

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

Injury No.: 04-141651

Employee: Gustave Bopp  
Employer: Fisher & Frichtel (Settled)  
Insurer: Auto Owners Insurance 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 section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 3, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued November 3, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29th day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

# AWARD

Employee: Gustave Bopp Injury No.: 04-141651  
Dependents: N/A Before the  
Employer: Fisher & Frichtel (Settled) **Division of Workers'**  
Additional Party: Second Injury Fund Department of Labor and Industrial **Compensation**  
Insurer: Auto Owners Insurance Company (Settled) Relations of Missouri  
Hearing Date: August 6, 2008 Jefferson City, Missouri  
Checked by: SC:ml

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
  - 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
  - Date of accident or onset of occupational disease: August 13, 2004
  - State location where accident occurred or occupational disease was contracted: St. Louis, County
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
  - 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 injured his cervical spine while hammering fence posts into the ground.
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: Cervical spine
  - Nature and extent of any permanent disability: 12.5% PPD of the cervical spine paid by Employer

15. Compensation paid to-date for temporary disability: \$20,119.93
16. Value necessary medical aid paid to date by employer/insurer? \$122,564.77
17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: \$736.10

19. Weekly compensation rate: \$490.73/\$354.05
20. Method wages computation: Stipulation

### COMPENSATION PAYABLE

22. Second Injury Fund liability Dismissed

**Total: NONE**

23. 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: Geoffrey Meyerkord

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gustave Bopp

Injury No.: 04-141651

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: Fisher & Frichtel (Settled)

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Auto Owners Insurance Company (Settled)

Checked by: SC:ml

### STATEMENT OF THE CASE

A hearing was held for a final award at the Missouri Division of Workers' Compensation ("DWC") St. Louis office at the request of Gustave Bopp ("Claimant"), on August 6, 2008, pursuant to Section 287.450 RSMo (2000).

Attorney Geoffrey Meyerkord represented Claimant and Assistant Attorney General Kareitha Osborne represented the Second Injury Fund ("SIF").

Prior to hearing, Fischer & Frichtel ("Employer") and Auto Owners Insurance Company ("Insurer") settled their case with Claimant for 12.5 % of the whole person. At the hearing, Claimant submitted injury numbers 04-030630 and 04-141651 for resolution. Although separate awards were issued, the body of each award contains similar issues and facts. The record closed after presentation of evidence. Hearing venue is correct and jurisdiction properly lies with DWC.

Claimant's Exhibits A-U are admitted over SIF's objection to Exhibit E, based on relevance. SIF's Exhibit I is admitted over Claimant's objection, based on relevance. Any notations contained in the records were present when admitted into evidence.

### **STIPULATIONS**

The parties stipulated that on or about August 13, 2004:

- Claimant was employed by Employer and sustained an accident which arose out of and in the course of employment in St. Louis County;
- Employer and Claimant were operating under the Missouri Workers' Compensation Law;
- Employer's liability was fully insured by Insurer;
- Employer had notice of the injury;
- A claim for compensation was timely filed;
- Claimant's average weekly wage is \$736.10;
- Claimant's rate for temporary total disability ("TTD") and permanent total disability ("PTD") is \$490.73 and \$354.05 for PPD;
- Employer paid \$20,119.93 in TTD benefits for 41 weeks;
- Employer paid \$122,564.77 in medical benefits for injury numbers 04-141651 and 04-030630; and
- Claimant achieved maximum medical improvement ("MMI") on August 3, 2005.

The sole issue to be decided is the nature and extent of SIF liability, if any, for PPD or PTD benefits?

### **SUMMARY OF DECISION**

The entire record, including Claimant's testimony, appearance, demeanor, medical reports, and applicable law establish SIF is not liable to Claimant for PPD or PTD benefits.

### **FINDINGS OF FACT**

All evidence was reviewed, but only evidence supporting this award is referenced below. Any objections not expressly ruled upon in the award are overruled. Based upon competent and substantial evidence contained in the record, I find the following facts:

#### ***Background Facts***

1. Claimant was 38 years old when he sustained a cervical injury while working on August 13, 2004. He is divorced with a 6 year old child. Claimant graduated high school and attended college for one semester.

