

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

Injury No.: 07-052662

Employee: Walter Braggs
Employer: Federal Mogul Corporation (Settled)
Insurer: Travelers Commercial Casualty (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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 7, 2011. The award and decision of Administrative Law Judge Suzette Carlisle, issued February 7, 2011, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 17th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Walter Braggs

Injury No.: 07-052662

Dependents: N/A

Employer: Federal Mogul Corporation (Settled)

Additional: Second Injury Fund

Insurer: Travelers Commercial Casualty (Settled)

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

Hearing Date: November 1, 2010

Checked by:SC

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: May 18, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant injured his left shoulder when he used his left arm to pull himself onto the sweeper at work.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left shoulder
14. Nature and extent of any permanent disability: Permanent Total Disability
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$5,300.00

Employee: Walter Braggs

Injury No.: 07--052662

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$542.91
19. Weekly compensation rate: \$361.94 (PPD, PTD, & TTD)¹
20. Method of wage computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

34.8 weeks of permanent partial disability from Employer (Previously settled)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$361.94) payable by SIF for weeks beginning
November 19, 2008 and thereafter, for Claimant's lifetime

TOTAL:

TO BE DETERMINED

23. Future requirements awarded: Pursuant to this award

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Gary Wolfe

¹ PPD stands for permanent partial disability, TTD-temporary total disability, and PTD- permanent total disability

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Walter Braggs	Injury No.: 07-052662
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Federal Mogul Corporation (Settled)	Department of Labor and Industrial Relations of Missouri
Additional:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Travelers Commercial Casualty (Settled)	

STATEMENT OF THE CASE

A hearing was held at the Missouri Division of Workers' Compensation (DWC), St. Louis office at the request of Walter Braggs (Claimant), on November 1, 2010, pursuant to Section 287.450 RSMo (2005).² Claimant seeks a final award against the Second Injury Fund for either permanent partial or permanent total disability. Attorney Gary Wolfe represented Claimant. Assistant Attorney General Karietha Osborne represented the Second Injury Fund (SIF). Venue is proper and jurisdiction lies with the DWC. The record closed after presentation of the evidence.

Prior to the hearing, Federal Mogul Corporation (Employer) and Travelers Commercial Casualty (Insurer) settled their claim with Claimant for 15% of the left shoulder, and did not participate in the proceeding.³ Claimant's Exhibits A – O and the SIF's Exhibits I-III were admitted.⁴

STIPULATIONS

The parties stipulated that on or about May 18, 2007:

1. Claimant was employed by Employer in St. Louis City located in the State of Missouri;
2. The Employer and Claimant operated under the Missouri Workers' Compensation Law;
3. Employer's liability was fully insured;
4. Employer had proper notice of the injury;
5. The Claim for Compensation was timely filed;
6. Claimant's average weekly wage was \$542.91;
7. Claimant's rate of compensation was \$361.94 for TTD, PPD, and PTD;
8. Employer paid no TTD benefits;
9. Employer paid medical benefits totaling \$5,300.00; and
10. Claimant achieved maximum medical improvement (MMI) on March 19, 2008.

² All references in this award are to the 2005 Revised Statutes of Missouri unless otherwise stated.

³ All references in this award to the Employer also include the Insurer.

⁴ Exhibit II was admitted over objection by the Claimant that it is an abandoned claim.

ISSUES

The parties identified the following issues for disposition:

1. Did Claimant sustain an occupational disease?
2. If so, did the occupational disease arise out of and in the course of Employment?
3. Was the occupational disease medically, causally related to Claimant's work activities?
4. What is the nature and extent of SIF liability; if any; for PPD or PTD benefits?

SUMMARY OF DECISION

Based on the entire record, Claimant's testimony, demeanor during hearing, medical records, expert testimony and the applicable laws of the State of Missouri; I find Claimant met his burden to prove he sustained an occupational disease that arose out of and in the course of employment and was medically, causally related to his work activities. Furthermore, Claimant is unable to compete in the open labor market based on his primary injury, preexisting disabilities, work experience, education, academic skills, and medical restrictions.

FINDINGS OF FACT

All evidence was reviewed but only evidence supporting this award is discussed below:

1. Claimant is 62 years old and married with no dependent children living at home. He graduated from Lincoln Senior High School and received no additional education.
2. During Claimant's career, he held two jobs and both were physically demanding. After high school, Claimant first worked at a steel factory, as a ladder-liner, where he knocked out stoppers and put in new lines.
3. In 1973, Employer hired Claimant under the company name Cooper & Wagner. Claimant worked as a laborer, molder, brick layer, foundry worker, overhead crane operator, furnace helper, and repair person. He lifted up to 60 pounds, carried metal, climbed, and walked around the facility.
4. In April of 2006 Employer assigned Claimant to work on a floor sweeper, which was used to clean the factory. The sweeper was about the size of a pickup truck. The step used to climb onto the sweeper was located 18 inches above the floor. Claimant could not climb onto the step because of his knees and right shoulder, so he used his left arm to pull himself up. He reversed the process to descend.
5. Claimant worked 8-10 hours per day, Monday through Friday, with two breaks and one lunch period each day, and an occasional Saturday. Claimant climbed on and off the sweeper 12-15 times a day. He does not recall telling Dr. Cohen he only climbed onto the sweeper 5 times a day.

6. Claimant believes his left shoulder injury was due to overuse because his right shoulder and knee were weak and not fully functional, although he did not wear a knee brace.
7. Dr. Yamaguchi surgically repaired Claimant's left rotator cuff on September 24, 2007.
8. Claimant worked for Employer for 34 ½ years, until June 22, 2007 when Employer moved to China. He has not looked for work because he believes he cannot work.
9. Claimant cannot perform yard work. His wife does practically everything around the house. Claimant cannot sit in a chair or stand for more than an hour. He cannot walk more than 15 minutes. Claimant cannot crouch, if he kneels, he has difficulty getting up. It hurts to lift a gallon of milk. He sleeps about five hours and turns frequently due to pain. Claimant lies down about 2:00 p.m. to rest for a couple of hours.
10. Claimant does not read much. He is superintendant of Sunday school at his church and each Sunday he delegates assignments to four teachers and an assistant. He is also a deacon which requires him to stand in front of the congregation for 15 minutes per month.
11. Claimant is a poor historian due to memory loss which he believes occurred after he hit his head at work in the past. He does not remember when he saw Drs. Chu and Baumer or what he told them, however he does not dispute information contained in the medical records regarding his back, knees and shoulders.

Pre-Existing Conditions

12. In 1990 Claimant injured his **low back** while operating a crane when he pulled on an electrode and fell on his back. He sought medical treatment and took medication. A year later, he began driving a fork-lift, because the crane job ended and the fork-lift was easier to operate. Claimant saw a doctor for his back took medication and kept working. There was no settlement for the low back case. He limited the amount he lifted after the back injury. He had ongoing pain, but no longer had pain into his right leg.
13. A radiology report dated August 14, 2004 showed complaints of low back pain radiating into Claimant's right leg. An x-ray revealed advanced degenerative disc disease at L2-3 and mild spondylosis throughout the spine. An MRI of the low back revealed similar findings but no herniations.
14. In 2004 Claimant fell on a steel plate and injured **both knees**. **Kevin Baumer, M.D.**, treated Claimant for right knee pain, injected the right knee in September 2004, and provided a brace.
15. An x-ray of the right knee dated August 16, 2004 was unremarkable. A right knee x-ray, three views standing, dated August 26, 2004 showed excellent preservation of the joint space. An MRI of the right knee dated September 3, 2004 revealed a small chronic tear at the posterior horn of the medial meniscus, Baker's cyst, and a large cyst near the medial femoral condyle. Dr. Baumer diagnosed arthritis, injected the right knee, and provided a brace.

16. In September 2005 Claimant returned to Dr. Baumer with complaints to both knees. X-rays revealed arthritis in both knees, more on the left, and spurring. Dr. Baumer injected the right knee. Claimant had bilateral knee pain when he pulled himself onto the sweeper at work.
17. In October 2004 Claimant injured his **right shoulder** while moving large barrels at work. On December 17, 2004 Dr. Kostman repaired Claimant's right rotator cuff, performed a subacromial decompression, and permanently restricted lifting to 25 pounds floor to waist. Employer and Claimant settled the case for 29% PPD of the right shoulder. Claimant and the SIF settled the case for 15% PPD of the preexisting right knee.
18. A radiology report of the left shoulder dated April 20, 2006 revealed hypertrophic spurring of the acromioclavicular joint. The history included pain but no trauma.

Primary Injury-Medical Evidence

19. **Bradley Evanoff, M.D.**, examined Claimant on June 13, 2007 for the following complaints: bilateral knee pain for three years, untreated, bilateral shoulder pain, lower and upper back pain, and bilateral wrist pain.
20. A radiology report of Claimant's left knee dated June 13, 2007 revealed moderate osteoarthritis of the medial joint. The right knee was unremarkable.
21. During examination, Dr. Evanoff noted exaggerated responses which did not reflect Claimant's functional ability. Dr. Evanoff diagnosed arthritis of the left shoulder, knees, back, and wrists and did not find a definite link between the development of osteoarthritis of the shoulders and knees and heavy physical labor, and referred Claimant to his personal physician for follow-up treatment.
22. A left knee MRI dated August 22, 2007 revealed a possible osteochondral defect of the medial femoral condyle, degenerative changes, and a possible tear of the posterior horn of the medial meniscus. A right knee MRI identified patellar effusion.
23. On September 14, 2007, **Ken Yamaguchi, M.D.**, diagnosed a small full thickness supraspinatus tear of the left shoulder which he surgically repaired on September 24, 2007.

Expert Medical Opinions

24. **Russell C. Cantrell, M.D.**, a physician board certified in physical medicine and rehabilitation, provided an Independent Medical Examination on May 13, 2008 at Employer's request.
25. Dr. Cantrell diagnosed the following conditions: a) Mechanical neck pain related to underlying osteoarthritis, b) Mechanical low back pain related to degenerative abnormalities, c) Left shoulder post arthroscopic rotator cuff repair, d) right knee pain caused by patellofemoral joint pain, and e) Left knee pain consistent with osteoarthritis. Dr. Cantrell had no diagnosis for the right shoulder surgery in 2004.

26. Dr. Cantrell found no PPD for work related injuries to Claimant's cervical and lumbar spine, left shoulder and bilateral knees. Dr. Cantrell found no causal connection between Claimant's job duties on the sweeper and complaints to his lower back, left shoulder, and bilateral knees. He noted Claimant's symptoms continued after he stopped working. Also, Dr. Cantrell opined that climbing onto the sweeper four to five times per day was insufficient to cause cumulative trauma to Claimant's knees. Furthermore, Claimant reported right knee complaints before April 2006.⁵
27. Dr. Cantrell imposed the following restrictions for Claimant's low back, left shoulder and knees: no lifting over 30 pounds from floor to waist, sit ten minutes every hour, avoid kneeling, repetitive squatting and repetitive use of the left upper extremity above shoulder level. Dr. Cantrell determined the restrictions were not related to work injuries.
28. Dr. Cantrell rated disability opined it was not work related.
29. **Raymond F. Cohen, M.D.**, a board certified neurologist, examined Claimant once on May 12, 2009 at the request of his attorney. Examination revealed right knee grinding, reduced flexion, and tenderness, right shoulder pain with movement in all areas, decreased range of motion, weak rotator cuff muscles, tenderness with pressure, and a positive impingement test.
30. For the May 18, 2007 injury, Dr. Cohen diagnosed a left shoulder rotator cuff tear and impingement, surgically repaired, and concluded Claimant's work was the prevailing factor that caused the May 18, 2007 occupational disease to the left shoulder.
31. Dr. Cohen explained the April 2006 acute injury became worse with repetitive climbing onto the sweeper and required surgery after the May 18, 2007. Claimant pulled his body onto the sweeper with his left shoulder due to restrictions on his right shoulder, and limited range of motion of his low back and knees. The repetitive action also caused more injury to his knees and lumbar spine.
32. For the occupational disease injury through May 18, 2007, Dr. Cohen rated 20% PPD of the left shoulder, 10% PPD of the lumbar spine, 20% PPD of right knee, and 5% PPD of the left knee.
33. Dr. Cohen diagnosed the following preexisting disabilities: right shoulder surgery for rotator cuff tear, lumbar degenerative disc disease, right and left knee strain/sprains. Dr. Cohen rated 40% PPD of the right shoulder, 20% PPD of the lumbar spine, 15% PPD of the right knee and 15% PPD of the left knee, and 25% PPD of the left shoulder for the April 2006 injury.
34. Dr. Cohen imposed the following restrictions: no overhead work, no repetitive use of his upper extremities, no lifting over ten pounds, no prolonged sitting or standing, walking, kneeling, squatting, stooping, ladder work, climbing, or walking on uneven surfaces.

⁵ Dr. Cantrell referred to right knee complaints in 2004 when Dr. Bauer diagnosed arthritis based on MRI abnormalities. Also, Claimant reported left knee symptoms in August 2004.

35. Based on Claimant's subjective complaints, examination, and medical records review, Dr. Cohen found Claimant's preexisting conditions were a hindrance or obstacle to employment or reemployment and combine with the primary injury on May 18, 2007 to exceed their simple sum, and render Claimant permanently and totally disabled.
36. However, Dr. Cohen acknowledged he is not a vocational rehabilitation counselor, does not engage in job placement, and does not study the labor market to determine which jobs are appropriate for specific restrictions.

Expert Vocational Opinion

37. **Mr. John S. Dolan**, a board certified vocational counselor, examined Claimant on November 9, 2009 at the request of his attorney. Mr. Dolan administered the Wide Range Achievement Test IV.
38. The Wide Range Achievement Test IV tests ability to read, spell, and perform math. Claimant recognized words at the fourth grade level, and understood sentences at the fifth grade level. Compared to people age 55 to 65, 98 percent read better than Claimant, 97 percent spell better, and 91 percent perform better in math. When reading, Claimant mispronounced about fifty percent of the words.
39. Mr. Nolan concluded Claimant knew how to operate forklifts, tow motors, hoists, etc, but cannot do so because they require repetitive and prolonged use of lower extremities which Claimant cannot perform. Dr. Cohen's restrictions prevent repetitive use of arms and hands or repetitive standing, walking, stooping or climbing for long periods.
40. Mr. Dolan found Claimant unable to perform non-physical work due to a lack of academic ability.
41. Based on Claimant's education, work experience, academic skills, and Dr. Cohen's restrictions, Mr. Nolan found Claimant is unable to maintain employment in the open labor market. Mr. Nolan found a small group of unskilled jobs where a worker can stand and sit as needed. However, those jobs disappear given Claimant's inability to read, write, and perform math.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the competent and substantial evidence presented during the hearing, and the applicable law of the State of Missouri, I make the following rulings of law:

Claimant sustained an occupational disease which arose out of and in the course of employment and is medically causally related to his work

Claimant asserts that pulling himself onto the sweeper caused injury to his left shoulder, low back and both knees. The SIF contends Claimant's work activities lacked sufficient repetition to cause an occupational disease injury.

Claimant has the burden to prove all essential elements of a claim, including causation. *Decker v. Square D Co.*, 974 S.W.2d 667, 670 (Mo.App. 1998). A claimant's medical expert in an occupational disease case must establish within a "reasonable probability" that the disease was caused by conditions in the work place. *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 902. (Mo.App. 1999) (Citations omitted).⁶ 'Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt.' *Thorsen v. Sachs Elec. Co.* 52 S.W.3d 611, 620 (Mo.App. 2001) (Citations omitted).⁷ Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). (Citations omitted).

