

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

Injury No.: 04-103113

Employee: Jamey Blake
Employer: Leo O'Laughlin, Inc. (Settled)
Insurer: Aetna Casualty and Surety Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of Administrative Law Judge Rebecca S. Magruder, dated May 26, 2010.

Preliminaries

The administrative law judge heard this matter to consider: (1) whether employee sustained an injury by accident arising out of and in the course of his employment on September 23, 2004; (2) the nature and extent of permanent disability and the liability (if any) of the Second Injury Fund.

The administrative law judge found, "for the sake of argument," that employee sustained an injury by accident arising out of and in the course of his employment on September 23, 2004, and that employee is permanently and totally disabled as a result of the last injury, considered alone. Given these findings, the administrative law judge denied employee's claim against the Second Injury Fund.

Employee filed an Application for Review with the Commission alleging that the administrative law judge erred because: (1) employer/insurer and employee stipulated, as part of their settlement, that the last accident did not permanently and totally disable employee; (2) employee sustained injuries prior to the last injury that were obstacles and hindrances to his employment; and (3) the administrative law judge failed to make a final, complete, and clear ruling with regard to whether employee sustained an accident on September 23, 2004.

For the reasons set forth herein, we reverse the award of the administrative law judge.

Findings of Fact

Preexisting conditions

In 1990, employee injured his back when he slipped on ice while loading cement into a cement mixer. Employee missed work for several months, underwent physical therapy, and settled a workers' compensation claim against his employer for 5% permanent partial disability of the body as a whole. Dr. Douglas Rope, employee's rating physician, opined that employee sustained a 20% permanent partial disability of the body as a whole due to the 1990 back injury.

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On May 21, 1993, employee sustained a closed-head injury in a motor vehicle accident. Employee was diagnosed with a seizure disorder and prescribed Dilantin, which he took for one year. Because he feared he wouldn't be able to pass a DOT physical with his seizure condition, employee spent five years driving locally as a dump-truck driver after the May 1993 accident. Dr. Rope opined that, given that employee's occupation involves constant driving, if an employer learned that employee had seizures, employee's seizure disorder definitely would constitute a hindrance and obstacle to employment. Dr. Rope explained that he did not provide a disability rating in connection with this condition because he did not have sufficient information on the seizure disorder at the time of his evaluation.

We find Dr. Rope credible. We find that employee suffered a preexisting permanent partial disability of 20% of the low back and that employee's low back and seizure conditions constituted hindrances or obstacles to employment.

Primary injury

Employee, 45 years old at the time of the hearing in this matter, worked his entire adult life as a truck driver, until September 23, 2004. On that date, employee was reentering his truck after fueling at the Flying J Truck Stop in Kansas City when he slipped on the steps and fell. As employee fell, his right arm was caught and twisted in the "handle bar," a large handle used to climb into the cab of the truck. Employee felt a pop or snap and experienced ongoing pain in his right shoulder and low back.

Employee was first seen in connection with the accident at Scotland County Memorial Hospital, where he was referred to Dr. William Dixon. An MRI showed severe degenerative disc disease at the L5-S1 level with a bulging disc and mild to moderate bilateral foraminal encroachment. On January 26, 2006, Dr. Lowry Jones diagnosed aggravation of a preexisting degenerative disc process and recommended surgery. Dr. Jones also diagnosed impingement in employee's right shoulder and recommended physical therapy or an injection. Dr. Jones opined that employee could not return to work as a truck driver with the level of pain he was experiencing. Employee testified that treating doctors recommended surgery but he declined to go that route due to concerns that doctors could not guarantee a favorable result.

Dr. Rope diagnosed the following injuries in connection with the September 23, 2004, accident: right shoulder impingement with residual loss of motion, pain, and mild weakness; and low back discomfort with probable protrusion at L5-S1 and bilateral lumbar radiculopathy, more pronounced on the right side. Dr. Rope assigned the following restrictions (specifying that they were predominately in light of the combination of the September 23, 2004, injury with employee's prior back condition): no sitting, standing, or walking in excess of 15 minutes, occasional lifting of no more than 10 pounds, and use of a cane while employee is on his feet. Dr. Rope opined that employee will likely be unable to return to driving in any degree, given his inability to sit for protracted periods.

