrictions imposed by Dr. Kennedy, and the lack of restrictions recommended by Dr. Emanuel, Claimant could return to his regular employment. Even with Claimant's subjective complaints, Mr. England believed he could perform a variety of entry-level occupations such as security work, cashiering, dispatching, night clerk etc... Just considering the restrictions imposed by Dr. Volarich due to the primary and pre-existing injuries, there were still some jobs within the open labor market. Other than Dr. Farmer's restrictions,² it was only if you assumed the Claimant's subjective complaints and the combination of his medical problems described by various doctors including Dr. Volarich, that Claimant was considered unemployable. If he was unemployable, it was due to a combination of his medical problems, rather than those related only to the primary injury.

Mr. Dolan was of the opinion, based upon the records review, interview, and testing, within a reasonable degree of vocational certainty, that Claimant was not employable in the open labor market. He testified Claimant has a poorly controlled pain problem that is severe enough, according to Dr. Volarich and Dr. Farmer, his primary care physician, to keep him from sticking to tasks. He could not tolerate an eight-hour workday. Under either of those doctors' restrictions, it was Mr. Dolan's opinion Claimant does not have any real access to employment for which a reasonably stable labor market exists.

Mr. Dolan relied heavily upon Dr. Farmer's restrictions as set forth in his March 28, 2006 Medical Source Statement, but admitted he has no idea if the restrictions are permanent or not, and cannot identify the etiology of the restrictions. Mr. Dolan relied heavily on Claimant's pain complaints. He also acknowledged that if it is found credible that Claimant's pain is causing him to lie down frequently throughout the day, that need, in and of itself, would render him unemployable in the open labor market.

² Mr. England acknowledged Dr. Farmer's restriction that Claimant recline several times a day would prevent regular employment. Although the Farmer report is inadmissible hearsay, it is permissible for an expert to rely on hearsay. *Irving v. Missouri State Treasurer* 35 S.W.3d 441, 447 (Mo.App. W.D.,2000) (An "expert may rely on hearsay in rendering an opinion. Any weaknesses in the foundation for an opinion that relies on hearsay can be brought out on cross-examination, and affect only the opinion's weight"). However, because Dr. Farmer was not subject to cross-examination, I cannot give his restrictions equal weight as those experts who did testify.

ADDITIONAL FINDINGS OF FACT AND RULINGS OF LAW

Based on a comprehensive review of the above-stated evidence, including Claimant's testimony, the expert medical and vocational opinions and depositions, the medical records, and the stipulations, as well as my personal observations of Claimant at hearing, and based upon the applicable laws of the State of Missouri, I find:

1. Claimant shall recover TTD benefits from October 4, 2003 to October 11, 2005.

The issue of whether Claimant is entitled to recover TTD benefits following his release by Dr. Kennedy was deferred in the 2005 Temporary Award due to insufficient evidence. Following the evaluation and treatment of Claimant's shoulder, there is now sufficient credible evidence to find Claimant is entitled to recover TTD benefits for the time beginning October 4, 2003 to October 11, 2005.

"The burden of proving entitlement to temporary, total disability benefits [is] on [the] [e]mployee." *Seeley v. Anchor Fence Company*, 96 S.W.3d 809, 821 (Mo.App. S.D.2002)³. Temporary total disability compensation is paid until the employee can return to work, his condition stabilizes, or he has reached a point where further progress is not expected. *Minnick v. South Metro Fire Protection Dist.*, 926 S.W.2d 906, 909 (Mo.App. W.D.1996). The purpose of temporary, total disability benefits is to cover the cost for a worker's healing period. *Seeley* at 821. The test is whether an employee is able to compete in the open labor market given the employee's present physical condition. *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. W.D.1997); *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 506 (Mo.App. S.D. 2005).

There is now ample evidence to support a finding Claimant was temporarily and totally disabled from the accident date to his release at MMI after his shoulder surgery. Dr. Emmanuel, the treating doctor for the shoulder, Dr. Volarich, Mr. England, Mr. Dolan, and Claimant's own testimony support a finding Claimant was unable to work during this period. Employer shall compensate Claimant for 105 3/7 weeks of TTD benefits.

2. Claimant is not entitled to future medical treatment to cure and relieve him of the effects of his injuries.

Once again, the parties are asking the administrative law judge to determine if Claimant requires additional treatment. Section 287.140.1 "entitles the worker to medical treatment as may reasonably be required to cure and relieve from the effects of the injury." *Ford v. Wal-Mart Associates, Inc.*, 155 S.W.3d 824, 828 (Mo.App. E.D.2005). It is sufficient to award future medical benefits if the claimant shows by reasonable probability that he is in need of additional medical treatment by reason of his work-related accident. *Bock v. Broadway Ford Truck Sales, Inc.*, 55 S.W.3d 427, 437 (Mo.App. E.D. 2001). The parties stipulated Claimant was at maximum medical improvement as of on January 3, 2006. However, MMI is not inconsistent

³ This is one of several cases cited in this Award in support of other principles of law not affected by the *Hampton* ruling, which overruled many workers compensation cases only with respect to the proper standard of review. See *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 200, 224-32 (Mo. banc 2003). No further note will be made of such *Hampton* cases.

with the need for future medical treatment. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 890 (Mo.App. S.D.,2001)(citations omitted).

There is a dispute as to whether Claimant needs additional treatment for his neck or back that is reasonably required to cure and relieve from the effects of the work injury⁴. Dr. Volarich stated in his October 29, 2007 report that Claimant developed myofascial pain syndrome as a direct result of the May 22, 2003 work accident, and it is likely Claimant will require additional care for his ongoing myofascial pain syndrome similar to the treatments that have been provided in the past. The treatment recommendations Dr. Volarich made in his October 29, 2007 letter were the same treatment recommendations he made at the time of his April 2004 examination and the same treatment that has been ineffective. Further, Dr. Volarich agreed the findings in the 2005 Temporary Award (that there was no further medical treatment reasonably required to cure and relieve the effects of Claimant's cervical and lumbar injuries) was consistent with his opinions as of the time of his October 3, 2006 evaluation.

In contrast to Dr. Volarich, Dr. Kennedy testified Claimant did not require any additional treatment for his neck or low back after he was released from care in September 2003. Further, Dr. Mirkin testified that, up until the date Claimant was released by Dr. Kennedy, he received all necessary treatment to cure and relieve the effects of his neck and low back injuries. Dr. Mirkin also thought that the treatment Claimant received to his low back and neck after his release from Dr. Kennedy was not necessary to cure and relieve the effects of the May 22, 2003 work injury, but was for "chronic intermittent degenerative complaints."

Some of Claimant's own treating doctors found no additional treatment warranted. In July 2007, Dr. Burger, based on a normal neurological assessment and normal neurophysiologic testing, explained that, beyond anti-inflammatories, perhaps some physical therapy and time, supportive care is otherwise indicated. As of December 24, 2010, Dr. Yazdi found Claimant was not a surgical candidate, and Dr. Thom deemed Claimant ineligible for a dorsal column stimulator.

Claimant has degenerative disease in his body, and there is no evidence of an orthopedic injury such as a tear, fracture or herniation causally related to the work injury (other than in the shoulder, which is not at issue for further treatment). Claimant testified that the treatment he has received, which is essentially the same as the treatment recommended by Dr. Volarich, offered no real relief. The fact that the treatment sought has been ineffective supports the conclusion reached in the 2005 Temporary Award, which is repeated herein, that Claimant has received all the treatment that is reasonably required to cure and relieve the effects of his work injury. The claim for future treatment is denied.

3. Employer and Second Injury Fund Liability for Permanent Disability.

Although Claimant is undoubtedly entitled to recover for his permanent disability, there is a conflict in the evidence as to whether the recovery should be for total disability or partial disability. There is compelling evidence on both sides of the issue. After reviewing and weighing all the evidence, I find Claimant shall recover permanent partial disability benefits from both Employer and the Second Injury Fund.

⁴ No doctor recommends further treatment for the shoulder.

Under Mo. Rev. Stat. § 287.020.7 (2000), “total disability” is defined 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.” The test for permanent total disability is 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 (Mo. App. E.D. 1995).

Under Mo. Rev. Stat. § 287.190.6 (2000), “‘permanent partial disability’ means a disability that is permanent in nature and partial in degree ...” The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. *Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. *Fogelson v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975).

Where, as here, the Second Injury Fund is involved, Mo. Rev. Stat. § 287.220 (2000) provides the appropriate apportionment of benefits under the statute. In order to recover from the Second Injury Fund, Claimant must prove a pre-existing permanent partial disability, that existed at the time of the primary injury, and which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment should employee become unemployed. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo. App. E.D. 1999). Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together. In the permanent partial disability scenario, the disabilities must also meet thresholds of 12.5% PPD of the body as a whole or 15% PPD of a major extremity. These thresholds are not applicable in permanent total disability cases. § 287.220.1.

It is first necessary to determine whether Claimant is permanently and totally disabled under the Missouri Workers’ Compensation Law. While it is true Claimant was temporarily totally disabled for nearly two years while he waited for proper treatment to his shoulder, he reached MMI from the other body as a whole injuries fairly quickly. He has also had a worsening of preexisting conditions, his cardiopulmonary disease. Dr. Kennedy gave restrictions that would not preclude employment, Dr. Emmanuel did not provide restrictions, and an FCE showed Claimant capable of work at the medium demand level.

Vocational expert Jim England testified that just based upon the restrictions from Drs. Kennedy and Emanuel alone, Claimant could even return to driving a truck. Even considering the Claimant’s subjective complaints, Mr. England believed he could perform a variety of entry-level occupations such as a security guard, cashier or dispatcher. Mr. England also opined that there

were still jobs in the open labor market using Dr. Volarich's restrictions (which included restrictions related to preexisting disabilities). Vocational expert J. Steven Dolan gave the opinion that based on the restrictions of Drs. Kennedy and Emanuel; Claimant was restricted from returning to his job at Yellow Freight due to the weight restrictions, but remained capable of employment in an unskilled entry-level position.

Although Dr. Farmer's statement that Claimant "must recline frequently throughout the day" could preclude employment, I do not find that restriction to be reasonable, credible or supported by the objective evidence. The statement has not been subject to cross examination. It is not known whether the restriction is permanent. Contained in boilerplate in a social security related form, it is not clear whether the information is relevant for workers compensation purposes. In addition to these flaws, there is medical evidence contradicting the restriction. Dr. Mirkin could not find any orthopedic reason to require Claimant to lie down throughout the day. The FCE showed greater capabilities. Neurological assessment and neurophysiologic testing was normal. Because it is not reasonable to consider the need to recline frequently as a credible vocational limitation, the opinions that are based on this restriction are not credible and will not form the basis of a finding in this case.

Although capable of working, Claimant nonetheless has real and significant permanent partial disability. He underwent shoulder surgery. Dr. Emmauel, the treating surgeon, rated the PPD at 5% of the left shoulder, while Dr. Volarich rated the disability at 40% of the left shoulder. Considering Claimant's complaints, the objective evidence, and other credible evidence of record, I find the PPD associated with the left shoulder to be 27 ½%.

The other disability associated with the primary injury is more difficult to gauge. Claimant's complaints have been amorphous – he complains of pain along his whole left side, from head to foot. He has documented degenerative disease that preexisted and could account for many of his complaints. No treatment has been effective, and multiple tests have been unremarkable. Yet even the treating physician imposed restrictions, and provided ratings of 5% PPD of the lumbar spine, and 5% of the cervical spine. Dr. Volarich rated 25% of the lumbar spine and 25% of the cervical spine, with an additional 5% for worsening of the myofascial pain syndrome.

Considering Claimant's complaints, the objective evidence, and other credible evidence of record, I find the PPD associated primary work injury to be 15% of the lumbar spine and 15% of the cervical spine. I further find Claimant is entitled to multiplicity. A multiplicity factor is "a special or additional allowance for cumulative disabilities resulting from a multiplicity of injuries." *Eagle v. City of St. James*, 669 S.W.2d 36, 42 (Mo.App.1984). The [factfinder] has the discretion to include a multiplicity factor in assessing cumulative disabilities but is not required to do so. *Chambliss v. Lutheran Medical Center*, 822 S.W.2d 926, 932 (Mo.App.1991); *Sharp v. New Mac Elec. Co-op.*, 92 S.W.3d 351, 354 (Mo. Ct. App. 2003). Due to the multiple injuries, a multiplicity factor of 10% shall apply.

Claimant has measurable preexisting permanent partial disability significant enough to be a hindrance and obstacle to employment. Since he was a teen, Claimant has lived with an obvious and disabling lower extremity injury that limited his vocation options, slowed his activities at work and home, and caused him pain. Dr. Volarich rated 50% PPD at the hip and

35% PPD at the knee. I find the permanent partial disability associated with his childhood leg fracture, surgery and resulting malunion is equivalent to 35% of the right lower extremity at the hip, to include all PPD of the right lower extremity.

Claimant also has significant disability associated with his cardio-pulmonary disease. Following his heart attack in 2000, Claimant's ability to work in weather extremes, his stamina, and his lifting capabilities were adversely affected. Dr. Volarich rated 25% PPD due to the cardiopulmonary disease. I find the permanent partial disability associated with the preexisting cardiopulmonary disease is equivalent to 15% PPD of the body as a whole.

Section 287.220 RSMo. sets forth the statutory authority for the determination of Second Injury Fund liability. Assuming the employee is entitled to receive compensation on the basis of a combined disability and the injuries under consideration meet the statutory threshold, the Administrative Law Judge is charged with making three determinations: 1) the degree of disability attributable to all injuries or conditions existing at the time the last injury was sustained; 2) the degree of disability which would have resulted from the last injury considered alone and of itself; and 3) the degree of disability which existed prior to the last injury. The sum of the second and third determinations is then subtracted from the first, with the balance representing the liability of the Second Injury Fund.

I find the degree of Claimant's disability that is attributable to all injuries existing at the time of the last injury is equivalent to 399 weeks of disability. The sum of the primary injury/disability (183.8 weeks) and the preexisting disability (injuries totaling 132.45 weeks) is 316.25 weeks. The Second Injury Fund is liable for 82.75 weeks (399 weeks - 316.25 weeks = 82.75 weeks).

CONCLUSION

Claimant was temporarily totally disabled until he reached MMI from his shoulder injury, at which time he was permanently and partially disabled from the May 22, 2003 accident, alone and in combination with his prior disabilities. Employer and the Second Injury Fund are liable for benefits as set forth above. Attorney Christopher Tucker shall have a lien of 25% for legal services rendered.

I certify that on 6/21/13,
I delivered a copy of the foregoing award
to the parties to the case. A complete
Date: _____ 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: [Signature]

Made by: [Signature]
KARLA OGRODNIK BORESIC
Administrative Law Judge
Division of Workers' Compensation