Section 287.067.1 and 3 states:

- 1) **"Occupational disease"** is defined as... an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

- 3) An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

To prove an occupationally induced disease rather than an ordinary disease of life involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort. *Townser v. First Data Corp.*, 215 S.W.3d 237, 241-242 (Mo. App. 2007). "[T]he claimant must establish, generally through expert testimony, the probability that the occupational disease was caused by conditions in the work place. . . . A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. The opinion may be based on a written report alone." *Id.* at 242.

I find Claimant to be generally credible. Although his recall is incomplete, he did not dispute the medical records which are consistent with his testimony and other records in evidence. Claimant reported problems with his knees and back and left shoulder increased when he pulled himself onto the sweeper.

⁶ Abrogated on other grounds by *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 41 A.L.R.5th 889 (Mo. Apr 25, 1995).

⁷ This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect.

I find credible Dr. Cohen's opinion that Claimant sustained injury to his left shoulder, knees, and low back from climbing on and off the sweeper with his left shoulder. Claimant pulled his body weight onto the sweeper with his left shoulder due to restrictions on his right shoulder, and limited range of motion of his low back and knees. Claimant could not distribute weight to both shoulders which placed stress on his left rotator cuff and caused a tear. The repetitive action also caused more injury to his preexisting knee and lumbar spine injuries.

I find Dr. Cantrell's opinion is not credible that Claimant sustained no shoulder injury because he did not improve after he stopped working and did not climb onto the sweeper enough to cause injury. In addition, Dr. Cantrell incorrectly reported that Claimant told Dr. Cohen he used his right leg and knee to climb onto the sweeper and held on with both hands. In reality, Claimant provided both doctors with a consistent history of repetitive use of his left arm and leg to climb onto the sweeper.

Based on credible testimony by Claimant and Dr. Cohen, medical records and reports, I find repetitive climbing onto the sweeper was the prevailing factor that caused Claimant's left shoulder tear and need for surgery. I find repetitive climbing with the left shoulder exposed Claimant to more injury than the general public to such injury. I find Claimant established a link between his left shoulder injury and the distinctive act of climbing onto the sweeper with his left arm. I find the occupational disease was medically causally related to the act of climbing onto the sweeper.

Claimant sustained permanent partial disability from the last injury alone

Claimant asserts the SIF is liable for PTD benefits due to the combination of his left shoulder injury and preexisting disability to his bilateral knees and low back. The SIF contends Claimant did not sustain an occupational disease therefore he is not entitled to PTD benefits.

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

Pursuant to Section 287.220.1 RSMo (2005)⁸, pertaining to SIF liability for PPD benefits, Claimant must prove:

- 1) The employee has permanent disability resulting from the last injury alone which is compensable, 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 combined 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 the pre-existing disability considered separately.

⁸ See also *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. 2000) and *Luetzinger v. Treasurer of Missouri, Custodian of Second Injury Fund*, 895 S.W. 2d 591 (Mo. App. 1995).

However, in deciding whether the SIF has any liability, the first determination is the degree of disability from the last injury considered alone. *Hughey*, 34 S.W.3d at 847. Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. *Id.* If the last injury in and of itself rendered Claimant PTD, then the SIF has no liability and the employer is responsible for the entire amount. *Id.* (*Citations omitted*).

I find credible Dr. Cohen's opinion that Claimant sustained PPD from the left shoulder injury. Dr. Yamaguchi surgically repaired Claimant's left rotator cuff and Dr. Cohen imposed work restrictions related to the injury. Claimant testified he has shoulder pain if he lifts a gallon of milk. I find Claimant sustained 15% PPD of the left shoulder from the May 18, 2007 occupational disease injury.

Claimant is permanently and totally disabled due to the combination of his primary injury and pre-existing disabilities

To establish entitlement to PTD benefits, Claimant must also prove that all of the injuries and conditions combined, including the last injury; result in the employee being permanently and totally disabled. *Boring v. Treasurer*, 947 S.W. 2d 483 (Mo. App. 1997).