#### ***Employment Facts***

2. In 1992, Claimant worked as a package sorter for UPS. He worked as a laborer for Luth & Sons, performing heavy work. Claimant was a self-employed painter for five years. He lifted ladders, paint buckets, painted over head, and maintained business records. Claimant worked for St. Joseph's Hospital as a carpenter and painter for ten years.
3. Claimant worked as a laborer for Employer from 2000 to 2004. He supervised subcontractors in erosion control, cleaned debris from new construction, inspected and cleaned sewers and man holes, shoveled, and lifted debris, buckets and tools weighing up to 50 pounds.
4. On or about August 12, 2004, Claimant returned to work after recovering from an earlier neck surgery. He began to construct a fence. On August 13, 2004, Claimant re-injured his neck while driving fence posts into the ground with a sixty pound cylinder. Claimant felt pain in the neck, shoulder, and arm similar to pain from the earlier injury. He completed his shift but sought medical treatment when he could not return to work the next day. After conservative treatment was unsuccessful, Dr. Bernardi performed neck surgery on January 3, 2005. This was Claimant's fifth cervical spine surgery.
5. On October 27, 2004, Employer terminated Claimant due to a workload reduction, and Claimant received unemployment benefits in 2005. He has not worked since that time. Claimant applied for a job with Whelan Security as a driver, but failed the physical examination. Claimant testified he can no longer work, but no has doctor recommended he stop working.
6. Complaints include pain in the neck, arms, right thigh, and occasional groin and hand numbness, and a pain level of seven to eight out of ten. He testified he takes eight-five-hundred milligrams of Vicodin per day, prescribed by his primary physician. Claimant testified he takes medication to sleep because of neck pain. He compensates by sleeping during the day. Medication affects his ability to concentrate. On a typical day, Claimant takes medication, feeds the dogs, and watches television. Claimant has gained weight due to inactivity.
7. Claimant holds current hunting and fishing licenses, but has not hunted since July 2007. Most of his hunting time was spent socializing with friends. Claimant drives a manual shift pick up truck with a Class E drivers' license and no restrictions. He can drive seventy-nine miles one way.
8. **Mrs. Betty Jane Bopp**, Claimant's mother, is a nurse and testified on his behalf. In 2006, Claimant moved in with Mrs. Bopp and Claimant's father so they could assist him. After Claimant injured his neck, Mrs. Bopp noticed he gained weight and has trouble sleeping, memory lapses, headaches, and inability to work around the house. Mrs. Bopp cooks, washes laundry, feeds the dogs, and cares for Claimant's daughter when she visits. She observed Claimant take two Vicodin pills every four hours for pain and medicine to sleep.

#### *Pre-existing Medical Facts*

9.
  - 1) In April 1993, Dr. Kennedy performed a cervical fusion at C4-5.
  - 2) In August 1993, Dr. Albanna performed an anterior fusion at C5-6.
  - 3) On February 24, 1995, Dr. Vollmer revised the C5-6 fusion with a plate and graft.
  - 4) On April 24, 2004, Dr. Bernardi performed an anterior C6-7 disectomy and fusion, with a plate and screws.

#### *Medical and expert opinion facts*

10. On January 3, 2005, **Dr. Robert Bernardi** revised the C6-7 fusion with a posterior fusion, C7-T1 hemilaminotomy and foraminotomy and iliac crest bone graft. Rods and bolts were placed between C6-7 and C7-8.
11. On August 4, 2005, Dr. Bernardi placed Claimant at MMI and returned him to work with no repetitive lifting over twenty-five pounds, no intermittent lifting over fifty pounds, and no repetitive bending, neck twisting or overhead work. Dr. Bernardi noted Claimant took Flexeril and Vicodin intermittently, wrote a final prescription, and referred Claimant to his primary physician for refills.

12. **Dr. Jerome Levy** (retired), is a board certified surgeon, and examined Claimant on September 27, 2005, at the request of his attorney. Dr. Levy diagnosed post multiple discectomies and fusions of the cervical spine, post non union at C6-7, re-fusion at C6-7 extending to C7-8, and chronic cervical strain.
13. On examination, Dr. Levy found limited range of motion of the cervical spine, positive Tinel's on the right, and decreased sensation of the right index finger.
14. Dr. Levy rated 20% PPD of the whole person for the January 2004 accident, 20% PPD of the whole person for the August 2004 accident, and 10% PPD of the whole person for three neck injuries prior to January 2004. Dr. Levy opined the pre-existing disability was a hindrance and obstacle to employment or re-employment despite the absence of symptoms.
15. Dr. Levy restricted lifting to twenty pounds, no hammering or heavy work, recommended vocational assessment, and deferred to a vocational specialist about Claimant's ability to work.
16. Dr. Levy opined surgeries after the January and August 2004 accidents were not related to the first three neck surgeries.
17. **Dr. Jeffrey F. Magrowski, Ph.D.**, is a certified vocational rehabilitation counselor. On February 7, 2008, he interviewed Claimant for three and a half hours, at his attorney's request. Dr. Magrowski reviewed Dr. Levy's report and summaries of treatment provided by Drs. Bernardi, Fisher, Tucker, and Kitchens.
18. Dr. Magrowski performed the following tests; the Slosson Intelligence, Purdue Pegboard dexterity ("assembly"), and Wide-Range Achievement ("literacy"). Claimant scored average intelligence, high school level in math and post high school in reading. Claimant scored better on the assembly test which was administered after he took Vicodin.
19. Dr. Levy provided a supplemental report regarding Claimant's restrictions, at Dr. Magrowski's request. Restrictions permitted sitting for eight hours, occasional lifting, carrying up to twenty pounds at shoulder level, crawling, climbing, and frequent lifting and carrying up to ten pounds, squatting and bending. Dr. Magrowski did not ask Dr. Bernardi for clarification about restrictions.
20. Dr. Magrowski concluded Claimant was unable to compete in the open labor market based on Dr. Levy's restrictions, test results, medical summaries, and Claimant's presentation, and a failed Commercial Driver Fitness examination.
21. Dr. Magrowski found Claimant able to work as a surveillance system monitor, but predicted medication and other limitations would prevent him from staying alert. Claimant could work as a telephone worker and cashier, with vocational rehabilitation. But Dr. Magrowski did not believe Claimant would qualify for training because he takes narcotic medication. Furthermore, Dr. Magrowski did not believe trainers would admit they reject participants who take prescribed narcotics.
22. **Mr. James England Jr.**, a certified rehabilitation counselor, conducted a records review at SIF's request.
23. Mr. England found Claimant can perform light to medium level work based on restrictions set by Drs. Bernardi and Levy, test results, age, and education.
24. Mr. England concluded Claimant could no longer perform heavy labor; however, Claimant can work as a cost estimator for paint contractors, answer questions at a remodeling facility, and supervise building maintenance crews for apartment complexes and hospitals.
25. Mr. England opined Claimant can be retrained or return to school because he is academically sound. Mr. England recommended vocational rehabilitation should Claimant seek a career-oriented position. The nearest rehabilitation facility is located in Rolla, Missouri.

## RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find SIF is not liable to Claimant for PPD or PTD benefits for the reasons stated below.

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

### *I. No SIF liability for PTD benefits*

Claimant seeks PTD benefits from SIF. To establish SIF liability, Section 287.220 RSMo (2000) requires the [fact finder] make three findings regarding disability:

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

To establish permanent total disability, a third requirement is necessary;

- 3) There must be a determination that all of the injuries and conditions combined, including the last injury, resulted in the employee being permanently and totally disabled.

However, if a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, SIF is not liable and the employer is responsible for the entire amount. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000). Therefore, the inquiry begins with Employer's liability.

#### ***1) Claimant sustained permanent disability from the last injury alone***

After August 2004, Drs. Bernardi and Levy placed permanent restrictions on Claimant's ability to work and Dr. Levy recommended vocational assessment to determine Claimant's ability to work with restrictions.

Dr. Bernardi revised the C6-7 fusion with a bone graft, posterior fusion, two rods and screws. About one-third of the C7-T1 facet joint was removed. Dr. Levy found significant limitations with range of motion, positive right Tinel's and decreased sensation of the right index finger, and rated 20% PPD of the body as a whole for the August 2004 injury. Claimant testimony is credible that he has pain in the neck, arms, right thigh, occasional groin numbness, and difficulty sleeping. Based upon medical records, reports, credible testimony by Claimant and Dr. Levy, I find Claimant sustained permanent disability from the last injury alone.

#### ***2) Pre-existing disability did not create a hindrance or obstacle***

Dr. Levy rated 10% PPD of the body as a whole for neck disability before January 2004; and found it created a hindrance or obstacle to employment or re-employment. SIF contends the injuries do not create a hindrance or obstacle to employment and there is no synergistic effect.

I find Dr. Levy's opinion not credible that Claimant's injuries before January 2004 created a hindrance or obstacle to employment or re-employment. Medical evidence shows Claimant informed Drs. Bernardi, Mirkin, and Levy his neck complaints resolved after surgery in 1995 until he injured his neck in January 2004.

Claimant gave inconsistent testimony regarding neck symptoms before January 2004. At the hearing, he testified neck pain and hand numbness continued after surgery in 1995, and he needed help with overhead painting and heavy lifting. But during deposition, he said his neck problems resolved after 1995. On cross-examination, he testified his neck was fine but he worked through pain. Claimant told Dr. Levy the pain resolved, but he continued to have pain.

The record contains undisputed evidence Claimant worked after 1995 for nine years as a laborer, carpenter and painter, lifting up to fifty pounds with no restrictions; and was a self employed painter during at least four of those years.

When Dr. Bernardi returned Claimant to work August 11, 2004, he reported mild intermittent pain to the left periscapular, but he was “very pleased” with the results. Dr. Bernardi noted Claimant was doing “exceptionally well.” Claimant returned to the same job full time without restrictions; and performed heavy labor for two days before he re-injured his neck August 13, 2004.

Based on testimony by Dr. Levy and Claimant, and medical records, I find Claimant’s pre-existing disability did not create a hindrance or obstacle to employment or re-employment. I find the pre-existing disabilities did not combine with the primary injury to create greater disability than their simple sum.

### ***3) Claimant is not permanently and totally disabled***

Claimant asserts he is PTD due to disability from pre-existing medical conditions and the primary injury. SIF contends Claimant is not PTD.

**Section 287.020.7 RSMo (2000)**, defines total disability as the inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. To determine if a claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition. *Massey v. Missouri Butcher & Café Supply*, 890 S.W. 2d 761, 763 (Mo. App. 1995).

I find Mr. England’s opinion more credible than Dr. Magrowski’s opinion. Mr. England found Claimant able to compete in the open labor market. Although he did not interview Claimant, Mr. England based his opinion on a review of medical records from treating physicians, restrictions set by Drs. Bernardi and Levy, and Claimant’s transferable skills, age, education, and test scores.

Dr. Magrowski did not review any medical records or reports prepared by treating physicians. He only reviewed Dr. Levy’s report, prepared for litigation by a non-treating physician. Dr. Magrowski asked Dr. Levy to clarify restrictions but did not ask Dr. Bernardi.

Dr. Bernardi’s weight restrictions were missing from the summary. Dr. Magrowski conceded the summaries had no restrictions based on medication, and noted Claimant “had to qualify for unemployment” in 2005. Dr. Magrowski’s reliance on medical summaries and a social security decision is not persuasive.

Mr. England found Claimant unable to perform heavy labor, but able to work entry level service jobs such as cost estimator for a paint company, answer desk attendant at a remodeling company, and crew supervisor for property management at an apartment complex or hospital. Dr. Magrowski found Claimant able to work as a surveillance system monitor; within Dr. Levy’s restrictions; or as a telephone worker, or cashier, with vocational training.

Dr. Magrowski’s opinion is not credible that Claimant does not qualify for training because he uses prescription narcotics and training facilities will not admit they refuse participants who use prescription narcotics.

According to Mr. England, regulations do not prevent employment or vocational training while taking prescription narcotics. Mr. England determined Claimant to be a vocational training candidate, if he sought career-oriented work, but as of the hearing date Claimant had not applied. Furthermore, no doctor restricted Claimant’s ability to work based on medication, pain or sleep patterns. Dr. Levy had an opportunity to modify his restrictions in December 2007 but did not. Instead, he said Claimant could sit for eight hours, stand four hours and walk four hours

with rest, use his hands repetitively to grip, push and pull, use fine manipulations, use both feet to operate foot controls, and drive moderately.

Dr. Magrowski's testimony is not credible that Claimant cannot work as surveillance monitor because he takes prescription narcotics. Against Dr. Magrowski's advice, Claimant took medication before testing and additional medication during the test, yet he scored high school level in math and post high school in reading. Claimant was able to focus during the three and a half hour interview with Dr. Magrowski. During deposition, Claimant admitted he had no problems with reading, writing, or basic mathematics.

Claimant testified he takes eight Vicodin per day. However, when released in 2005, Claimant reported taking Flexeril and Vicodin "only intermittently." During the hearing, I observed Claimant remain awake, alert, and answer questions during the two hour hearing, occasionally touching the left side of his neck and slumping in the chair.

Based upon medical records, the credible vocational opinion of Mr. England and Claimant's testimony, I find an employer in the ordinary course of business would expect Claimant to perform the work he was hired to do in his present physical condition. I find Claimant is employable in the open labor market.

## ***II. Second Injury Fund is not Liable for PPD***

Once a determination is made that an Employee has been permanently and partially disabled, the inquiry turns to what degree, if any, an individual is permanently partially disabled for purposes of SIF liability. *Leutzig v. Treasurer of the state of Missouri*, 895 S.W.2d 591 (Mo. App. 1995).

**Section 287.220.1 RSMO. (2000)**, provides SIF is implicated in all cases of permanent partial disability where there has been pre-existing permanent partial disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability reached a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and pre-existing conditions must produce additional disability greater than the simple sum of the disabilities.

Dr. Levy rated 10% PPD of the body as a whole for cervical disability sustained prior to January 14, 2004, which I find does not meet the required statutory threshold. I previously found Claimant did not meet his burden to prove the pre-existing disability was a hindrance or obstacle to employment or re-employment.

I further find Claimant did not meet his burden to prove the primary and pre-existing conditions created more disability than their simple sum. The concept of synergistic enhancement, especially when there are injuries to the same body part, is a complicated medical issue requiring expert testimony. Where there is no expert testimony addressing the combination effect between the pre-existing and primary disabilities, there can be no award of permanent partial disability. *Anderson v. Emerson Electric. Co.*, 698 S.W.2d 574, 576-77 (Mo. App. 1985) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121. S.W.3d 220, 223, (Mo banc 2003). Here, Dr. Levy, the only doctor providing a rating, simply added the percentages of disability from each neck injury to reach an overall disability rating of 50%.

I find Claimant failed to prove the pre-existing disability created a hindrance or obstacle to employment or re-employment. I find Claimant failed to prove the primary and pre-existing neck injuries combined to create more disability than their simple sum, therefore SIF is not liable for PPD.

## CONCLUSION

Claimant's disabilities prior to August 2004 do not meet the statutory threshold, were not a hindrance or obstacle to employment or re-employment and did not combine with the primary injury and produce a synergistic effect. SIF is dismissed.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

**Suzette Carlisle**  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
**Jeffrey W. Buker**  
*Director*  
*Division of Workers' Compensation*

Includes medical benefits paid by Employer for Injury Numbers 04-141651 and 04-030630

SIF contended Dr. Magrowski's report lacked foundation as he relied on medical summaries from an unknown source. SIF's objection is overruled.

Claimant contended Mr. England's report was not reasonably reliable because he lacked knowledge about Claimant's daily medications. Also, Mr. England did not examine, treat, or speak to Claimant. Claimant's objection is overruled.

At the hearing, Claimant testified he continued to have problems after each surgery; including hand numbness, pain with overhead painting or lifting, and he sought help with those activities. However, Claimant admitted during his deposition that his neck problems resolved between 1995 to January 2004.

Dr. Albanna's records are not in evidence. Claimant provided this history to Dr. Levy and his testimony was consistent with the history to Dr. Levy. Dr. Vollmer referenced Dr. Albanna's recommendation for cervical discectomy and fusion at C5-6, but did not state it was performed.

The prior C6-7 fusion fractured as a result of the August 13, 2004 work accident.

Claimant applied for a job that required a lot of driving, and did not meet the driving requirements.

Mr. England used results from the test administered by Dr. Magrowski.

Dr. Magrowski testified he knew Claimant had to be ready, willing and able to work in order to qualify for unemployment benefits.

Dr. Levy rated (10% Pre-existing +20% -Jan. 04+20% -Aug 04) and stated "overall disability is therefore sixty percent (50%)." During deposition, SIF clarified this point: Question: (Doctor) You list your numerical ratings of disability at the end of your report, is that correct? Answer: I did.

Question: And you added them up to come up with an overall disability, is that correct? Answer: Correct.