

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

Injury No.: 05-075046

Employee: Patrick Benoist
Employer: Anheuser Busch Companies, Inc.
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

On June 4, 2010, the administrative law judge denied employee's claim against the Second Injury Fund. On June 23, 2010, employee filed an Application for Review of the award by the Labor and Industrial Relations Commission (Commission) 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge and awards no compensation on employee's claim against the Second Injury Fund. The award and decision of Administrative Law Judge John Howard Percy, issued June 4, 2010, is attached and incorporated by this reference.

Employee's claim against the employer remains open.

Given at Jefferson City, State of Missouri, this 2nd day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Patrick Benoist Injury No. 05-075046
Dependents: N/A Before the
Employer: Anheuser Busch Companies, Inc. (previously settled) **Division of Workers' Compensation**
Additional Party: Second Injury Fund Department of Labor and Industrial Relations of Missouri
Insurer: Self-insured Jefferson City, Missouri
Hearing Date: February 25 & March 3, 2010 Checked by: JHP

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 1, 2005
5. State location where accident occurred or occupational disease was contracted St. Louis City, 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? Self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Heavy overhead lifting, work with power and hand tools, and constant repetitive use of both of his upper extremities.
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 upper extremities
14. Nature and extent of any permanent disability: None against the Second Injury Fund
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Patrick Benoist

Injury No. 05-075046

- 17. Value necessary medical aid not furnished by employer/insurer? None claimed
- 18. Employee's average weekly wages: >\$1,045.46
- 19. Weekly compensation rate: \$696.97 PTD/TTD/ \$365.08 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Second Injury Fund liability: No

TOTAL: None

22. Future requirements awarded: None

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

FINDINGS OF FACT and RULINGS OF LAW:

Claimant:	Patrick Benoist	Injury No. 05-075046
Dependents:	N/A	Before the
Employer:	Anheuser Busch Companies, Inc. (previously settled)	Division of Workers' Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Self-insured	Jefferson City, Missouri Checked by: JHP

A hearing in this proceeding was held on February 25, 2010. The record was left open for 30 days to allow the Second Injury Fund to submit the deposition testimony of Dr. James P. Emanuel. The deposition transcript was received and the record was closed on March 3, 2010. Both parties submitted proposed awards on March 25, 2010.

STIPULATIONS

The parties stipulated that on or about July 1, 2005:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was self-insured;
3. the employee's average weekly wage exceeded \$1,045.46;
4. the rate of compensation for temporary total disability and permanent total disability was \$696.97 and the rate of compensation for permanent partial disability was \$365.08;
5. the employee developed the onset of an occupational diseases affecting his upper extremities arising out of and in the course of employee's employment in St. Louis City, Missouri; and
6. the employee reached maximum medical improvement with respect to the injuries from the July 1, 2005 occupational diseases on May 16, 2006.

The parties further stipulated that:

1. the employer had notice of the occupational diseases and a claim for compensation was filed within the time prescribed by law;
2. no compensation has been paid; and
3. the employer has not paid any medical expenses.

ISSUES

The issues to be resolved in this proceeding are¹:

1. the nature and extent of any permanent disability sustained as a result of the work-related injury of July 1, 2005;
2. the nature and extent of any preexisting disabilities which employee had at the time of the work-related injury of July 1, 2005; and
3. whether and to what extent employee sustained any additional permanent total or permanent partial disability for which the Second Injury Fund would be liable pursuant to section 287.220 Mo. Rev. Stat. (2000) as a result of the combination of any preexisting disabilities with the disability from the primary injuries.

SECOND INJURY FUND LIABILITY

Having settled his/her claim against Employer/Insurer, Patrick Benoist, Employee herein, seeks an award under Section 287.220.1 Mo. Rev. Stat. (2000) for permanent total disability compensation against the Second Injury Fund. Employee claims that he is permanently and totally disabled as a result of the combination of the disabilities due to the occupational diseases affecting his upper extremities which developed around July 1, 2005 and the preexisting disabilities in his low back and both knees. The Second Injury Fund contends that Claimant was not rendered permanently and totally disabled by the combination of Claimant's primary injuries with his preexisting disabilities, and that if he was rendered permanently and totally disabled, it was due to the occupational diseases affecting his upper extremities alone and without regard to his preexisting disabilities.

Section 287.220.1 Mo. Rev. Stat. (2000) provides that where previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combine to result in total and permanent disability, the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itself and the Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability under Section 287.200. Grant v. Neal, 381 S.W.2d 838, 840 (Mo. 1964); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990). The employee must prove that a prior permanent partial disability, whether from a compensable injury or not, combined with the subsequent compensable injury to result in total and permanent disability.

Obviously, where the disability caused by the primary injury is total disability, there can be no liability for the Second Injury Fund. For the Second Injury to be liable for permanent total

¹ At the beginning of the hearing, the parties agreed that there was a dispute as to whether the left elbow cubital tunnel syndrome was a compensable occupational disease. In their proposed awards, both parties agreed that Claimant's left cubital tunnel syndrome was a compensable occupational disease and part of the primary injury. (See Page 4 of Claimant's Proposed Award and Page 7 of the Second Injury Fund's Proposed Award.) Given the agreement of the parties, it will not be necessary to make findings as to whether the left cubital tunnel syndrome was part of the primary injury.

disability compensation, the total disability must result from the combination of the preexisting disabilities and the disability caused by the primary disability. If total disability is caused by the primary injury alone, there can no combination. The employee is not entitled to permanent total disability compensation from both the Second Injury Fund and the employer. Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo. App. 2000); Vaught v. Vaughts Inc., 938 S.W.2d 931, 939 (Mo. App. 1997); Roller v. Treasurer of State of Mo., 935 S.W.2d 739, 740 (Mo. App. 1996).

Where the last injury alone causes the employee to become permanently and totally disabled, then the employer is liable for permanent disability compensation under Section 287.200. See Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 276 (Mo. App. 1996); Feldman v. Sterling Properties, 910 S.W.2d 808, 810 (Mo. App. 1995); Moorehead v. Lismark Distributing Co., 884 S.W.2d 416, 419 (Mo. App. 1994); Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987); see also Terrell v. Board of Education, City of St. Louis, 871 S.W.2d 20 (Mo. App. 1993); Reves v. Kindell's Mercantile Co., Inc., 793 S.W.2d 917 (Mo. App. 1990); Roby v. Tarlton Corp., 728 S.W.2d 586, 589 (Mo. App. 1987); Weinbauer v. Gray Eagle Distributors, 661 S.W.2d 652 (Mo. App. 1983); Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886 (Mo. App. 1975); Mashburn v. Chevrolet Kansas City Div., G.M. Corp., 397 S.W.2d 23 (Mo. App. 1965); Garrison v. Campbell "66" Express, 297 S.W.2d 22 (Mo. App. 1956).

On the other hand, where permanent and total disability results only from the combination of the disability from the primary injury with preexisting disabilities and with unrelated post-primary injury progression of preexisting disabilities, the Second Injury Fund is not liable for permanent and total disability. The Second Injury Fund is not liable for any post-accident worsening of an employee's preexisting disabilities which are not caused or aggravated by the last work-related injury or for any conditions which arise after the last work-related injury. Lammert v. Vess Beverages, Inc., 968 S.W.2d 720, 725 (Mo. App. 1998); Garcia v. St. Louis County, *supra*; Frazier v. Treasurer of Missouri, 869 S.W.2d 152 (Mo. App. 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo. App. 1992); see also Wilhite v. Hurd, 411 S.W.2d 72 (Mo. 1967).

The first determination to be made is the extent compensation liability of the employer for the last injury, considered alone. Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo. App. 2000); Vaught v. Vaughts Inc., 938 S.W.2d 931, 939 (Mo. App. 1997); Roller v. Treasurer of State of Mo., 935 S.W.2d 739, 740 (Mo. App. 1996). After that has been determined, then the extent of preexisting disabilities is to be determined. Lastly, the fact finder is determine whether the preexisting disabilities combine with disabilities from the primary injury to create permanent total disability. Where the combination of those disabilities causes permanent total disability, the Second Injury Fund is liable for permanent total disability, but only after the employer has paid the compensation due for the disability resulting from the primary injury. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985).

Disability from Primary Injuries

The parties stipulated that Employee developed bilateral rotator cuff tears, bilateral carpal tunnel syndrome, and left cubital tunnel syndrome², occupational diseases, which arose out of and in the course of his employment on or about July 1, 2005. They did not stipulate to the nature and extent of any disability.

Section 287.020.7 Mo. Rev. Stat. (1994) defines total disability as the "inability to return to any employment and not merely...[the] inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment" mean "that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1982). The words "any employment" mean "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." Id. at 922; Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990); Crum v. Sachs Elec., 769 S.W.2d 131, 133 (Mo. App. 1989). "[W]orking very limited hours at rudimentary tasks [is not] reasonable or normal employment." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995). The primary determination with respect to the issue of total disability is whether, in the ordinary course of business, any employer would reasonably be expected to employ the claimant in his or her present physical condition and reasonably expect him or her to perform the work for which he or she is hired. Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Talley v. Runny Mead Estates, Ltd., 831 S.W.2d. 692, 694 (Mo. App. 1992); Brown v. Treasurer of Missouri, at 483; Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 504 (Mo. App. 1989). The test for permanent and total disability is whether given the employee's condition, he or she would be able to compete in the open labor market; the test measures the employee's prospects for obtaining employment. Reiner at 367; Brown at 483; Fischer at 199. A claimant who is "only able to work very limited hours at rudimentary tasks is a totally disabled worker." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995).

The employee must prove the nature and extent of any disability by a reasonable degree of certainty.³ Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). The fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact

² See footnote 1 supra.

³ It is unclear whether this standard has been changed by the adoption of Section 287.808 Mo. Rev. Stat. (2005 Supp.) which modified the burden of proof for factual propositions to "more likely to be true than not true."

finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986).

Section 287.020.3(1) Mo. Rev. Stat. (2005 Supp.), which was added in 2005, provides in pertinent part that “[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability.” “Prevailing factor” is defined as “the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.”

Section 287.190.6(2) Mo. Rev. Stat. (2005 Supp.), which was enacted in 2005, provides that “[p]ermanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.”

The appellate courts have long held that the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986). The provisions of Section 287.190.6(2) have probably modified the unfettered discretion previously given to the fact finder in accepting or rejecting expert opinions to the extent that the fact finder must now accept those opinions which are based on objective findings and reject inconsistent opinions based on subjective findings.

However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence of the nature, cause, and extent of disability. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo. App. 1995). This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corp., 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the employee. Fogelsong at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., *supra* at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993); Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993). The provisions of Section 287.190.6(2) have

probably modified the unfettered discretion previously given to the fact finder in accepting or rejecting lay opinions to the extent that the fact finder must now reject lay opinions which conflict with medical opinions based on objective findings.

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and nonmedical. Accordingly, the appellate courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 505 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); McAdams v. Seven-Up Bottling Works, 429 S.W.2d 284, 289 (Mo. App. 1968). The fact finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. Fogelson v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. Gilley v. Raskas Dairy, 903 S.W.2d 656, 658 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

Findings of Fact

Based on my observations of Claimant's demeanor during his testimony, I find that he is a credible witness and that his testimony is generally credible. Based on the credible testimony of Claimant and on the medical records, I make the following findings of fact.

Description of Primary Injuries

Patrick Benoist was employed as a pipe fitter by Anheuser Busch Companies, Inc. for over 22 years prior to July 1, 2005. Mr. Benoist was required heavy overhead lifting, work with power and hand tools, and constant repetitive use of both of his upper extremities. Mr. Benoist last worked at Anheuser Busch on May 10, 2005. (Claimant's Testimony)

Prior to May of 2005 Employee began experiencing problems with his upper extremities. He had difficulty sleeping due to shoulder pain. He was losing feeling in his hands. He first sought treatment for his shoulder in March of 2005. (Claimant's Testimony)

Medical Treatment

Claimant sought treatment for his upper extremities from Dr. Hashim S. Raza, his primary care physician on May 9, 2005. He complained of wrist, shoulder, and neck discomfort. Physical therapy was prescribed. (Claimant's Exhibit A, which has been rearranged in chronological order)

Employee received chiropractic treatment from William R. Nolan, Jr. beginning May 20, 2005 through June 7. (Claimant's Exhibit A)

Dr. Khalidia A. Anwar examined Employee on June 8, 2005. Mr. Benoist told him that he developed pain in both shoulders and upper extremity numbness and tingling in mid-March, 2005. He also complained of numbness and swelling of the hands, weakness, and difficulty buttoning shirts. Dr. Anwar's impressions were bilateral shoulder impingement syndrome and possible carpal tunnel syndrome versus radiculopathy. Dr. Anwar prescribed Vicodin, ibuprofen, and Flexeril, and physical therapy. (Claimant's Exhibit A)

Dr. Anwar performed an EMG and nerve conduction study of Claimant's upper extremities on June 8. He reported that there was evidence of focal median sensory motor neuropathy bilaterally at the wrist, which was consistent with the clinical diagnosis of bilateral carpal tunnel syndrome, and electrodiagnostic evidence of ulnar neuropathy on the left side, which was consistent with the clinical diagnosis of left cubital tunnel syndrome. (Claimant's Exhibit A)

On June 10 Dr. Anwar administered bilateral subacromial bursa injections. (Claimant's Exhibit A)

Claimant received physical therapy for his shoulders from June 13 through July 8, 2005. (Claimant's Exhibit A)

Dr. Anwar reexamined Claimant on June 30, 2005. Mr. Benoist indicated that the injections had not improved his bilateral shoulder pain. He ordered MRIs of both shoulder. (Claimant's Exhibit A)

The MRIs were performed on July 7 by Dr. E. Isin Akduman. The impressions regarding the right shoulder were tendinosis of the supraspinatus tendon with a questionable partial thickness tear, fluid in the subacromial and subdeltoid bursa, and degenerative changes of the acromioclavicular joint with mild indentation on the supraspinatus tendon. The impressions regarding the left shoulder were supraspinatus tendinosis and fluid in the subacromial bursa. (Claimant's Exhibit A)

Employer sent Mr. Benoist to Concentra Medical Centers where Dr. Anne-Marie M. Puricelli examined him On July 18, 2005. Her assessments were shoulder impingement and bilateral carpal tunnel syndrome. Dr. Puricelli visited his work site at Anheuser Busch and concluded that his medical conditions were not work-related. She released him from care on July 26. (Claimant's Exhibit A)

Claimant sought treatment from Dr. David A. Caplin, a plastic surgeon, who examined him on August 9, 2005. Mr. Benoist told him that he had been experiencing upper extremity symptoms for over four months with nocturnal exacerbation of his symptoms and exacerbation when driving. Dr. Caplin recommended carpal tunnel surgery and the use of Heelbos for his cubital tunnel syndrome. He prescribed Celebrex. He referred him to Dr. James Emanuel, an orthopedic surgeon, for evaluation of his shoulder complaints. (Claimant's Exhibit A)

On August 11 Claimant was examined by Allen Mathieu, physician assistant to Dr. Emanuel. On examination he noted pain with resistance in all rotator cuff positions of the right shoulder and mild impingement of the left shoulder. He recommended that he follow up with Dr. Emanuel for surgery on his shoulders. (Claimant's Exhibit A)

Dr. Caplin performed a left endoscopic carpal tunnel decompression on August 15, 2005. He noted compression of the median nerve in the left carpal tunnel with thickening of the transverse carpal ligament. Dr. Caplin examined him subsequently and noted that he was doing well. (Claimant's Exhibit A)

Dr. James Emanuel, an orthopedic surgeon, examined Claimant on August 23, 2005. Mr. Benoist complained of bilateral shoulder pain, right worse than left, decreased strength and easy fatigue of the shoulders. Dr. Emanuel thought that he had a full thickness rotator cuff tear and acromioclavicular arthritis. He recommended arthroscopy of the right shoulder, subacromial decompression, distal clavicle resection and repair of the tear. (Claimant's Exhibit A)

On September 14, 2005 Dr. Emanuel performed surgery on Employee's right shoulder. On inspection of the shoulder, he noted evidence of tearing of the glenoid labrum, intrasubstance, as well as some detachment from the bone, suggesting early degenerative changes, a partial tear (40% thickness) at the base of the biceps tendon, intrasubstance tearing (35%) of the supraspinatus tendon, and some partial tearing of the anterior-superior labrum with synovitis. Dr. Emanuel extensively debrided the glenohumeral joint, including debridement of the glenoid labrum, debrided the undersurface of the rotator cuff, the biceps tendon, the subacromial bursa, and the distal clavicle, and removed 4 to 6 mm of the anterior acromion and 1 cm of the distal clavicle. (Claimant's Exhibit A)

On September 20, October 11 and November 1 Allen Mathieu examined Claimant's right shoulder and ordered physical therapy. (Claimant's Exhibit A)

Dr. Caplin performed a right endoscopic carpal tunnel decompression on November 17, 2005. He noted compression of the median nerve in the right carpal tunnel with thickening of the transverse carpal ligament. Dr. Caplin examined him subsequently and noted that he was doing well. (Claimant's Exhibit A)

Dr. Emanuel reexamined Employee's right shoulder on November 29, 2005. He noted that it continued to improve and recommended a home exercise program. (Claimant's Exhibit A)

Dr. Emanuel reexamined both of Employee's shoulders on January 10, 2006. He noted that the right shoulder was stable with no signs of impingement. He recommended continuation of the home exercise program. Regarding the left shoulder, Dr. Emanuel noted tenderness at the

acromioclavicular joint and weakness in initiation of abduction. As he was concerned about a partial rotator cuff tear, he recommended arthroscopy of the left shoulder. (Claimant's Exhibit A)

On January 18, 2006 Dr. Emanuel performed surgery on Employee's left shoulder. On inspection of the shoulder, he noted evidence of significant early arthritic changes of the glenohumeral joint including detachment and fraying of glenoid labrum with grade III to IV chondromalacia on a very small area off the periphery of the glenoid and the posterior/inferior humeral head. He noted that the articular surface of the rotator cuff was intact. Dr. Emanuel extensively debrided glenohumeral joint for osteoarthritis and for the glenoid labral tear, debrided the acromion and distal clavicle, and resected 5 to 6 mm of the acromion and 1 cm of the distal clavicle. (Claimant's Exhibit A)

On January 26, 2006 Allen Mathieu examined Claimant's left shoulder and ordered physical therapy. (Claimant's Exhibit A)

Dr. Caplin reexamined Claimant on February 2 and noted that both wrists were doing well. On February 28 he felt that Claimant had de Quervain's tendonitis of the left thumb. He recommended phonophoresis. (Claimant's Exhibit A)

On March 17, 2006 Allen Mathieu examined Claimant's left shoulder and ordered additional physical therapy. (Claimant's Exhibit A)

Dr. Emanuel reexamined Claimant's shoulders on April 17, 2006. Mr. Benoist reported that his range of motion was excellent, but he still had no strength in his shoulders. He felt they were weaker. Dr. Emanuel noted that he had weakness in initiation of abduction and some tenderness in the area of the acromioclavicular joint. He recommended therapy for another month. (Claimant's Exhibit A)

Dr. Caplin reexamined Claimant on April 26, 2006. He noted that Employee had bilateral de Quervain's symptoms, left greater than right, which was improving with phonophoresis and episodic splinting. (Claimant's Exhibit A)

Dr. Emanuel reexamined Claimant's shoulder on May 15, 2006. Employee reported that his shoulder movement was excellent and did not complain much of pain. His biggest complaint was lack of strength and endurance. He reported that he fatigued very easily. On examination Dr. Emanuel found full active and passive range of motion of both shoulders, good rotator cuff strength in external rotation and initiation of abduction, and good stability. He opined that Claimant had reached maximum medical improvement with regard to his shoulders. He indicated that Claimant could work within the medium work demand level with a 25 pound weight restriction from floor to waist, no lifting greater than 15 pounds from waist to overhead, no pushing or pulling greater than 150 pounds on a 4-wheeled cart, 25 pounds without a cart, no lifting greater than 25 pounds and no repetitive overhead reaching or lifting. (Claimant's Exhibit A)

Dr. Caplin reexamined Claimant on May 18, 2006. He recommended that Employee avoid forceful repetitive use of his hands as much as possible to see if the de Quervain's tendonitis improved. Dr. Caplin reexamined Claimant on August 8, 2006. He again

recommended that Employee avoid forceful repetitive use of his hands as much as possible. He indicated that if Employee's symptoms worsened, then he would recommend Kenalog injections and possible surgery.

Claimant's Testimony

Mr. Benoist testified that he continues to have difficulties in his upper extremities as a result of the bilateral rotator cuff tears and bilateral carpal tunnel syndrome. He has weakness in both arms, the right greater than the left. He easily loses strength in his arms and avoids any overhead activity. Mr. Benoist also testified that he continues to have wrist pain, numbness and tingling. He has diminished strength and limited motion. In addition, he occasionally experiences sharp shooting pain from his left elbow into his upper arm.

On cross-examination, Claimant agreed that he currently has pain in both shoulders, that he is limited in his ability to reach upward, and that he is limited in his ability to put his arms out away from his torso. Claimant also agreed that he has numbness in his hands with repetitive use, that he drops things easily from his hands, and that he has problems with writing or handling small objects for more than brief amounts of time.

Medical Opinions

Dr. Emanuel testified that a combination of claimant's upper extremity problems prevented him from returning to work as a pipe fitter. Dr. Emanuel clarified that the combination consisted of shoulder, carpal tunnel, and cubital tunnel syndrome problems. (Second Injury Fund Exhibit I, Pages 19-20)

Dr. David Volarich testified by deposition on behalf of Claimant on December 3, 2008. He testified regarding the medical records he reviewed and the history obtained from Mr. Benoist, both related to the July 1, 2005 injuries as well as his prior conditions. Regarding the work injuries leading up to July 1, 2005, Dr. Volarich diagnosed Claimant with overuse syndrome of both upper extremities at the wrist causing bilateral carpal tunnel syndrome, overuse syndrome of the left elbow causing cubital tunnel syndrome, overuse syndrome of the right upper extremity at the shoulder causing impingement and aggravation of shoulder degenerative arthritis, and overuse syndrome of the left upper extremity at the shoulder causing internal derangement in the form of impingement and aggravation of arthritis. (Claimant's Exhibit D, Pages 7-8)

With regard to the bilateral upper extremity injuries, Dr. Volarich opined that Mr. Benoist sustained 35% permanent partial disability of each wrist, 15% permanent partial disability of the left elbow, 50% permanent partial disability of the right shoulder, and 45% permanent partial disability of the left shoulder. He also opined that Employee sustained 20% permanent partial disability of the body as a whole due to the combination of the injuries to both upper extremities. (Claimant's Exhibit D, Pages 12-13)

Dr. Volarich felt that there was preexisting disability which was a hindrance to employment or re-employment. He opined that Mr. Benoist had 80% permanent partial disability of the right knee due to the recurrent internal derangement and development of post-traumatic

degenerative arthritis that required total knee joint replacement, 35% permanent partial disability of the left knee due to the internal derangement that required arthroscopic repair, and 15% permanent partial disability of the body as a whole rated at the lumbosacral spine due to the chronic lumbar syndrome causing back pain and occasional right leg paresthesias. (Claimant's Exhibit D, Pages 14-15 and depo ex 2, p. 13-14)

Dr. Volarich opined that Mr. Benoist was unable to engage in any substantial gainful activity, nor could he be expected to perform in an ongoing working capacity in the future. Based upon Dr. Volarich's medical assessment alone, he felt Mr. Benoist was permanently and totally disabled as a result of his work injuries leading up to July 1, 2005 in combination with his preexisting medical conditions. (Claimant's Exhibit D, Pages 14-15 & 36)

Regarding the shoulders Dr. Volarich opined that Employee should avoid all overhead use of the arms and prolonged use of the arms away from the body, minimize pushing, pulling, and particularly traction maneuvers, not handle weights greater than 3 to 5 pounds with the arms extended away from the body or overhead, not handle weights greater than 10 to 15 pounds with either arm alone and dependent. Regarding the elbows, forearms, and wrists Dr. Volarich opined that Mr. Benoist should avoid using the hands in an awkward or blind fashion, minimize repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotary motions, avoid impact and vibratory trauma to the hands, and not handle weights greater than 10 to 15 pounds with the arms dependent. (Claimant's Exhibit D, Pages 16-17) On cross examination he added that Employee could lift 30 pounds with both hands. (Claimant's Exhibit D, Page 43)

Vocational Opinions

Mr. James England, a vocational rehabilitation counselor, testified by deposition on behalf of the claimant on March 26, 2009. Mr. England interviewed Mr. Benoist on September 23, 2008. He also reviewed the extensive medical records relating to Mr. Benoist's physical conditions. Based upon his review, Mr. England concluded that Mr. Benoist was permanently and totally disabled due his description of his typical day to day functioning and the impairments and restrictions described by Dr. Volarich. He based this opinion on the combination of Mr. Benoist's work-related injuries of July, 2005 and his preexisting injuries and disabilities to his knees and low back. (Claimant's Exhibit E, Pages 8-9)

Mr. England indicated that Claimant reported that his primary pain was in his shoulders. Employee also complained of numbness in his hands with repetitive use, limitations in his ability to reach upward or to put his arms out away from his torso very far. Claimant reported that his upper extremities were bothered by vibrations and that he could lift up to about 12 pounds or so on an occasional basis. Claimant also reported that he dropped things easily from his hands as he did not have very good strength in them. He told Mr. England that he had less ability to write or handle small objects for more than brief amounts of time. (Claimant's Exhibit E, Deposition Exhibit B, p. 12-13)

On cross examination Mr. England opined that considering only the restrictions of Dr. Emanuel, Dr. Caplin and the restrictions of Dr. Volarich regarding the shoulders and upper extremities would probably preclude even sedentary work activity. He added that Dr. Volarich's restrictions of minimizing repetitive gripping, pinching, squeezing, pushing, pulling, twisting,

rotary motions, 3 to 5 pounds of weight with the arms out away from the body or 10 to 15 pounds with the arms dependent would preclude sedentary activity. (Claimant's Exhibit E, Pages 13-14) On the other hand, considering only the restrictions of Dr. Emanuel and Dr. Caplin, Mr. England opined that Mr. Benoist could return to work in some capacity. (Claimant's Exhibit E, Page 16)

On re-cross examination Mr. England reiterated his opinion that considering the restrictions of Dr. Emanuel, Dr. Caplin, and Dr. Volarich, and Employee's complaints as far as the upper extremities, Employee would not be able to return to work. (Claimant's Exhibit E, Page 24) Dr. Emanuel further opined that considering Employee's complaints regarding his upper extremities and the restrictions of Dr. Emanuel and Dr. Caplin, he would not be able to return to work in any capacity. (Claimant's Exhibit E, Page 25)

Additional Findings

I find Claimant's testimony concerning his current symptoms and limitations regarding his upper extremities to be credible.

I find the opinions of Dr. Volarich regarding Employee's permanent disability from the work-related upper extremity injuries leading up to July 1, 2005 and his recommended restrictions pertaining to those injuries are credible.

Based on the credible opinions of Dr. Volarich, I find that regarding the shoulders Employee should avoid all overhead use of the arms and prolonged use of the arms away from the body, minimize pushing, pulling, and particularly traction maneuvers, not handle weights greater than 3 to 5 pounds with the arms extended away from the body or overhead, and not handle weights greater than 10 to 15 pounds with either arm alone and dependent. I further find that regarding the elbows, forearms, and wrists Mr. Benoist should avoid using the hands in an awkward or blind fashion, minimize repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotary motions, avoid impact and vibratory trauma to the hands, and not handle weights greater than 10 to 15 pounds with the arms dependent and 30 pounds with both hands dependent.

Based on the credible opinions of Dr. Volarich, I find regarding the work-related injuries leading up to July 1, 2005 that that Mr. Benoist sustained 35% permanent partial disability of each wrist, 15% permanent partial disability of the left elbow, 50% permanent partial disability of the right shoulder, and 45% permanent partial disability of the left shoulder. I further find that Employee sustained 20% permanent partial disability of the body as a whole due to the combination of the injuries to both upper extremities. The total of the foregoing disabilities is approximately 450 weeks.

Mr. England opined that considering only the restrictions of Dr. Emanuel, Dr. Caplin and the restrictions of Dr. Volarich regarding the shoulders and upper extremities would probably preclude even sedentary work activity. He added that Dr. Volarich's restrictions of minimizing repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotary motions, 3 to 5 pounds of weight with the arms out away from the body or 10 to 15 pounds with the arms dependent would preclude sedentary activity. Mr. England reiterated his opinion that considering the restrictions of Dr. Emanuel, Dr. Caplin, and Dr. Volarich, and Employee's complaints as far as the upper extremities, Employee would not be able to return to work. Dr. Emanuel further opined

that considering Employee's complaints regarding his upper extremities and the restrictions of Dr. Emanuel and Dr. Caplin, he would not be able to return to work in any capacity. I find the foregoing opinions by Mr. England to be credible.

Based on the credible opinions of Mr. England, I find that the restrictions of Dr. Emanuel, Dr. Caplin and Dr. Volarich regarding Employee's upper extremities alone would preclude sedentary work activity. I further find that considering Employee's complaints regarding his upper extremities and the restrictions of Dr. Emanuel and Dr. Caplin, he would not be able to return to work in any capacity. Based on the credible opinions of Mr. England, Claimant's vocational expert, I find that Claimant became permanently and totally disabled as a result of the work-related injuries of July 1, 2005 with respect to his upper extremities alone and without regard to any preexisting disabilities.

Where the disability caused by the primary injury is total disability, there can be no liability for the Second Injury Fund. For the Second Injury to be liable for permanent total disability compensation, the total disability must result from the combination of the preexisting disabilities and the disability caused by the primary disability. If total disability is caused by the primary injury alone, there can no combination. The employee is not entitled to permanent total disability compensation from both the Second Injury Fund and the employer. Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo. App. 2000); Vaught v. Vaughts Inc., 938 S.W.2d 931, 939 (Mo. App. 1997); Roller v. Treasurer of State of Mo., 935 S.W.2d 739, 740 (Mo. App. 1996).

Based on my prior findings, the claim against the Second Injury Fund is hereby denied.

Date: _____

Made by: _____

JOHN HOWARD PERCY
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

NAOMI PEARSON
Division of Workers' Compensation