Section 287.020.7 defines "total disability" as the inability to return to any employment and not merely inability to return to the employment the employee was engaged in at the time of the accident. The test for PTD is the worker's ability to compete in the open labor market. *Karoutzos v. Treasurer of State*, 55 S.W. 3d 493, 499 (Mo.App. 2001) (*Citations omitted*). The "crucial question is whether or not an employer can reasonably be expected to hire the claimant in his present physical condition and can reasonably expect him to perform the work successfully." *Muller v. Treasurer of Missouri*, 87 S.W.3d 36 (Mo. App. 2002).

Prior to May 2007 Dr. Kostman restricted Claimant's right shoulder lifting to 25 pounds from floor to waist. Claimant continued to work light duty until the development of the occupational disease in May 18, 2007. Treating and examining doctors agree Claimant had significant degenerative changes to his knees and low back prior to May 2007 and Dr. Cohen imposed additional restrictions after the May 2007 injury. Claimant credibly testified that using his left arm to pull himself onto the sweeper caused pain to his knees and low back. I find credible Dr. Cohen's opinion that Claimant's preexisting disabilities to knees, back, and right shoulder were a hindrance or obstacle to employment or reemployment and combine with the left shoulder injury to render Claimant permanently and totally disabled.

In contrast, I find Dr. Cantrell's opinion is not credible that Claimant's left shoulder is not work related because he continued to have symptoms after he stopped working. Dr. Cohen credibly testified that Claimant had a rotator cuff tear that worsened with repetitive climbing and required surgery. Furthermore, Dr. Cantrell concluded Claimant did not climb onto the sweeper enough to develop an occupational disease injury, but did not state how much climbing was needed for the condition to develop.

I find credible Mr. Dolan's opinion that Claimant is unable to maintain employment in the open labor market based on his age, education, work experience, academic skills, and Dr. Cohen's work restrictions. Admittedly Claimant has the knowledge to operate fork-lifts, tow motors, and hoists, but cannot perform the repetitive and prolonged activity with his upper and

lower extremity restrictions imposed by Dr. Cohen. Furthermore, Mr. Dolan concluded Claimant could not perform unskilled work with flexible movement due to inadequate academic skills.

Claimant had an excellent work record of performing physical labor for more than 30 years. However, based on Claimant's age, credible testimony by Mr. Dolan, Dr. Cohen, and Claimant, medical reports, records, and less than credible testimony by Dr. Crandall, I find no employer can reasonably be expected to hire Claimant in his present physical condition and expect him to perform work successfully. I find Claimant is permanently and totally disabled due to a combination of the May 18, 2007 primary injury and preexisting disabilities to his shoulders, knees, and low back.

Commencement Date for Permanent Total Disability Payments

The obligation to pay permanent disability compensation commences on the date claimant's permanent disability begins. ***Kramer v. Labor & Indus. Rel. Com'n***, 799 S.W.2d 142, 145 (Mo. App. 1990).

The parties stipulated Claimant achieved MMI on March 19, 2008, therefore, I find Claimant reached MMI on March 19, 2008. Having previously found 15% PPD of Claimant's left shoulder, I find Employer is liable for 34.8 weeks of compensation at the stipulated rate of \$361.94 per week, beginning retroactively on March 19, 2008.

I find Employer's liability for PPD should have commenced March 19, 2008, and concluded on November 18, 2008. I find the SIF is liable to pay Claimant the sum of \$361.94 per week beginning November 19, 2008 and continuing for the remainder of his life. ***Laterno v. Carnahan***, 640 S.W.2d 470, 471 (Mo. App. 1982).

CONCLUSION

Claimant is permanently and totally disabled due to a combination of his primary work injury and preexisting medical conditions. The SIF is liable for payments beginning November 19, 2008. The award is subject to a lien in favor of Claimant's attorney for legal services rendered as outlined in this award.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation