

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

Injury No.: 07-118562

Employee: Pamela Bridgman
Employer: WEB-CO Custom Industries, Inc. (Settled)
Insurer: Sheltered Workshop Insurance (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision reversing the September 24, 2013, award and decision of the administrative law judge.

Issue Presented

The sole issue before us is whether the Second Injury Fund is liable for permanent total disability benefits in this case. The administrative law judge concluded that the Second Injury Fund is not liable for permanent total disability benefits. We disagree.

Findings of Fact

On December 7, 2007, employee sustained injury when she fell on black ice. The parties stipulate that the accident and injury arose out of and in the course of her employment. Employee settled her claim against employer for approximately 15% of the left shoulder.

Employee proceeded to trial of her claim against the Second Injury Fund. The administrative law judge's findings of fact are thorough and accurate and we adopt them to the extent that they are not inconsistent with our findings, conclusion, award, and decision herein.

In 2003, employer first hired employee notwithstanding that employee had significant preexisting permanent disabilities. Employer re-hired employee in March 2007. There is no evidence to suggest that employer hired employee as a business, political or personal favor or to secure a business advantage (e.g. tax advantage, government grant). Employee was not assigned merely simple tasks or make work projects. During employee's first period of employment with employer, employer promoted employee to assistant supervisor – a job she performed successfully until a period of uncontrolled diabetes prevented employee from working for a time. Employer again hired employee after her diabetes was controlled. Employee usually worked three days per week for over six hours each day. Employee performed real work for regular wages, which wages were sufficient to enhance significantly employee's quality of life.

¹ Statutory references are to the Revised Statutes of Missouri 2007, unless otherwise indicated.

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Dr. David Volarich was the only medical expert to offer testimony in this matter. Dr. Volarich evaluated employee and reviewed her extensive medical history in reaching his opinions. Dr. Volarich is of the opinion that “the accident that occurred 12/7/07 when Ms. Bridgman was getting out of a car, stepped onto an icy sidewalk, slipped and fell onto her left side is the substantial contributing factor as well as the prevailing or primary factor causing left proximal humerus greater tuberosity nondisplaced fracture and partial rotator cuff tear of the left shoulder, both of which required nonoperative treatment. As a result of this injury, she also sustained a cervicothoracic strain injury and aggravated her myofascial pain syndrome.” Dr. Volarich opined that employee sustained a 35% permanent partial disability referable to her left shoulder and a 15% permanent partial disability of the body as a whole referable to her cervicothoracic strain and the aggravation of her pain syndrome. Dr. Volarich noted that Dr. Lennard placed employee at maximum medical improvement on May 27, 2009. We find credible Dr. Volarich’s opinions.

Vocational expert Phillip Eldred testified for employee. Mr. Eldred reviewed employee’s medical records and personally evaluated employee. Mr. Eldred determined that employee had many preexisting permanent conditions of ill that constituted hindrances or obstacles to employee’s employment or reemployment. Mr. Eldred opined that employee is permanently and totally disabled as a result of a combination of her preexisting disabilities and her injury of December 7, 2007. Vocational expert James England offered his opinions on behalf of the Second Injury Fund. Mr. England opined that employee was permanently and totally disabled for workers’ compensation purposes even before she began employment for employer. In reaching his opinions, Mr. England reviewed employee’s medical records but he did not evaluate employee. Mr. England did review a deposition given by employee upon which he relied. Unfortunately, the Second Injury Fund did not offer into evidence the deposition upon which Mr. England relied. The absence of the deposition prevents us from properly evaluating Mr. England’s opinions so we will not rely upon his opinions. Having fully considered the vocational opinions, we credit the vocational opinion of Mr. Eldred.

Discussion

The administrative law judge denied compensation in this matter because she found that employee was permanently and totally disabled before she sustained the work injury. The administrative law judge’s denial is based upon the holding of the Missouri Court of Appeals for the Western District in *Schussler v. Treasurer*² wherein the *Schussler* court held that “[b]y the [287.220’s] plain language, it applies to a claimant who has a ‘preexisting permanent *partial* disability,’ not to claimants who are already permanently and totally disabled.” (Emphasis in original.)³

The administrative law judge’s reliance upon *Schussler* appears to be misplaced because the application of the *Schussler* rationale to the facts of this case is seemingly in conflict with the Supreme Court’s direction in *Treasurer v. Witte*⁴ handed down one year after *Schussler*. The *Witte* court clarified that we are not to use the third and fourth sentences of § 287.220.1 to determine if the Second Injury Fund is liable for permanent

² 393 S.W.3d 90 (Mo. App. 2012).