In his brief and argument, employee failed to provide us any indication of when he reached maximum medical improvement following the work injury. Nor did employee elicit an opinion as to the date of maximum medical improvement from his medical expert. As a result, we were obliged to search the un-indexed medical record in an

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effort to find evidence to aid our analysis as to this crucial fact. From our review, it appears that the last treatment employee received for symptoms related to the injuries of September 23, 2004, was to undergo an MRI of the lumbar spine and thoracic spine through Northeast Regional Medical Center on April 18, 2007. We find that employee reached maximum medical improvement from the work injury on April 18, 2007, the last day he treated for symptoms related to the injuries of September 23, 2004.

Dr. Rope opined that employee sustained a 15% permanent partial disability at the 232 week level in connection with the right shoulder injury, and a 25% permanent partial disability of the body as a whole in connection with the low back injury. We find Dr. Rope credible and adopt his diagnoses and ratings.

Other than working without pay for his girlfriend for about one year, which involved minimal duties such as occasionally operating a cash register or moving small, light boxes and figurines, employee has not worked since September 23, 2004.

Expert medical and vocational evidence

With regard to employee's ability to work following the September 23, 2004, accident, Dr. Rope opined that employee is permanently and totally disabled due to the sequelae from that accident combined with employee's preexisting disabling conditions.

The vocational expert Terry Cordray evaluated employee at the request of his attorney. Mr. Cordray opined that employee is permanently and totally disabled due to a combination of his injuries sustained on September 23, 2004, and his preexisting back and seizure conditions.

The Second Injury Fund did not present any contrary expert medical or vocational evidence. We find Dr. Rope and Mr. Cordray credible. We find that employee is permanently and totally disabled due to the combination of employee's preexisting disabling low back and seizure conditions and his injuries sustained in the accident on September 23, 2004.

Conclusions of Law

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.

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

We are convinced that employee's preexisting disabilities were serious enough to constitute hindrances or obstacles to employment for purposes of § 287.220 RSMo. Employee provided evidence of a preexisting low back injury and seizure condition. Each of these conditions had the potential to combine with future work-related injuries so as to cause greater disability than would have resulted in the absence of these conditions. Dr. Rope rated employee's preexisting back disorder at 20% permanent partial disability of the body as a whole and opined that employee's seizure disorder was a hindrance or obstacle to employment, and we have found Dr. Rope credible. We conclude that at the time he sustained the September 23, 2004, work injury, employee suffered from a low back disability and a seizure condition, both of which constituted hindrances or obstacles to employment or reemployment.

We now proceed to the question whether employee met his burden of establishing entitlement to compensation from the Second Injury Fund. Section 287.220.1 RSMo, provides, in relevant part, as follows:

After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" ...

The foregoing section requires us to first determine the compensation liability of the employer for the last injury, considered alone. If, as the administrative law judge found, employee is permanently and totally disabled due to the last injury considered in isolation, the employer, and not the Second Injury Fund, is responsible for the entire amount of compensation. See *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

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We have found that, as a result of the last injury, employee sustained a 25% permanent partial disability of the body as a whole referable to the lumbar spine and a 15% permanent partial disability at the 232 week level referable to the right shoulder. The record contains no expert medical or vocational evidence suggesting that employee is permanently and totally disabled as a result of the work injury considered in isolation. To the contrary, both Dr. Rope and Mr. Cordray opined that employee is permanently and totally disabled due to a combination of employee's preexisting back and seizure conditions and his injuries sustained on September 23, 2004. We have found these experts credible. We conclude that the injury of September 23, 2004, considered in isolation, did not render employee permanently and totally disabled, but that employee is disabled due to a combination of his preexisting disabilities and conditions of ill as they existed on September 23, 2004, in combination with the injuries sustained on that date. We conclude, therefore, that employee has met his burden of establishing Second Injury Fund liability under § 287.220.1.

Conclusion

Based upon the foregoing, we reverse the award of the administrative law judge. We find the Second Injury Fund liable to employee in the amount of \$251.26, the difference between employee's permanent total disability rate (\$605.31) and employee's permanent partial disability rate (\$354.05) for 134.8 weeks (the extent of employer's theoretical liability for the work injury) beginning April 18, 2007 (employee's date of maximum medical improvement). Thereafter, the Second Injury Fund is liable to employee for weekly permanent total disability benefits in the amount of \$605.31 for his lifetime, or until modified by law.

The award and decision of Administrative Law Judge Rebecca S. Magruder, dated May 26, 2010, is attached solely for reference.

For necessary legal services rendered to employee, Jerry Kenter, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 10th day of February 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

**FINAL AWARD DENYING COMPENSATION
as to Second Injury Fund Only**

Employee: Jamey Blake Injury No: 04-103113
Dependents: N/A
Employer: Leo O'Laughlin, Inc. (Settled)
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Insurer: Aetna Casualty and Surety Company (Settled)
Hearing Date: May 6, 2010
Briefs Filed: May 14, 2010 Checked By: RSM/cy

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: May 3, 2004
5. State location where accident occurred or occupational disease was contracted: Kansas City, Clay County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was reentering cab of tractor trailer when he slipped injuring his right shoulder and low back.
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: right shoulder, low back
14. Nature and extent of any permanent disability: permanent and total as to last injury alone
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? Unknown
18. Employee's average weekly wages: \$907.50
19. Weekly compensation rate: \$605.31/\$354.05
20. Method wages computation: Stipulation
21. Amount of compensation payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jamey Blake

Injury No: 04-103113

Dependents: N/A

Employer: Leo O'Laughlin, Inc. (Settled)

Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund

Insurer: Aetna Casualty and Surety Company (Settled)

Checked By: RSM/cy

The above Claim was heard on May 6, 2010. The parties stipulated to the following:

1. On or about September 23, 2004 ("the injury date"), Employer was an employer operating subject to Missouri's Workers' Compensation law with its liability fully insured by Aetna Casualty and Surety Company;
2. Mr. Blake was its employee working subject to the law in Kansas City, Clay County, Missouri;
3. Mr. Blake notified Employer of his alleged injury and filed his claim within the time allowed by law.

ISSUES

The parties requested the Division to determine:

1. Whether the Claimant suffered an accident, injury or occupational disease on September 23, 2004, in the course and scope of his employment;
2. The nature and extent of permanent disability, including the liability of the Second Injury Fund.

Claimant's evidence consisted of:

1. His testimony;
2. The testimony of his girlfriend Randi X. King;
3. Medical records, Volume 1, excluding tab 6, the report of Dr. Stuckmeyer, admitted into evidence as Claimant's Exhibit A;
4. Medical records, Volume 2, admitted into evidence as Claimant's Exhibit B;
5. Vocational Report and CV of Terry Cordray, admitted into evidence as Claimant's Exhibit C;

6. Fuel Ticket, admitted into evidence as Claimant's Exhibit F;
7. A receipt, admitted into evidence as Claimant's Exhibit G;
8. Medical Report of Dr. Douglas Rope, admitted into evidence as Claimant's Exhibit H;
9. The deposition testimony of Dr. Douglas Rope, admitted in to evidence as Claimant's Exhibit I;
10. The deposition testimony of Terry Cordray, admitted into evidence as Claimant's Exhibit J.

The Second Injury Fund's Evidence consisted of:

1. The deposition testimony of the Claimant, admitted into evidence as Second Injury Fund's Exhibit 1.

In his Worker's Compensation Claim filed on October 22, 2004, Claimant alleged injury to his right upper extremity, back and body as a whole, while climbing into the cab of his truck on September 23, 2004. As a result of this injury, Claimant alleged he was permanently and totally disabled. Claimant also alleged pre-existing injury to his back and jaw/face.

Claimant is a 45 year old Caucasian male who resides in Kirskville, MO. He completed high school and attended 4-6 months of a funeral director school before quitting. He has no additional college or training. He denies any computer training. Mr. Blake worked as truck driver for his whole career, spending most of his career as an over-the-road driver with a five-year period where he drove trucks locally. He last worked on September 23, 2004, the date of his alleged injury.

Mr. Blake reported several injuries prior to his alleged September 23, 2004 injury. In 1991, while working as an over-the-road truck driver, he fell off of the deck of a cement truck injuring his low back. He was off work for a few months but returned to truck driving. Treatment for this injury included physical therapy and acupuncture. Mr. Blake was injured again in 1993 when he sustained a jaw fracture. He testified that he was struck in the face by someone wearing brass knuckles. He had his jaw surgically wired shut. This injury limited his ability to eat hard food on the left side of his mouth. Mr. Blake was involved in a motor vehicle accident on May 21, 1993 which caused a closed-head injury. He testified that he had consumed three alcoholic drinks and then drove his car. His alcohol level was .78% after the accident. He was diagnosed with a seizure disorder and prescribed Dilantin, which he took for about one year. He never discontinued driving, but reported taking a five-year break to drive trucks locally. He then returned to over-the-road trucking.

Mr. Blake alleges that he was hauling a load to Ohio on behalf of Employer. He was fueling his truck at Flying J in Kansas City, Missouri before stopping to visit his family near Edina, MO. He testified that he slipped entering his truck after fueling. He allegedly injured his

low back and his right upper extremity while trying to catch himself. He attempted to report the injury to his employer, but did not speak with anyone from his company for three days. Claimant reportedly could not leave his truck for two or three days and therefore was not immediately able to drive home. His mother came and picked him up and he was first seen at Scotland County Memorial Hospital's emergency room on September 29, 2004. He was then seen by Dr. Dixon at Memphis Medical Services in Memphis, Missouri. Dr. Dixon restricted his work to frequent position changes and no driving and he was given a prescription for Vicodin.

Claimant had an MRI on October 12, 2004 at Northeast Regional Medical Center in Kirksville, Missouri. Severe disc degeneration was noted at the L5-S1 level abutting the anterior portion of the thecal sac around the spinal cord and causing mild narrowing of the central spinal canal. Claimant reported sleep interruption due to pain on November 3, 2004 and reported pain with sitting or standing. On March 28, 2005 Claimant had a CT scan of the right shoulder performed at Scotland County Memorial Hospital. Erosion was noted in the posterior portion of the glenoid rim consistent with degenerative disease. Also, Dr. Schneider, D.O. noted Claimant had diminished motion in all directions and weakness on lateral raise of the right shoulder.

Claimant had a second MRI on September 7, 2005. A central disc herniation was noted at the L5-S1 level described as large and causing central canal stenosis.

Dr. Lowry Jones, M.D. evaluated Claimant on January 26, 2006. Dr. Jones recommended a surgical decompression and fusion of the L5-S1 and assessed that Claimant's shoulder pain was secondary to an impingement.

The first issue in this case is whether or not the Claimant suffered an accident on September 23, 2004. Determination of whether an accident occurred is hindered by inconsistencies with Claimant's credibility in this case. The Claimant testified that he had consumed only three drinks prior to his 1993 motor vehicle accident, and yet Dr. Rope states that Mr. Blake's blood alcohol content was 0.78%. Additionally, there is confusion as to the cause of Claimant's jaw fracture. He testified that his jaw was broken when he was struck in the face by a man wearing brass knuckles. However, he advised Dr. Rope that his jaw was broken as a result of falling on a truck bed. These inconsistencies impair the Claimant's credibility. Because the latter issue is dispositive in this case, however, I will find for the sake of argument that the Claimant did sustain, on September 23, 2004, "injury which has arisen out of and in the course of employment." RSMo. 287.020.3(1).

The dispositive issue in this case is the extent of disability resulting from Claimant's September 23, 2004 accident. Mr. Blake is claiming he is permanently and totally disabled under the Missouri Workers' Compensation Law and further that his permanent and total disability results from the combination of the disability resulting from the accident on September 23, 2004 and permanent disability from prior injuries. Section 287.020.7 RSMO. 2000 defines total disability as an "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."

At issue in this case is the liability of the Second Injury Fund. The Missouri Supreme Court in the case of Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966) explained the procedure, which must be undertaken when there is a dispute as to whether the employer or the Second Injury Fund is liable for permanent total disability benefits. The Court explained that the first consideration is the disability resulting from the last injury alone. Otherwise, the words in §287.220 “considered alone and of itself” were meaningless. Therefore, a claimant’s pre-existing disabilities are irrelevant until employer’s liability for the last injury is determined. And if a claimant’s last injury in and of itself renders a claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. See Huey v. Chrysler Corporation, 34 S.W.3d 845 (Mo.App. 2000); Keysior v. TransWorld Airlines, 5 S.W.3d 195, 201 (Mo.App. 1999); Maas v. Treasurer of Missouri, 964 S.W.2d 541 (Mo.App. 1998); Roller v. Treasurer of Missouri, 935 S.W.2d 739, 741 (Mo.App. 1996).

In order to determine whether an individual is permanently and totally disabled under the Missouri Workers’ Compensation Law it is necessary to consider the Claimant’s age, education, occupational history and job skills, as well as his physical condition in determining his ability to compete in the open labor market. Mr. Blake is currently 45 years of age, graduated from high school, attended four months of a funeral direction college program. Other than one break while the Claimant was in the corrections system, he worked his entire post-high school career as a truck driver. He worked as both over-the-road driver, and for five years as a local driver. In both employments Claimant’s skills included operating a truck and driving various routes. Over-the-road truck driving is a semi-skilled, medium-strength demand position. Local dump truck driving is unskilled medium-strength demand position. See generally Claimant’s testimony.

The terms “any employment” means “any reasonable or normal employment or occupation.” Brown vs. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo App. 1990). The Missouri Courts have repeatedly held that the test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the employer in the usual course of business would reasonably be expected to employ the Employee in his present physical condition. See e.g. Faubion v. Swift Adhesives Co., 869 S.W.2d 839 (Mo App. 1994); Hines v. Conston of Missouri #852, 857 S.W.2d 546 (Mo App 1993); Lawrence v. R-VIII School District, 834 S.W.2d 789 (Mo app 1992); Carron v. St. Genevieve School District, 800 S.W.2d 64 (Mo App. 1991); Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195 (Mo App. 1990). The critical question is whether Employer could reasonably be expected to hire the Claimant, considering her present physical condition, and reasonably expect her to successfully perform the work. Forshee v. Landmark Excavating and Equipment, et al, No.85582 (Mo app. E.D. 2005); Sutton v. Vee Jay Cement Contracting Company, 37 S.W.3rd 803, 811 (Mo App. 2000). Total disability means the inability to return to any reasonable or normal employment. It does not require that the employee be completely inactive or inert. Isaac v. Atlas Plastic Corporation, 793 S.W.2d 165 (Mo app. 1990); Kowalski v. M.G. Metals and Sales, Inc., 631 S.W.2d 919 (Mo App. 1982). The following factors are to be considered in determining whether an individual is permanently and totally disabled: the Claimant’s physical condition, including his limitations and capabilities, his age, education and occupational background and skills. See generally Brown v.

Treasurer of Missouri, 795 S.W.2d 479 (Mo App. 1990); Issac, 793 S.W.3d 165 (MO App. 1990); Reve v. Kindell's Mercantile Company, Inc., 793 S.W.2d 917 (Mo App. 1990); Laturno v. Carnahan, 640 S.W.2d 470 (Mo App. 1982); Patchin v. National Supermarkets, Inc., 738 S.W.2d 166 (Mo App. 1987).

The last factor in determining whether a person is permanently and totally disabled under the Missouri Workers' Compensation Law is the Claimant's physical condition. The initial relevant issue is the Claimant's disability caused by the injury in the work-related accident. The credible testimony of a claimant concerning work-related functioning can constitute competent and substantial evidence. See Hampton v. Big Boy Steel Erection, 121 S.W.3 220, 223-224 (Mo. Banc 2003). Claimant testified that he can lift 5 pounds. He reported that due to his pain, he performs very limited driving. Further, Claimant testified that he has numbness down his right leg. He testified that he can only sleep about three hours per night. Claimant walks with an assistive device. Claimant reported that since the accident on September 23, 2004 he no longer bowls, hunts or fishes. Claimant testified that he has not had surgery since the September 23, 2004 accident, as the treating physicians cannot guarantee an outcome and he fears a greater amount of pain.

In addition, Claimant's testimony is supported by the report and May 12, 2009 deposition testimony of Dr. Douglas Rope, M.D. (Claimant's Exhibit I). I find Dr. Rope's testimony credible and adopt his ratings and opinions in this case. Claimant's expert, Dr. Rope, conducted a physical examination of Claimant and reviewed medical records. Dr. Rope found that Claimant had impingement of the right shoulder with residual pain, weakness, loss of motion, and a low back pain with a probable disc protrusion and radiculopathy. (Claimant's Exhibit I, page 24). Dr. Rope reviewed two radiology reports from two MRI's of the Claimant's low back. The first MRI was taken October 12, 2004 and was read as severe degeneration at L5-S1 level abutting the anterior portion of the thecal sac around the spinal cord and causing mild narrowing of the central spinal canal without disc herniation. The second MRI taken September 7, 2005 showed central disc herniation at the L5-S1 level described as large and causing central canal stenosis. (Claimant's Exhibit I, pages 5-8). Dr. Rope states that even though the MRI's were read differently, they both show abnormalities and that both support the diagnosis of a frank herniation. (Claimant's Exhibit I, pages 10-11). Dr. Rope assigned Claimant a 15 percent permanent disability at the 232 level and 25 percent permanent disability to the whole person both pursuant to the whole person. (Claimant's Exhibit I, page 26). I find in accordance with Dr. Rope that Claimant sustained 15 percent disability referable to the right shoulder and 25 percent disability to the body as a whole, both of these disabilities attributable to the September 23, 2004 accident.

Dr. Rope confirmed his opinion that the Claimant was subject to numerous limitations due to the September 23, 2004 accident, stating, "...he should limit time on his feet to 15 minutes and limit sitting time to the same amount. Carrying capacity would have to be one-handed, given his need for the cane. You'll remember that he was using a cane outside the home even after the 2004 injury, so that carrying capability would date to the September of 2004

accident. And be unable to do any significant driving because of among other things, his inability to sit.” (Claimant’s Exhibit I, page 25). Dr. Rope opined that the postural restrictions for the lumbar spine were due to the September 2004 injury because based on Claimant’s work history, he was able to sit for long hours prior to September 23, 2004. (Claimant’s Exhibit I page 32). Dr. Roped cited to Dr. Lowry Jones’ opinion that after the September 23, 2004 injury, Claimant would be unlikely to return as a truck driver. He further stated that he believed that the back fusion Claimant underwent caused him to be “someone who is unable to work....” (Claimant’s Exhibit I pages 32 and 34). Dr. Rope cited limitations on the Claimant due to Claimant’s September 23, 2004 injury to his right shoulder, saying “People with shoulder impingement, they generally can’t reach. They can’t do sustained work with the hands outstretched at or above shoulder level.... He’s got some grip strength loss. In general, people with an injury to one shoulder, nothing else, with impingement, they can go back at least to medium work with limitations on reaching and overhead work.” (Claimant’s Exhibit I, page 31-32). In the Claimant’s case, however, he was using a cane for his back on the other side and therefore would not have been able to do reaching or overhead work with his other arm or shoulder. (See Exhibit I pages 29-32.) I find in accordance with Dr. Rope that the Claimant should be limited on his feet to 15 minute intervals and limit sitting time to the same amount. I further find Claimant’s carrying capacity is limited to one arm and that he is limited from driving. I find in accordance with Dr. Rope’s testimony that all of these restrictions are due to the accident on September 23, 2004.

Claimant’s occupational expert, Terry Cordray, states that Claimant is totally disabled and that no employer in the usual customary course of business trying to earn a profit is going to hire this individual to do any job. (Claimant’s Exhibit J, Page 34.) Mr. Cordray testified that Claimant is unable to return to a truck driving job because it is medium in strength demand and requires staying in a captive seated position for hours. Mr. Cordray does not believe that Claimant could do either dump truck driving or over-the-road driving. Mr. Cordray stated that based on the physician’s restrictions, Claimant is placed below a sedentary physical demand category. Further, Mr. Cordray testified that he does not believe that based on Claimant’s vocational background that he has any skills that transfer to a sedentary job. (Claimant’s Exhibit J, Page 29-30).

I find that Claimant is permanently and totally disabled from any reasonable or normal employment or occupation as a result of his low back and right shoulder injury on September 23, 2005¹. As a result of the pain and limitations resulting from that accident, Claimant is subject to significant restrictions. Given those restrictions, Claimant’s limited educational background, lack of transferable occupational skills and his static medical prognosis without obtaining the recommended surgery, I find that no reasonable employer would employ Claimant. The

¹ Even if a reviewing body found Claimant is not permanently and totally disabled from the last accident alone, then Claimant’s July 4, 2008 subsequent accident and injury to his low back added extra injury resulting in worsening of Claimant’s condition. The Second Injury Fund is not responsible for any subsequent disability unrelated to the work accident. See Garcia v. St. Louis County, 916 S.W.2d 263 (Mo.App. E.D. 1995).

testimony of Dr. Rope and Mr. Cordray verify that Claimant is unemployable because of these conditions and limitations. Because the last injury on September 23, 2004 in and of itself renders the Claimant permanently and totally disabled, the Second Injury fund has no liability. Landman v. Ice Cream Specialties, Inc., 107 S.W. 3d 240, 248 (Mo. Banc 2003).

I have found that the accident the Claimant suffered on September 23, 2004 caused significant injury to his right shoulder and low back. These injures have caused numerous restrictions and significant medical problems. I find Dr. Rope's testimony credible. I find that the results of the 2004 injury in isolation would render Claimant permanently and totally disabled under the Missouri Workers' Compensation Law. Given Claimant's limited educational background and limited work experience, I find the Claimant would have been unable to return to any gainful employment due solely to the effects of the last injury. Therefore, the Second Injury fund is not liable for any permanent total disability in this matter.

Made by: _____

Rebecca S. Magruder
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this _____ day of _____, 2010, by:

Naomi Pearson
Division of Workers' Compensation