³ *Id.*, at 98.

⁴ 414 S.W.3d 455 (Mo. 2013).

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total disability benefits; we are to use the fifth sentence. The *Witte* court specifically held that the language upon which the *Schussler* court relied (“If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise...”) is stated in the singular by design to clarify that, when applying the thresholds in permanent *partial* disability cases, at least one disability, considered alone, must meet one of the statutory thresholds appearing in the third sentence.⁵

Our application of § 287.220.1 to the facts of this claim for permanent total disability benefits is guided by the *Witte* holding and the recent decision in *Lewis v. Treasurer*.⁶ The *Lewis* court highlighted a litany of cases wherein courts erroneously have applied the statutory rules for determining the compensability of permanent partial disability claims when considering claims for permanent total disability benefits. The *Lewis* court rejected those applications and directed focus back to the following simple rule:

For a claimant to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.⁷

As a result of the work injury considered alone and of itself employee sustained a 35% permanent partial disability referable the left shoulder and a 15% permanent partial disability of the body as a whole. The combination of the effects of the work injury and employee’s pre-existing disabilities resulted in employee’s permanent total disability. Employee has satisfied the *Lewis* test set forth above. The Second Injury Fund is liable to employee for permanent total disability benefits.

The case of *Laturno v. Treasurer*⁸ supports our award of permanent total disability against the Second Injury Fund. At the time of his work injury, Mr. Laturno was about 50 years old. Mr. Laturno had worked continuously for that same employer for over thirty years notwithstanding several pre-accident disabilities, the main one being a life-long intellectual disability which alone, according to expert testimony, had reduced him to doing simple manual tasks as an unskilled laborer under close supervision. In *Laturno*, the court considered the possibility that Mr. Laturno was unable to compete in the open labor market before the work injury but ultimately determined that it mattered not because the test for permanent total disability measures a worker’s prospects *for returning to employment*. Such a test “cannot change the fact of past employment.”⁹ The *Laturno* court upheld the award of permanent total disability benefits.

⁵ *Id.*, at 463-464 (internal citations omitted)(“The legislature’s use of different terminology for permanent partial disability and permanent total disabilities is presumed intentional and for a particular purpose. Therefore, in the third sentence, it is presumed the legislature intended to require a single preexisting permanent partial disability, considered in isolation, to meet the thresholds before triggering the fund’s liability...It is possible that multiple injuries can give rise to a single disability. Such a situation is not contemplated by the [third sentence’s] language, however.”)

⁶ 435 S.W.3d 144 (Mo. App. 2014).

⁷ *Id.*, at 157 (citing *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo. App. 2007)).

⁸ 640 S.W.2d 470 (Mo. App. 1982).

⁹ *Id.*, at 473.

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The facts of the instant case provide even more compelling reasons to award compensation than did the facts in *Laturno*. As we have already found, employee's work for employer was not limited to merely simple tasks or make work projects. Employee's work for employer was reasonable and normal employment. And this is not a situation wherein a seriously disabled and marginally employable worker sustained a minor injury at the workplace which did not demonstrably alter her employment prospects or earnings capacity. Employee sustained a significant injury resulting in a significant increase in her level of overall disability, which has deprived her of a significant source of income, and which we find has permanently precluded her from future employment.

Our decision to assess liability against the Second Injury Fund in this case is consistent with and furthers the purposes of the Second Injury Fund. The purpose of the Second Injury Fund is to encourage the employment of individuals who are disabled from a preexisting injury.¹⁰ It encourages such employment by ensuring that an employer is only liable for the disability caused by the work injury.¹¹ As we now know, employee's preexisting disabilities carried not only the *potential* to combine synergistically with a work injury but *did in fact* combine with employee's work injury to result in greater disability to employee than she would have otherwise sustained as a result of December 7, 2007, work accident considered alone and of itself. If we were to hold that the Second Injury Fund is not liable for permanent total disability benefits in this case we would necessarily be holding that liability for permanent total disability benefits remains with the employer even though the employer acted just as the legislature hoped by hiring employee with significant preexisting disabilities. To leave liability for the payment of permanent total disability benefits with the employer in a case such as this is directly contrary to the purpose of the Second Injury Fund and patently unjust.

We must dispense with one final matter. The Second Injury Fund argues that the legislature's recent addition to § 287.220 of language specifically providing for the compensability of the claims of employees of sheltered workshops is somehow evidence that the legislature did not intend for such claims to be compensable when the legislature enacted the version of the § 287.220 applicable to this claim.¹² If we were to accept the Second Injury Fund's logic, we also would have to conclude that when the legislature enacted the previous version of § 287.220 it did not intend to cover the claims of employees whose preexisting disabilities were "the direct result of active duty military service" or of employees who had a "preexisting permanent partial disability of an extremity, loss of eyesight in one eye, or loss of hearing in one ear, when there is a subsequent compensable work-related injury...of the opposite extremity, loss of eyesight in the other eye, or loss of hearing in the other ear..." since the legislature added language providing for their compensability in the recent amendments, too.¹³ Inasmuch as the 2013 amendments seem aimed at narrowing (rather than expanding) the category of injuries for which the Second Injury Fund liability is available, the inclusion of specific language covering injuries sustained by sheltered workshop workers (as well as veterans and victims

¹⁰ *Witte*, 414 S.W.3d at 460.

¹¹ *Id.*

¹² § 287.220.3(2)(b) RSMo (eff. 1/1/2014)(Senate Bill 1 (2013)).

¹³ See §§ 287.220.3(2)(a)(i) and 287.220.3(2)(a)(iv) RSMo (eff. 1/1/14).

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of opposite body part injuries) seems to us to indicate a legislative intent to *retain* coverage already existing in the previous version of the statute.

Conclusions

Employee sustained a 35% permanent partial disability referable to her left shoulder and a 15% permanent partial disability of the body as a whole referable to her cervicothoracic strain and the aggravation of her pain syndrome. Employee reached maximum medical improvement on May 27, 2009. Employee is permanently and totally disabled as a result of the effects of her work injury in combination with her preexisting disabilities.

Award

We reverse the administrative law judge's award denying compensation in this matter. Employee is permanently and totally disabled as a result of the effects of her December 2007 work injury in combination with her preexisting disabilities.

Employee is entitled to permanent total disability benefits from the Second Injury Fund beginning upon the conclusion of the period of disability attributable to work injury, which period began May 28, 2009, and continued for 141.2 weeks. Consequently, effective February 10, 2012, the Second Injury Fund shall pay to employee \$79.52 per week for her lifetime, or until modified by law.

John Newman, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee which shall constitute a lien on said compensation.

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

The award and decision of Administrative Law Judge Victorine R. Mahon, issued September 24, 2013, is attached hereto and her findings are incorporated herein by this reference, to the extent that they are not inconsistent with this award.

Given at Jefferson City, State of Missouri, this 19th day of September 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Pamela Bridgman

Injury No. 07-118562

Dependents: N/A

Employer: WEB-CO Custom Industries, Inc. (settled)

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

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Sheltered Workshop Insurance (settled)

Hearing Date: August 26, 2013

Checked by: VRM/db

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, as to primary injury.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: December 7, 2007.
5. State location where accident occurred or occupational disease was contracted: Webster 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 fell on the ice on Employer's property.
12. Did accident or occupational disease cause death? No. Date of death? Not applicable.
13. Part(s) of body injured by accident or occupational disease: Left arm at the shoulder.
14. Nature and extent of any permanent disability: Previously settled.

15. Compensation paid to date for temporary disability: \$601.73.
16. Value necessary medical aid paid to date by employer/insurer: \$6,435.36.
17. Value necessary medical aid not furnished by employer/insurer: None.
18. Employee's average weekly wages: Sufficient to yield the following rates.
19. Weekly compensation rate: \$79.52 (PTD) / \$133.20 (PPD).
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Employer settled.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Pamela Bridgman

Injury No. 07-118562

Dependents: N/A

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INTRODUCTION

The parties appeared before the undersigned Administrative Law Judge on August 26, 2013, for a final hearing to determine the liability of the Second Injury Fund. Pamela Bridgman (Claimant) appeared in person and with her attorney of record, John Newman. Assistant Attorney General Cara Harris represented the Second Injury Fund. Employer, WEB-CO Custom Industries, Inc., and its insurer, Sheltered Workshop Insurance, previously settled with Claimant. The parties stipulated to the following facts and issues:

STIPULATIONS

1. On December 7, 2007, Claimant sustained an injury arising out of and in the course of employment. The accident occurred in Webster County, Missouri. Venue and jurisdiction are proper in Springfield, Missouri, where the hearing was conducted.
2. Claimant was an employee of WEB-CO Custom Industries, Inc., pursuant to Chapter 287 RSMo. Both Claimant and Employer were operating under and subject to the provisions of the Missouri Workers' Compensation Law at the time of the accidental injury. Employer was fully insured with Sheltered Workshop Insurance on the date of the injury.
3. Employer received proper notice of the injury. The claim was filed within the time allowed by law.
4. The average weekly wage at the date of injury was sufficient to yield a permanent partial disability rate of \$133.20 and a permanent total disability rate of \$79.52.
5. Employer paid \$6,435.36 in medical expenses and \$601.73 in temporary total disability.
6. Employee previously settled her claim as against Employer and its insurer.
7. The issues to be resolved pertain to the Second Injury Fund's liability. Claimant seeks permanent total disability, or in the alternative, enhanced permanent partial disability:

EXHIBITS¹

Claimant offered the following exhibits, which were admitted into evidence without objection:

- Exhibits A Medical Records – various providers
 (Exhibit A-14 is the vocational report of Phillip Eldred)
- Exhibit B Curriculum Vitae – Dr. David Volarich
- Exhibit C Medical Report – Dr. David Volarich
- Exhibit D Deposition – Dr. David Volarich
- Exhibit E Settlement with Employer – Injury No. 07-118562

The Second Injury Fund offered the following exhibit, which was admitted into evidence without objection:

- I. Deposition – James England

FINDING OF FACT

Claimant's last injury occurred as she slipped and fell in Employer's parking lot while going to work on an icy day. She landed on her left shoulder, which resulted in the finding of a broken shoulder and a torn tendon. Because of her shoulder problems, Claimant never returned to work, nor does she believe she could return to work doing the repetitive job of putting the nozzles in bags. Claimant has not worked since the date of her last work related accident of December 7, 2007.

With respect to the last accident, she settled her claim with Employer. The settlement recites that it is for a lump sum of \$4,635.36 for 15 percent of the left shoulder at the 232-week level, and a compromise of all other disputes.

At the time of the hearing, Claimant was 47 years old with a birth date of November 17, 1965. She was born in Washington State with Albinism. She was determined to be legally blind at the age of three years. Claimant initially attended school in Washington State where they had appropriate books for her vision issues; however, such accommodations stopped when she moved to Arkansas in the second grade. With no special education or access to large print books, Claimant failed to pass the seventh grade and left school. She still cannot read very well, even in large print. She also is not proficient in Braille, despite having studied the alphabet in the mid-1990s with the Missouri Vocational Rehabilitation for the Blind.

In addition to her limited education, no GED, and difficulty reading, Claimant's poor eyesight and Albinism has posed difficulty for her in any bright environments. She testified she could not clearly see the face of the Judge who was also sitting nearby in the courtroom. Claimant advised Dr. David Voarich, who performed an Independent Medical Examination, that her eyesight was 20/400 without correction, and 20/200 with correction. Dr. Volarich indicated that this created an almost 100 percent disability with reference to the visual system.

¹ Marking contained in any exhibit were present at the time the documents were received the exhibit into evidence. Any objection not addressed at the hearing or in this Award are overruled.

Claimant has been married to her husband, Randy, for 31 years. They have two children, neither of whom lives in the home. Claimant had stayed at home most of their married life. She had held only two jobs in her entire life. She has worked a total of about four years during her adult life.

In the 1980s, Claimant first worked as a companion for an elderly woman with Alzheimer's disease. She helped clean the woman's house and prepared her meals. Claimant worked from early in the morning until in the afternoon. Claimant was dependent on her mother's schedule as her mother provided her with transportation. Claimant does not drive. Even at this job, she had some difficulty performing her chores. After only about a year, Claimant quit, married, raised a family, and stayed home until 2003.

Claimant first became aware of WEB-CO Custom Industries in 2001 when her husband was certified to work there as a disabled person. In 2003, Claimant applied for work at WEB-CO for employment and nowhere else. The company is a sheltered workshop that assembles 3-M products. She believed her employment there was conditional on her having a disability because the company first had to verify with her physician that she was legally blind before she obtained the job in 2003.

Claimant initially was hired to perform assembly type work. After about six months, she was promoted as an assistant to a supervisor where she helped keep track of work being done by others. She worked 30 hours per week. Working at WEB-CO helped improve her pre-existing depression because she was able to contribute to the family.

Unfortunately, in May 2005, Claimant had to resign her position due to a hospitalization related to uncontrolled diabetes, which posed liver and kidney complications. It was not until March 2007, Claimant returned to any work. She went back to WEB-CO Custom Industries at the request of her husband because of difficult family finances. Her employment was with the understanding that she would work only part-time, three to four days per week depending on her physical ability. She never worked 40 hours in a week. By September 2007, the most work Claimant could physically perform was three days a week, 6.25 hours per day. Claimant said she could not have worked anywhere five days a week because of her physical condition. In 2007, Claimant performed only piecework, placing glue nozzles into a bag.

Claimant currently takes a number of medications, including Oxycontin for pain, antidepressants, and drugs to treat nausea, blood pressure, fibromyalgia, headaches, restless leg syndrome, and a thyroid condition. She currently is very limited in what she does around the house. She finds it necessary to lie down during the day. She admitted she has suffered from a number of preexisting disabilities, as detailed in the testimony and report of Mr. Phillip Eldred (her vocational expert) and Dr. Volarich (her IME physician).

Medical Opinion

Dr. David Volarich examined Claimant on February 23, 2010. He stated that Claimant suffered a greater tuberosity fracture of the proximal humerus and a partial rotator cuff tear from the last injury, which was treated conservatively. She also was diagnosed with cervicothoracic strain

and myofascial pain, which also was treated conservatively. Dr. Volarich rated this last injury and imposed restrictions. He also identified a number of preexisting medical problems and disabilities suffered by Claimant, including:

Her list of medical history is extensive and includes allergic rhinitis, osteoarthritis, fibromyalgia, Epstein-Barr virus, migraine headaches, osteoporosis, albinism, legal blindness, GERD, peptic ulcer disease, gastric ulcer, hiatal hernia, hypothyroidism, hypertension, hypercholesterolemia, depress, fibrocystic breast disease, mitral valve prolapsed, obesity, insomnia, obstructive sleep apnea, diabetes mellitus diagnosed 12/18/03, and on insulin 1/30/04, pyelonephritis, ureterolithiasis, anemia, right lung pneumonia, recurrent urinary tract infections, right lateral epicondylitis, chronic nausea since age 13, irritable bowel syndrome, restless leg syndrome, and peripheral neuropathy.

(Exhibit D, page 18). Dr. Volarich did not rate each of these conditions, but focused on the musculoskeletal problems (Exhibit D, page 36). He also identified an extensive list of medications that Claimant was taking at the time of his examination, including Methadone, a narcotic pain medication. Asked whether Claimant was capable of working full time in the open labor market at the time of her last work injury, Dr. Volarich responded, "Probably not," but stated that he would defer to a vocational assessment.

Vocational Opinions

Phillip Eldred is a certified vocational counselor who met with Claimant on March 29, 2011. He testified live at the hearing. He opined that Claimant was permanently and totally disabled as a combination of Claimant's preexisting disabilities and the disability stemming from the last work accident on December 7, 2007. Mr. Eldred identified the following preexisting disabling conditions, which he said were a hindrance or obstacle to her employment prior to December 7, 2007:

- Low Back Injury
- Right Elbow
- Diabetes
- Albinism
- Vision
- Fibromyalgia
- Chronic Fatigue Syndrome
- Sleep Apnea
- Restless Leg Syndrome
- Migraine Headaches
- Arthritis
- Depression
- Carpal Tunnel Syndrome

In addition to these disabilities, Mr. Eldred admitted Claimant had other conditions that existed prior to her injury on December 7, 2007, including irritable bowel syndrome, hypertension, thyroid problems, high cholesterol, peripheral neuropathy, and a compromised immune system from Epstein-Barr disease.

Mr. Eldred understood that Claimant takes narcotic pain medication for her pain, and specifically at the time he saw her, she was taking Methadone. Claimant testified on direct examination, however, that she now took Oxycontin. Mr. Eldred said Claimant's use of chronic narcotic medication on a daily basis, which she was taking prior to the injury of December 7, 2007, would also adversely affect her employability, as would her inability to drive due to her poor eyesight.

Mr. Eldred administered several tests to Claimant. The results revealed that Claimant lack educational skills. Her word reading was equivalent to the third grade, spelling was at the second grade, and math computation was at the fourth grade. Mr. Eldred believed Claimant lacked the ability to undergo any sort of retraining program. He admitted that because her educational level is very low, that factor would prevent her from qualifying for many jobs. He said Claimant also has no transferable skills from her past employment that could transfer to a less physically demanding job.

Looking at the restrictions imposed on Claimant by Dr. Volarich, Mr. Eldred said they limited Claimant to less than sedentary work as defined by the Dictionary of Occupational Titles. Looking at all of Claimant's preexisting conditions, Mr. Eldred concluded that Claimant was currently permanently and totally disabled from the open labor market as a result of a combination of her pre-existing disabilities and her injury of December 7, 2007 to her left shoulder.

Having previously been employed with Missouri Vocational Rehabilitation, Mr. Eldred was familiar with Claimant's last employer. He agreed it was a workshop which employed physically or mentally disabled people. He was aware that the company occasionally hires persons who are not certified as disabled, which he believed was the case with Claimant.

Mr. Eldred refused to directly answer whether he would have found Claimant permanently and totally disabled in his private consulting business for workers' compensation purposes had he seen her in January 2007, prior to her return to work at WEB-CO Custom Industries in March 2007. He said he would have to "speculate" as to what an employer might do. Mr. Eldred opined that Claimant was working in the open labor market at the time of her injury on December 7, 2007, albeit not full time.

Jim England is a vocational rehabilitation counselor who testified by deposition. Although Mr. England did not personally meet with Claimant, he reviewed records regarding her medical conditions as well as the depositions taken in this case. Mr. England observed that Claimant had never worked a regular full-time competitive job on a sustained basis. He opined that Claimant was permanently and totally disabled for Missouri Workers' Compensation purposes even prior to her employment at WEB-CO Custom Industries, and prior to her work accident in December 2007, due to her multiple medical conditions.

While Mr. England did not know initially that WEB-CO was a sheltered workshop, he was not surprised to learn such fact. He believed such information only served to bolster his opinion. He explained that someone who works at a sheltered workshop must be certified as disabled in order to obtain that employment, unless they were hired in a management position. When Claimant

was rehired in March 2007, and at the time of her last injury, she was performing piecework and was performing no supervisory or management duties.

Credibility Finding

I find Claimant credible. To the extent the opinions of Mr. Eldred and Dr. Volarich conflict with the vocational opinion of Mr. England, I find Mr. England's opinion more credible and persuasive.

CONCLUSIONS OF LAW

For Second Injury Fund liability for permanent and total disability to exist, the previous disability and the last injury must combine to create permanent total disability. § 287.220.1 RSMo 2000. For the Second Injury Fund to have *any* liability to Claimant under § 287.220.1 RSMo 2000, she must demonstrate that she had pre-existing permanent *partial* disability. "By the section's plain language, it applies to a claimant who has a 'preexisting permanent *partial* disability..." [Emphasis in the original]. *Schussler v. Treasurer of State-Custodian of Second Injury Fund*, 393 S.W.3d 90, 98 (Mo. App. W.D. 2012). If Claimant already was permanently and totally disabled prior to the last accident, she may not claim benefits from the Second Injury Fund. In this case, Claimant was not employable on the open labor market even prior to the last injury. She already was permanently and totally disabled.

The definitive test to determine whether an employee is permanently and totally disabled as defined by Chapter 287, RSMo, is: (1) whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in her present physical condition and reasonably expect her to perform the duties of the work for which she was hired; and (2) whether the employee would be able to compete in the open labor market. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo. App. E.D. 1992), *overruled on other grounds in Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Since birth, Claimant has been visually impaired, being declared legally blind at least by age three years. She suffered congenital Albinism, limiting her ability to work in many environments. At the time she started her employment at the sheltered workshop, Claimant also had multiple other medical conditions and disabilities, as detailed in the Findings of Fact. Mr. Eldred conceded that many of these disabilities posed a hindrance or obstacle to employment or reemployment. In her entire lifetime, she had worked only two jobs for short periods of time. The first was in an individual's home performing some domestic chores. The job lasted only about a year. The other was at the sheltered workshop. Her first stint for this last employer was interrupted by a lengthy hospitalization. When she eventually returned to the sheltered workshop in 2007, Claimant was only capable of working part-time due to her many physical ailments. At the time of the last accident, she was working a limited schedule of only 3 days a week, 6.25 hours per day. Her second nine-month stint for this employer was in a piecework job, with no supervisory or managerial duties. As Mr. England explained, non-managerial employees at a sheltered workshop must be disabled and are unable to find alternative employment on the open labor market to work there.

The fact that Claimant was employed to some degree at a sheltered workshop does not aid her endeavor to recover benefits from the Second Injury Fund. “To be permanently and totally disabled does not require that the employee be completely inactive or inert.” *Julian v. Consumers Markets, Inc.*, 882 S.W.2d 274, 275 (Mo. App. S.D. 1994), *overruled on other grounds in Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). As stated so clearly in *Grgic v. P & G Construction*, 904 S.W.2d 464 (Mo. App. E.D. 1995), the fact that Claimant is capable of performing some basic tasks for a limited number of hours does not mean the person is capable of work on the open labor market:

In our view, a claimant who is found by the commission to be “only able to work very limited hours at rudimentary tasks” is a totally disabled worker. “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.” *Brown*, 795 S.W.2d at 483. We do not consider working very limited hours at rudimentary tasks to be reasonable or normal employment. The commission found it significant that “he *sometimes* is able to work a few hours a day although he quickly becomes tired.” (Our emphasis). This limited activity does not mitigate against a finding of total disability. The fact that claimant *sometimes* can work a few hours a day serves only to highlight his inability to work a regular schedule, which is a hallmark of “odd-lot” total disability. *See Larson, 1C Law of Workmen's Compensation* § 57.51(a), p. 10–283 *et seq.* (1994). To hold these attempts at rudimentary tasks against Mr. Grgic “would tend to encourage idleness on the part of injured employees and discourage them from making efforts to help themselves for fear that any activity on their part might furnish evidence against their right to the compensation which the law has provided for them.” *Kinyon v. Kinyon*, 230 Mo.App. 623, 71 S.W.2d 78, 82 (1934).

904 S.W.2d at 466.

Similarly, in *P.M. v. Metromedia Steakhouse Company*, 931 S.W.2d 846 (Mo. App. E.D. 1996), the employee was found permanently and totally disabled as a result of her compensable injury despite that she had been working as a volunteer in a hospital four hours a week. In rejecting the argument of the employer, the Court wrote:

It scarcely need be said, as a matter of pure logic, that a permanently disabled person may show signs of improvement while remaining permanently disabled. The improvement may not be significant enough to cast doubt on the diagnosis of permanency; whether this is so is beyond lay understanding and must be resolved by experts. The LIRC's finding of permanent, total disability is supported by substantial evidence.

931 S.W.2d at 849.

Most recently, in *Schussler v. Treasurer*, the Court of Appeals reaffirmed that benefits may not be obtained from the Second Injury Fund if the employee already was permanently and totally disabled from preexisting conditions:

Finally, that Ms. Schussler maintained employment with Employer does not bar a finding that she was permanently and totally disabled. “Missouri courts have made clear that the Commission is not prevented from finding that a claimant is permanently and totally disabled simply because he or she holds limited, sporadic and/or highly accommodated

employment.” *Molder*, 342 S.W.3d at 412. A claimant's “good fortune in obtaining work other than through competition” does not preclude a finding of total disability. *Cooper v. Med. Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. W.D.1997) (internal quotation marks and citation omitted). Such an approach would penalize attempts by the disabled to self-support. *Molder*, 342 S.W.3d at 412. Rather, the test is whether the claimant could compete in the open labor market. *See Cooper*, 955 S.W.2d at 575.

393 S.W.3d at 97.

As in *Schussler*, the employee in the instant case had multiple preexisting disabilities. Although she was working, the job was accommodated work. She was working at a *sheltered workshop* as a disabled person performing piecework. She never attempted to find a job elsewhere. She worked only three days a week, and those were not full eight-hour days. The ability to work at a sheltered workshop on a limited hourly basis does not establish that a person is employable in the open labor market for Missouri Workers' Compensation purposes, as opined by vocational expert James England.

The greater evidence establishes that Claimant was permanently and totally disabled long before she last worked for WEB-CO Custom Industries, based on her multiple and severe preexisting disabilities. Claimant has failed to establish the basic criteria of having a pre-existing permanent partial disability before her last work related injury. I deny all benefits as against the Second Injury Fund in this case.

Made by: _____

Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation