

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

Injury No.: 04-027294

Employee: Bradley J. Burger
Employer: Bloomsdale Excavating Company, Incorporated
d/b/a Artisan Contracting (Settled)
Insurer: Bituminous 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 9, 2009. The award and decision of Administrative Law Judge Gary L. Robbins, issued April 9, 2009, 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 23rd day of September 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Bradley J. Burger

Injury No. 04-027294 /04-145230

Dependents: N/A

Employer: Bloomsdale Excavating Company, Incorporated d/b/a Artisan Contracting

Additional Party: Second Injury Fund

Insurer: Bituminous Insurance Company

Hearing Date: January 7, 2009

Checked by: GLR/kh

SUMMARY OF FINDINGS

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? March 24, 2004 and March 26, 2004.
5. State location where accident occurred or occupational disease contracted: Cape Girardeau 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 happened or occupational disease contracted: In 04-027294 the employee was using a portable when it torqued multiple

times injuring his right shoulder and arm. 04-145230 is a repetitive motion injury causing bilateral carpal tunnel.

12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Right shoulder in 04-027294 and bilateral wrists in 04-145230.
14. Nature and extent of any permanent disability: In 04-027294 the employee settled his case with the employer-insurer for 40% permanent partial disability of the right shoulder and 30% permanent partial disability of the body as a whole for psychological disability. In 04-145230 the employee settled his case with the employer-insurer for 20% permanent partial disability of each wrist, 4 weeks disfigurement and a 10% load.
15. Compensation paid to date for temporary total disability: N/A
16. Value necessary medical aid paid to date by employer-insurer: N/A
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$1,000.00 per week.
19. Weekly compensation rate: The employee's rate for temporary total and permanent total disability is \$662.55 per week. His rate for permanent partial disability is \$347.05 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award
22. Second Injury Fund liability: Permanent Total Disability. See Award
23. Future requirements awarded: None

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Thomas J. Gregory

FINDINGS OF FACT AND RULINGS OF LAW

On, January 7, 2009, the employee, Bradley J. Burger, appeared in person and by his attorney, Thomas J. Gregory, for a hearing for a final award. The employee had previously settled his cases with the employer-insurer. The Second Injury Fund was represented by Assistant Attorney General Clifton K. Verhines. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Bituminous Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Bloomsdale Excavating Company Incorporated d/b/a Artisan Contracting and was working under the Workers' Compensation Act.
3. On or about March 24, 2004 the employee sustained an accident or occupational disease arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$1,000.00. His rate for temporary total and permanent total disability is \$662.55 per week. His rate for permanent partial disability is \$347.05 per week.
7. The employee's injury was medically casually related to his accident or occupational disease.

ISSUES

Whether the Second Injury Fund has liability for either permanent partial disability or permanent total disability?

EXHIBITS

The following exhibits were offered and admitted into evidence without objection:

Employee's Exhibits

- A. Transcript of Compromise Settlement-88-146849
- B. Stipulation for Compromise Settlement-91-013284
- C. Stipulation for Compromise Settlement-04-027294
- D. Stipulation for Compromise Settlement-04-145230
- E. Deposition of David T. Volarich, D.O.
- F. Deposition of Wayne A. Stillings, M.D.
- G. Deposition of James M. England, Jr.

Second Injury Exhibits

1. Medical records from Parkcrest Orthopedics, LLC
2. Medical records from Mid America Rehab

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT-

Mr. Burger was the only person who testified in person. All other evidence was presented in the form of records from the Division of Workers' Compensation, medical records and deposition testimony by David T. Volarich, D.O., Wayne A. Stillings, M.D., and James M. England.

Bradley J. Burger

Mr. Burger is presently forty-nine years old, unmarried, has a ten year old daughter and lives in Scott City, Missouri. He graduated from high school and received training in the military as a carpenter. He began working for Bloomsdale Excavating in 1994. Prior to that his work history generally involved working in the construction industry performing heavy labor jobs. Mr. Burger worked out of a union hall, but after 1994 most of his work was for Bloomsdale Excavating.

The employee had multiple accidents and/or injuries prior to the accidents and/or occupational injuries regarding his right shoulder on March 24, 2004 and his bilateral wrists on March 26, 2004:

1. 1978 motor vehicle accident-As a result of this accident Mr. Burger indicated that he hurt both knees, his left shoulder and caved the back of his head in. He testified that he was in a coma for weeks, had severe headaches for a long time and continues to have short term memory loss. He related this memory loss problem in general and to his job. As an example, he had to write down measurements as he could not remember them. In addition he indicated that he had a hard time squatting or sitting. Mr. Burger testified that he was out of work for 7 months due to this accident. (While Dr. Volarich and Dr. Stillings and Mr. England testified that they had access to some of the medical records regarding the employee's pre 2004 injuries and accidents, no specific medical records were presented at trial outlining the specific medical care that the employee received from this accident, therefore the only evidence concerning this matter came from the employee's memory and relevant medical opinions.)
2. 1986 injury to the left knee-The employee testified that he had surgery to his left knee.
3. 1988 injury to left knee and fractured right ankle-The employee testified that he fell off a roof. He indicated that he had surgery on his right ankle but did not have another surgery on his knee. The employee settled this case with the employer-insurer on March 23, 1989 for 5% permanent partial disability of the right ankle and 5% permanent partial disability of the left knee. See Employee Exhibit A.
4. 1991 back injury-The employee testified that he was taking down a "chain fall" and tore loose all of the muscles in his chest and back. He indicated that Dr. Eller treated him and he missed work for 18 months. He also indicated that Dr. Eller told him to avoid surgery

until he could not stand the pain any more. In addition Dr. Eller referred the employee to psychiatric/psychological care for depression. The employee never had back surgery but testified that he has had back problems ever since this accident. He indicated that he had trouble sitting at trial, can only drive about 30 minutes, has pain in both legs and avoided lifting due to these problems. In addition he indicated that he can walk for about ½ hour and that if he tried to stoop his back hurts and his knees locks up so he avoids these activities. The employee settled this case with the employer-insurer on October 1, 1993 for 27 ½ % permanent partial disability of the body as a whole. See Employee Exhibit B.

5. September 1999 right ankle injury-The employee testified that he did not have to have surgery for this injury.
6. June 2000 surgery to right knee-the employee testified that this was a non work related matter that caused him to miss work for some time.

On March 24, 2004, the employee injured his right shoulder while he was using a power drill. Dr. Knight performed surgery on this shoulder on May 13, 2004. Dr. Emanuel performed a second right shoulder surgery on January 5, 2005. The employee settled this case with Bloomsdale Excavating on August 3, 2007 for 40% permanent partial disability of the right shoulder and 30% permanent partial disability of the body as a whole for psychological disability. See Employee Exhibit C.

The employee was diagnosed with bilateral carpal tunnel problems in 2002. Dr. David Brown performed right hand carpal tunnel surgery on December 15, 2006 and left hand carpal tunnel surgery on January 5, 2007. He settled this case with Bloomsdale Excavating on August 3, 2007 for 20% permanent partial disability of each wrist, 10% load and 4 weeks disfigurement. See Employee Exhibit D.

Mr. Burger began working for Bloomsdale Excavating in 1994 and worked mostly for them until June 20, 2005 when he was finally released. He testified that his initial employment was mostly concrete work and then later as doing millwright work. He indicated that he switched more to the millwork work in 2000-2004 as he had problems with his knees and his back etc. from the past. In general he said he was wearing out. He described the millwright work as being less physical than the concrete work. As a millwright the employee testified that he spent most of his time welding. In addition, the employee indicated that his prior knee injuries affected his ability to work- he used climbing as an example and testified that this was another reason why he switched to millwright work. He also testified that his foreman liked him and gave him easier jobs to do and his coworkers helped him-they took care of him.

Mr. Burger had his first right shoulder surgery on May 13, 2004. He testified that he returned to work for several months after that surgery, maybe working for 3 days a week; but that the pain got so bad in November 2004 that he could not take it anymore. His second right shoulder surgery was done on January 5, 2005. He said that he was paid workers' compensation until June 20, 2005 and it was at that time that he was released. He indicated that he tried to return to work but they laid him off. In addition he sought employment through the union hall but no one would ever hire him. He testified that he was able to draw some unemployment through October 2005, but after that time has not received any benefits from workers' compensation or unemployment.

Mr. Burger described his carpal tunnel problems as beginning in 2002; however he never had such surgeries until after he left employment with Bloomsdale Excavating.

In addition to the physical problems that the employee described that resulted from his accidents prior to March 2004, he also testified about the physical problems he presently has including his two right shoulder surgeries and his bilateral carpal tunnel surgeries. The employee describes pain in his right shoulder with movement and weather. He stated that his pain occurs daily as a dull ache but that if he uses his arm or turns it wrong he gets a sharp pain. He gave an example that just reaching for a cup of coffee causes sharp pain. Due to these problems, he indicated that he uses his left arm more. In addition he testified that his sleep is interrupted every night and that he only sleeps 15-20 minutes at a time. Mr. Burger describes aches and pain in his hands on a daily basis. He indicated that drops things easily and has trouble gripping. Mr. Burger testified that he could not go to a lighter job as he cannot use his hands, his back hurts, and he has trouble with sitting and standing.

The employee testified about his life and daily activities. He lives with his mom and dad and two brothers most of the time, but also has a camper that he stays at in Wayne County. His daughter visits him per visitation. He reported that he watches a lot of television and reads. He usually lies in recliner or on the couch-the recliner is more comfortable. He testified that he falls asleep during the day as does not sleep at night-he tried sleeping pills but they made him groggy. He does not take pain pills as they make him sick. But he reported that he takes ibuprofen-about 12 pills a day on an average day.

Mr. Burger was first sent for psychiatric/psychological care in 1991 following his back injury. This was the time that Dr. Eller treated him and referred him to psychiatric counseling as he felt Mr. Burger was suffering from depression. The reports indicate that the employee was treated by Dr. Jordan who felt that the employee was depressed and prescribed Prozac for those problems. At trial Mr. Burger testified that he thinks that he has his depression under control. However he testified that he had issues with depression following his most recent injuries. He described problems of anger, lack of self worth, having a hard sleeping and difficulty with remembering. He testified that the Prozac that he took in 1991 made him violent and he therefore does not want to take any such pills.

During trial, Mr. Burger asked the Court permission to stand up after about 20 minutes indicating that he was in pain. The Court also observed that overall the employee's presentation and mood appeared to be flat. By the Court's observations, Mr. Burger gave the impression of someone who was in pain.

During cross examination Mr. Burger admitted that:

1. He is not seeing any doctors for depression and is not receiving any such treatment.
2. That he was not placed on any permanent restrictions due to his prior injuries.
3. No treating doctor reported that he could not work at full duty.
4. He is currently not treating for any medical condition and is not currently taking any medications for any medical condition.

David T. Volarich, D.O.

Dr. Volarich was retained and evaluated the employee at the request of the employee's counsel. He first saw Mr. Burger on March 14, 2006 and prepared a report about that visit. Dr. Volarich saw the employee again on September 17, 2007 and also prepared a report as a result of that visit. He testified by deposition on September 12, 2008. Dr. Volarich is a physician that testifies for the employee's side of the case most of the time.

Dr. Volarich took a history from the employee concerning his preexisting problems and the problems from his right shoulder and carpal tunnel surgeries, performed a physical examination and reviewed medical records as a basis for his comments and opinions.

One of Dr. Volarich's opinions was that Mr. Burger was depressed. In addition he reached a diagnosis regarding the employee's injuries from the March 24, 2004 accident: (the drill incident)

1. Internal derangement of the right shoulder in the form of a labral tear, partial rotator cuff tear and impingement. Status post arthroscopic labral debridement, debridement of the rotator cuff and subacromial decompression.
2. Persistent right shoulder pain, status post redo labral repair, rotator cuff repair, and subacromial decompression with distal clavicle excision.

In addition, at that time Dr. Volarich reached a diagnosis regarding the employee's injuries from the March 26, 2006 accident: (bilateral CTS)

1. Repetitive trauma right upper extremity causing medical nerve entrapment at the wrist or carpal tunnel syndrome, nonsurgical repair.
2. Repetitive trauma left upper extremity causing medical nerve entrapment at the wrist or carpal tunnel syndrome, nonsurgical repair.

Dr. Volarich also reached a diagnosis regarding the employee's preexisting injuries:

1. Closed head trauma causing skull fracture with residual short-term memory loss.
2. Left knee internal derangement. Status post arthroscopic medial meniscectomy.
3. Recurrent bilateral contusions.
4. Right ankle sprain/strain.
5. Right foot and lateral compartment laceration.
6. Chronic lumbar syndrome secondary to disc bulging at L4-5 causing bilateral lower extremity radicular symptoms.
7. Left foot plantar fasciitis.
8. Right foot fifth metatarsalgia.
9. Depression.

Dr. Volarich felt that Mr. Burger was at maximum medical improvement as to the March 24, 2004 injury, but that he had not reached maximum medical improvement as to the March 26, 2004 injury, (bilateral CTS) and further felt that Mr. Burger needed surgery. (At the time of Dr. Volarich's first evaluation, the employee had carpal tunnel problems but had not yet had carpal tunnel surgery).

Dr. Volarich also provided permanent partial disability ratings about the employee's disabilities after his first evaluation:

1. 35% permanent partial disability of the left lower extremity rated at the knee due to a torn medical meniscus that required arthroscopic repair.
2. 30% permanent partial disability of the right lower extremity rated at the knee due to a torn medical meniscus that required arthroscopic repair.
3. 25% permanent partial disability of the right lower extremity rated at the ankle due to recurrent strain and laceration over the distal fibula at the lateral ankle compartment.
4. 30% permanent partial disability of the body as a whole at the lumbrosacral spine due to a disc bulge at L4-L5.
5. 50% permanent partial disability of the right upper extremity rated at the shoulder due to a torn rotator cuff and torn labrum and impingement that required two surgical repairs.
6. 40% permanent partial disability of both upper extremities at the wrist level assuming that no surgery would be performed, and that if surgery was performed, his disability would be less.

Dr. Volarich again provided similar ratings after his second evaluations with some additional information. He reported that the injuries are permanent injuries and create a hindrance to his employment or reemployment.

1. 50% permanent partial disability of the right upper extremity at the shoulder due to the torn rotator cuff, torn labrum and impingement that required two separate surgical repairs. The rating accounted for pain, lost motion, weakness, crepitus and atrophy in the dominant arm.
2. 35% permanent partial disability of the right upper extremity at the wrist due to the severe carpal tunnel syndrome that required open carpal tunnel release. The rating accounted for ongoing paresthesias and weakness in the dominant hand. It's noted his pain syndrome improved with surgical repair.
3. 35% permanent partial disability of the left upper extremity at the wrist due to the severe carpal tunnel syndrome that required open carpal tunnel release. The rating accounted for pain, paresthesias and weakness in the non dominant hand. Again his pain syndrome improved after surgery.
4. 15% permanent partial disability of the body as a whole that he offered as a multiplicity factor due to the combination of injuries to both upper extremities.
5. 35% permanent partial disability of the left lower extremity at the knee due to the torn medical meniscus that required arthroscopic repair. The rating accounted for pain, lost motion, crepitus and weakness in the left lower extremity.
6. 30% permanent partial disability of the right lower extremity at the knee due to the torn medical meniscus that required arthroscopic repair. The rating accounted for pain, weakness and lost motion, as well as crepitus in the right lower extremity.
7. 25% permanent partial disability of the right lower extremity at the ankle due to the recurrent strain injury and laceration over the distal fibula and lateral ankle compartment. It accounted for pain and lost motion of the right ankle.
8. 30% permanent partial disability of the body as a whole rated at the lumbrosacral spine due to the disc bulge at L4-5. The rating accounted for back pain, lost motion and lower extremity paresthesias.
9. Dr. Volarich deferred as to a psychiatric evaluation for depression.

10. A small amount of additional disability in each foot because of the right foot metatarsalgia and the left plantar fasciitis but did not quantitate that since he had not sought nor received medical care for those conditions.

Dr. Volarich additionally offered further opinions in Mr. Burger's case:

1. "It is my opinion that the work accident that occurred on March 24, '04 when Mr. Burger was using a drill to drill metal and the drill bit got caught, jerking his right shoulder back and forth causing pain in the right shoulder is the substantial contributing factor as well as the prevailing factor causing the labral tear, rotator cuff tear and impingement that required two separate surgical repairs".
2. "It's my opinion the repetitive nature of Mr. Burger's work as described in the History and Job Activities section of my reports leading up to 3/26/04 are the substantial contributing factors as well as the prevailing or primary factors causing the severe bilateral carpal syndrome that required open carpal tunnel releases in each hand".
3. Mr. Burger was permanently and totally disabled as a result of the work related injury of 3/24/04 and leading up to the 3/26/04 in combination with each other as well as in combination with his preexisting medical conditions and disability from his psychiatric illnesses as opined by Dr. Stillings.
4. Mr. Burger was permanently and totally disabled prior to the development of any additional foot difficulties that he continues to have.
5. At the time of his initial evaluation Mr. Burger was permanently and totally disabled from a physical standpoint alone, and at the time of his second evaluation he took into consideration Dr. Stillings' evaluation with respect to the depression. Dr. Volarich opined that the psychiatric disabilities are on top of the physical disabilities, the physical disabilities in and of themselves would render him permanently disabled.
6. Any restrictions placed on the employee as of the March 14, 2006 evaluation are the same after the September 17, 2007 evaluation.

During cross examination by the Second Injury Fund, Dr. Volarich agreed with several statements that were presented to him:

1. He did not treat Mr. Burger and evaluated him for his attorney.
2. There were no restrictions after the employee's release after the drill incident.
3. The employee worked about one year after the claimed injuries.
4. He had no records regarding the 1978 skull fracture or injury of Mr. Burger. He relied on the employee's history alone.
5. He agreed to the same things regarding the employee's 1970's and 1980's knee problems.
6. He had no work records to review.
7. The employee gave subjective complaints.
8. The employee never had any back surgeries. Also that he was performing as a carpenter, that he was doing pretty heavy labor leading up to the shoulder injury in March of 2004. Dr. Volarich reported that the employee was doing more millwright work at that point-the employee was doing medium to heavy type work.
9. He did not see any work or medical restrictions that the employee had prior to March 24, 2004.
10. As to pain he had to trust that what the employee was telling him was accurate, and that anything that is inaccurate could change his opinion.

11. The ratings he gave for the employee's preexisting injuries are based in part on what the employee told him.
12. He had records on the back, part of the ankle and foot injury as well as the knee problems. He stated he lacked records on the skull and early knees.
13. He did not see where the employee was missing additional time from work, other than treatment for these conditions. Also, he saw no job duty modifications.
14. The employee told Dr. Volarich that he went back to full duties-that is the way it has to be in construction.
15. He agreed that he is not a vocational expert.
16. He agreed that he did not mention the Mid America report that indicated that it was the employee's intention not to return to work. He further agreed that it is possible that this information could demonstrate a lack of motivation for the employee to return to the work force.
17. He agreed that Dr. Jordan's report said that the employee denied being depressed.
18. He is aware that the employee disagreed with some things that Dr. Stillings stated in his report.
19. He agreed that he relied on Dr. Stillings for the psychiatric report but that he felt the employee was permanently and totally disabled just from the physical standpoint.

Dr. Volarich also testified about the permanent restrictions he recommended for Mr. Burger's situation. (Those are summarized later in this award).

James P. Emanuel, M.D.

Dr. Emanuel was the surgeon retained by the employer-insurer to perform the second surgery on the employee's right shoulder. His records are contained in SIF Exhibit 1.

Dr. Emanuel first saw the employee in December 2004 and performed surgery on January 5, 2005. Prior to the surgery, Dr. Emanuel put work restrictions on the employee. The records indicate that the employee had a serious shoulder injury and had a significant shoulder surgery. However, as of June 20, 2005, the employee was found to be at maximum medical improvement as to his right shoulder and was released to full duty without restrictions. At that time Dr. Emanuel referenced physical therapy reports of Vic Zuccarello and noted that Mr. Burger's subjective complaints are out of proportion to objective findings and do not match objective findings by x-ray or what was found during arthroscopic surgery.

James M. England Jr.

Mr. England was retained and evaluated the employee at the request of the employee's counsel. Mr. England is a vocational expert that is routinely employed by both employers and employees. He saw Mr. Burger on June 6, 2006 and prepared a report about that visit. He testified by deposition on April 15, 2008.

Mr. England took a history from the employee concerning his current and past disabilities and details about the problems that the employee was having both before March 24, 2004 and after.

He reviewed the medical records and opinions that were provided to him. In addition he did some of his own testing. Mr. England made some general observations about the employee:

1. The employee looked really tired.
2. He was physically uncomfortable.
3. The employee stood, sat and moved around in the interview.
4. The employee seemed down emotionally and admitted to that.

Mr. England reported that absent Mr. Burger's degrees of impairment, he had transferable skills down to a light level of exertion. He also said that Mr. Burger has the cognitive ability to do a variety of alternative work; academically he would be in good shape for further skill development.

Mr. England noted that there certainly was a difference of opinion as far as the employee's physical abilities. He indicated that Dr. Emanuel released Mr. Burger to full duty without restrictions while Dr. Volarich outlined restrictions as follows:

1. Avoid overhead use of the right arm or prolonged use of the right arm away from the body- especially above chest level.
2. Minimize pushing and pulling as well as traction maneuvers with the right arm.
3. Not to handle more than 5 pounds with the right arm out away from the body or overhead and only when needed.
4. 15 pound lifting with the right arm alone.
5. Was to avoid use of the hands in an awkward or blind fashion.
6. Minimize repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotary motions, and similar tasks.
7. Avoid impact and vibratory trauma to his hands.
8. Not to stoop, squat, crawl, kneel, pivot, climb, or do impact maneuvers.
9. To be cautious on uneven terrain or slopes and ladders especially if he was handling weight.
10. Avoid prolonged weight bearing for more than 45 to 60 minutes at a time or to tolerance.
11. Avoid all bending, twisting, lifting, pushing, carrying, climbing and similar tasks.
12. 30 pound lifting limit with regard to the back-only on an occasional basis.
13. Do not handle weight overhead or out from his body, and not to carry it over long distances or over uneven terrain.
14. Avoid being in a fixed position for more than an hour at a time-including both sitting and standing.
15. To change positions frequently to maximize comfort and to rest when needed.
16. Dr. Volarich felt the combination of these problems rendered him incapable of any type of work.
17. Mr. England saw Dr. Stillings' report indicating he felt the man's combination of problems rendered him totally disabled from a psychiatric standpoint.

Mr. England testified about how the employee was functioning and testified that it was his understanding that Dr. Emanuel's findings and opinions referred only to the employee's right shoulder.

After all of his review, testing and evaluating, Mr. England testified as to his opinions regarding Mr. Burger's disabilities:

1. I do not believe that this man could successfully compete for employment.

2. From a vocational standpoint it would appear to be based on the overall evidence that he's likely to remain totally disabled from a vocational standpoint.
3. From a vocational standpoint looking at the overall information that I have reviewed that his lack of ability to work would be due to a combination of all the different injuries and medical problems that he has rather than just due to the last two-the injury to his right shoulder and hands.
4. After reviewing all of the evidence, it appeared to me that based on the combination of the physical and emotional problems there wouldn't be anything left that he would be able to do vocationally.

Mr. England reviewed the report of Dr. Jordan from 2006, Dr. Brown's medical records and the supplemental report of Dr. Volarich after he did his initial report. He testified that nothing in those reports changed his opinions.

During cross examination, Mr. England agreed with many of the statements posed by the Second Injury Fund:

1. The employee had no work restrictions prior to March 24, 2004.
2. No treating doctor gave Mr. Burger any permanent restrictions either before or after his shoulder injury, and that Dr. Volarich was the only doctor who gave restrictions from a physical standpoint.
3. If you only look at the restrictions or the lack thereof of the treating physicians, Mr. Burger is employable.
4. If you look at the opinions of Dr. Stillings and Dr. Volarich, and what Mr. Burger reported, Mr. Burger is unemployable.
5. He had no records for the 1978 automobile accident but had other medical records for the prior injuries.

Wayne A. Stillings, M.D.

Dr. Stillings was retained and evaluated the employee at the request of employee's counsel. He saw Mr. Burger on June 13, 2006 and prepared a report about that visit. He testified by deposition on March 17, 2008. Dr. Stillings is a psychiatrist that regularly and mostly testifies for employees.

As all the other experts, Dr. Stilling reviewed the medical records that were provided to him. He also performed his own testing. Dr. Stillings took a history from the employee concerning both his physical and psychological problems. Dr. Stillings testified that the employee reported sleep disturbance due to pain in his right shoulder, that he was depressed, chronic low moods, loss of interest in life, 40 pound weight gain, fatigue, intermittent feelings of worthlessness, helplessness, uselessness, poor concentration, irritability, forgetfulness, and morbid thoughts that life is no longer worth living with his type of pain and disability. The employee did not report any suicidal ideation. Mr. Burger denied prior mental health care in his lifetime, however the records show that Dr. Eller treated and referred the employee for such care in 1991. At that time the employee was prescribed Prozac. There also were medical records from Dr. Skaggs that could be considered psychiatric. After his evaluation and MMPI testing, Dr. Stillings reported that the employee's mood was quite depressed. He reported opinions using Axis analysis:

Axis I-substance abuse recovering, 2. traumatic brain injury by history, 3. adjustment disorder with mixed emotional features related to his low back injury around 1991, mostly resolved, 4. mood disorder due to general medical condition, that being the right shoulder injury sustained on 3/24/04, 5. pain disorder associated with both psychological factors and GMC.

Axis II-nothing offered

Axis III-is based on medical records

Axis IV-disabled from employment, financial, and interaction with the legal system.

Axis V-his global assessment of functioning was 55 which transfers to a narrative of moderate symptoms and impairment.

In addition, based on the information he had, Dr. Stillings testified about his professional opinions:

1. "The 3/24/04 work injury is a substantial and the prevailing factor in causing Mr. Burger to suffer from a mood disorder and a pain disorder".
2. The mood disorder and the pain disorder are both permanent.
3. The mood disorder has an associated 30% permanent partial psychiatric disability.
4. The pain disorder has an associated 30% permanent partial psychiatric disability, 10% of which is preexisting due to the low back condition and 5% to the cumulative trauma to his upper extremities.
5. The employee has a 30% permanent partial disability related to the mood disorder as a result of the March 2004 injury.
6. The employee has a 15% permanent partial disability of the body due to the pain disorder related to the shoulder injury and 5% related to the bilateral carpal tunnel syndrome.
7. Mr. Burger does have a portion of his pain disorder, 10% preexisting permanent partial psychiatric disability due to the low back condition, 5% to the cumulative trauma leading to bilateral CTS. He also has preexisting TBI, traumatic brain injury, with associated permanent partial neuropsychiatric disability of 15%.
8. His preexisting substance abuse disorder and the preexisting adjustment disorder had no permanent partial disability because they had resolved.
9. From the neuropsychiatric standpoint he is permanently and totally disabled from gainful employment in the open labor market.
10. His permanent total disability is due to a combination of the primary injury and his preexisting injuries from the synergistic interaction.

During cross examination, Dr. Stillings agreed with many of the statements posed by the Second Injury Fund:

1. He did not treat Mr. Burger and only saw him one time in conjunction with his workers' compensation claim.
2. He indicated that he was not made aware that when the employee saw Dr. Jordan, he denied that he was depressed, had low moods, had irritability, had morbid thoughts, or that he had feelings of worthlessness and forgetfulness. He also testified that Mr. Burger lacks self insight to his psychiatric status and that he has a problem with the word depression.
3. He agreed pain is subjective in nature but that it depends on what the objective findings or correlates are.
4. He was asked if he was aware that Mr. Burger was fully functioning-full work duties as a carpenter at the time he was injured. Dr. Stillings testified that the employee said he was

- limping due to his back pain. While he agreed that the employee was working full time, he also testified that he did not know if he was working at full capacity.
5. Dr. Stillings testified that the employee told him pain was a chronic problem and that he did the best he could while enduring pain.
 6. He agreed that he did not see any permanent work restrictions for anything prior to the shoulder injury.
 7. He agreed that other than the one incident with Dr. Eller in the 1990's, the employee had no professional mental healthcare other than the one Community Counseling visit.
 8. He agreed that Mr. Burger's treatment for alcohol abuse was pastoral through the church. He saw no church records.
 9. He agreed that he had no past records from the employee's 1978 motor vehicle accident. He relied on what the employee told him. He had no way to verify memory loss or that employee was in a coma.
 10. He saw no records that the employee missed any work prior to the shoulder injury on a regular basis.
 11. He agreed that in making his assessments he relies extensively on the information provided by the employee, and as to the pain component he relied totally on what the employee told him. Dr. Stillings also testified that he saw no signs of symptom magnification or exaggerated pain behavior, and that the MMPI has many disguised questions in it that people really do not know what they are being asked.
 12. He did not do a physical exam of Mr. Burger.
 13. He agreed that he had the rating of Dr. Volarich. He said it would not have changed his conclusions but it certainly buttressed his opinions.

RULINGS OF LAW in 04-027294 (March 24, 2004)-

Liability of the Second Injury Fund

Paramount in making a decision in this case is whether the employee is believed to have provided credible and accurate information to the doctors and when he testified at trial. Just as critical is whether the testimony and professional opinions of Dr. Volarich, Dr. Stillings and Mr. England were based on accurate, truthful information thus making their opinions credible and worthy of belief. The only other medical evidence available is the medical records of Dr. Emanuel concerning the employee's last shoulder surgery and physical therapy notes for the same surgery. Those notes are generally confined to the shoulder surgery in 2005. They do not address the issue of whether the employee is permanently totally disabled.

The Second Injury Fund questions the credibility of the employee's evidence due to the absence of medical records for preexisting injuries, mainly the motor vehicle accident in 1978. While the employee did not offer the medical records concerning his prior injuries, the medical professionals reviewed and testified about that evidence with the exception of the 1978 records. Their opinions were based on those records, their examination and testing of the employee and on their professional experience and expertise. In addition the Second Injury Fund also questioned the employee's evidence as he worked a strenuous job and had no specific physical restrictions placed upon him prior to his March 24, 2004 shoulder surgery. The Second Injury

Fund also questions the employee's evidence as Dr. Emanuel placed no physical restrictions on the employee after the second shoulder surgery.

The employee is claiming that he is permanently and totally disabled. The term "total disability" in Section 287.020.7 RSMo, means 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. The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. See Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1992). The test for permanent total disability is whether; given the employee's situation and condition, he or she is competent to compete in the open labor market. See Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the "inability to return to any reasonable or normal employment." An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of State of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990).

The key question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she entered. See Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo. App. 1993), and Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995). The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo.

The first question that must be addressed is whether the employee is permanently and totally disabled. If the employee is permanently and totally disabled, then the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the preexisting injuries and conditions and the employee's last injury of March 24, 2004. Under Section 287.220.1, the preexisting injuries must also have constituted a hindrance or obstacle to the employee's employment or reemployment.

There is both medical and vocational evidence that addresses whether the employee is permanently and totally disabled. The opinions of Dr. Volarich, Dr. Stillings and Mr. England were that the employee was permanently and totally disabled, and this evidence was not disputed by any other professional or credible evidence. The employer-insurer settled with the employee on the primary issue concerning the shoulder injury. The Second Injury Fund did not challenge the employee's expert's opinions with other expert opinion.

Based on a review of all of the evidence, the Court finds the opinions of Dr. Volarich, Dr. Stillings and Mr. England are credible regarding whether the employee is permanently and totally disabled.

In addition to both the medical and vocational evidence, the Court found that the employee was a very credible and persuasive witness on the issue of permanent total disability. The Court assessed the employee as being a person who has worked hard his entire life and is not happy with his current situation where he cannot work. The employee offered detailed information to

the examining doctors and the Court concerning the impact that his physical conditions have had on his daily ability to function at home or in the work place. His testimony supports a conclusion that he will not be able to compete in the open labor market. The employee was observed during the hearing. In the Court's opinion his manner was flat and he exhibited characteristics of someone who was in pain. Contrary to most witnesses, the employee even asked permission to stand up and move around due to his discomfort. In the psychiatric/psychological area, the Court agrees with the general assessment of Dr. Stillings that the employee does not fully understand the concept of depression. The Court's opinion is that the employee worked hard physically all of his life and is not willing to admit to his true psychological issues due to work ethic/pride. The testimony and the observed behavior of the employee were important on the issue of permanent total disability.

Based on the credible testimony of the employee and the supporting medical and vocational rehabilitation evidence, the Court finds that no employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition and reasonably expect the employee to perform the work for which he was hired. The Court further finds that the employee is unable to compete in the open labor market and is permanently and totally disabled.

There is no credible evidence that the last injury alone caused the employee to be permanently and totally disabled. Dr. Volarich's offered his opinions as to the employee's disabilities from the March 24, 2004 injury. At the time of his initial evaluation he opined that Mr. Burger was permanently and totally disabled from a physical standpoint alone, and at the time of his second evaluation he took into consideration Dr. Stillings' evaluation with respect to the depression. Dr. Volarich opined that the psychiatric disabilities are on top of the physical disabilities, the physical disabilities in and of themselves would render the employee permanently disabled.

A Stipulation for Compromise Settlement was entered into by the employee and the employer-insurer and approved by the Division. The amount was \$73,852.24 which was based upon an approximate disability of 40% of the right shoulder and 30% of the body as a whole for psychological disability. The Court finds that as a result of the March 24, 2004 accident, the employee sustained permanent partial disability. Based upon the evidence I find that as a direct result of the last injury the employee sustained a permanent partial disability of 40% of the right shoulder and 30% permanent partial disability of the body as a whole for psychological disability. The Court further finds that the employee's last injury alone (right shoulder) did not cause the employee to be permanently and totally disabled.

The next issue to be addressed is whether the employee's pre-existing conditions were a hindrance or obstacle to his employment or reemployment. The employee testified as to the effects of his preexisting conditions/injuries on his ability to work prior to March 24, 2004. Just as importantly he discussed these preexisting disabilities with the various experts who testified in his behalf. These experts based their opinions in part on what Mr. Burger told them. There is no question that the statements and credibility of the employee are critical in assessing the concept of hindrance or obstacle. There is no credible evidence disputing whether the employee's prior injuries were debilitating in some sense and created some hindrance/obstacle, some difficulty in completing his job assignments. No evidence was introduced disputing the

testimony of the employee that he changed from heavy concrete work to millwright work due to problems that he was experiencing from his prior accidents. The employee provided multiple examples of how his prior injuries affected him physically or the steps he took to continue working. The employee testified that he was wearing out. The Court is not willing to punish the employee because he had a strong work ethic and completed his job assignments irrespective of his physical disabilities. Again the Court found the employee's testimony to be reliable and credible in this area. The experts also found that the employee's prior injuries were debilitating and provided ratings of permanent partial disability.

Based on a review of all of the evidence, the Court finds that the employee's pre-existing disabilities and conditions constituted a hindrance or obstacle to his employment or reemployment.

It was Dr. Stillings' opinion that the pre-existing disabilities and the disability associated with the injury of March 24, 2004 combined to create a greater overall disability. He specifically testified that the employee's permanent total disability is due to a combination of the primary and his preexisting injuries from the synergistic interaction. Dr. Volarich testified that the employee was permanently and totally disabled in combination from a physical standpoint despite the psychological disability. Mr. England testified that the employee was permanently and totally disabled in combination stating that it appeared to him that based on a combination of the physical and emotional problems there wouldn't be anything left that Mr. Burger would be able to do vocationally.

The Court therefore finds that the prior injuries combined synergistically with the primary shoulder injury to cause the employee's overall condition and symptoms. Based on the credible and undisputed testimony of Mr. Burger supported by the uncontradicted testimony of Dr. Volarich, Dr. Stillings and Mr. England, the Court finds that the employee is permanently and totally disabled as a result of the combination of his pre-existing injuries and conditions and the March 24, 2004 injury and conditions said injury caused.

The Court finds that the employee reached maximum medical improvement on June 20, 2005, the date that the employee was released from employment and the date that Dr. Emanuel stated that the employee reached maximum medical improvement.

Notwithstanding the fact that the employee settled his claim against the employer-insurer for a lump sum, I find that for the purpose of determining liability of the Second Injury Fund, the 40% permanent partial disability to the right shoulder and the 30% permanent partial disability to the body as a whole would have been payable in 212 and 6/7 weekly installments commencing on June 20, 2005, the end of the healing period, and continuing through July 19, 2009. Since the compensation rate for permanent partial disability is less than the amount payable for permanent total disability under Section 287.200 RSMo, the Second Injury Fund is liable for the difference between what the employee is receiving for permanent partial disability from the employer-insurer and what he is entitled to receive for permanent total disability under Section 287.220.1 RSMo. The difference between the permanent total disability rate of \$662.55 per week and the permanent partial disability rate of \$347.05 per week is \$315.50 per week. The Second Injury Fund is therefore ordered to pay to the employee the sum of \$315.50 per week for 212 6/7 weeks

commencing on June 20, 2005 and ending on July 19, 2009. Commencing on July 20, 2009 the Second Injury Fund is responsible for paying the full permanent total disability benefit to the employee at the rate of \$662.55 per week.

These payments for permanent total disability shall continue for the remainder of the employee's lifetime or until suspended if the employee is restored to his regular work or its equivalent as provided in Section 287.200 RSMO.

RULINGS OF LAW IN 04-145230 (March 26, 2004)

As the Court found the employee to be permanently and totally disable as a result of his preexisting injuries in combination with the disabilities from his accident of March 24, 2004, any decision regarding disabilities in 04-145230 is moot. Thus the employee's claim for permanent partial and permanent total disability is denied.

ATTORNEY'S FEE

Thomas J. Gregory, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: _____

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Naomi Pearson
Division of Workers' Compensation

Employee: Burger, Bradley

Injury No.: 04-027294 & 04-145230

Employee: Burger, Bradley

Injury No.: 04-027294 & 04-145230

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

Injury No.: 04-145230

Employee: Bradley J. Burger
Employer: Bloomsdale Excavating Company, Incorporated
d/b/a Artisan Contracting (Settled)
Insurer: Bituminous 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 9, 2009. The award and decision of Administrative Law Judge Gary L. Robbins, issued April 9, 2009, 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 23rd day of September 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Bradley J. Burger

Injury No. 04-027294 /04-145230

Dependents: N/A

Employer: Bloomsdale Excavating Company, Incorporated d/b/a Artisan Contracting

Additional Party: Second Injury Fund

Insurer: Bituminous Insurance Company

Hearing Date: January 7, 2009

Checked by: GLR/kh

SUMMARY OF FINDINGS

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? March 24, 2004 and March 26, 2004.
5. State location where accident occurred or occupational disease contracted: Cape Girardeau 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 happened or occupational disease contracted: In 04-027294 the employee was using a portable when it torqued multiple times injuring his right shoulder and arm. 04-145230 is a repetitive motion injury causing bilateral carpal tunnel.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Right shoulder in 04-027294 and bilateral wrists in 04-145230.
14. Nature and extent of any permanent disability: In 04-027294 the employee settled his case with the employer-insurer for 40% permanent partial disability of the right shoulder and 30% permanent partial disability of the body as a whole for psychological disability. In 04-145230 the employee settled his case with the employer-insurer for 20% permanent partial disability of each wrist, 4 weeks disfigurement and a 10% load.
15. Compensation paid to date for temporary total disability: N/A
16. Value necessary medical aid paid to date by employer-insurer: N/A
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$1,000.00 per week.
19. Weekly compensation rate: The employee's rate for temporary total and permanent total disability is \$662.55 per week. His rate for permanent partial disability is \$347.05 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award
22. Second Injury Fund liability: Permanent Total Disability. See Award
23. Future requirements awarded: None

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Thomas J. Gregory

FINDINGS OF FACT AND RULINGS OF LAW

On, January 7, 2009, the employee, Bradley J. Burger, appeared in person and by his attorney, Thomas J. Gregory, for a hearing for a final award. The employee had previously settled his cases with the employer-insurer. The Second Injury Fund was represented by Assistant Attorney General Clifton K. Verhines. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Bituminous Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Bloomsdale Excavating Company Incorporated d/b/a Artisan Contracting and was working under the Workers' Compensation Act.
3. On or about March 24, 2004 the employee sustained an accident or occupational disease arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$1,000.00. His rate for temporary total and permanent total disability is \$662.55 per week. His rate for permanent partial disability is \$347.05 per week.
7. The employee's injury was medically casually related to his accident or occupational disease.

ISSUES

Whether the Second Injury Fund has liability for either permanent partial disability or permanent total disability?

EXHIBITS

The following exhibits were offered and admitted into evidence without objection:

Employee's Exhibits

- A. Transcript of Compromise Settlement-88-146849
- B. Stipulation for Compromise Settlement-91-013284
- C. Stipulation for Compromise Settlement-04-027294
- D. Stipulation for Compromise Settlement-04-145230
- E. Deposition of David T. Volarich, D.O.
- F. Deposition of Wayne A. Stillings, M.D.
- G. Deposition of James M. England, Jr.

Second Injury Exhibits

1. Medical records from Parkcrest Orthopedics, LLC
2. Medical records from Mid America Rehab

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT-

Mr. Burger was the only person who testified in person. All other evidence was presented in the form of records from the Division of Workers' Compensation, medical records and deposition testimony by David T. Volarich, D.O., Wayne A. Stillings, M.D., and James M. England.

Bradley J. Burger

Mr. Burger is presently forty-nine years old, unmarried, has a ten year old daughter and lives in Scott City, Missouri. He graduated from high school and received training in the military as a carpenter. He began working for Bloomsdale Excavating in 1994. Prior to that his work history generally involved working in the construction industry performing heavy labor jobs. Mr. Burger worked out of a union hall, but after 1994 most of his work was for Bloomsdale Excavating.

The employee had multiple accidents and/or injuries prior to the accidents and/or occupational injuries regarding his right shoulder on March 24, 2004 and his bilateral wrists on March 26, 2004:

1. 1978 motor vehicle accident-As a result of this accident Mr. Burger indicated that he hurt both knees, his left shoulder and caved the back of his head in. He testified that he was in a coma for weeks, had severe headaches for a long time and continues to have short term memory loss. He related this memory loss problem in general and to his job. As an example, he had to write down measurements as he could not remember them. In addition he indicated that he had a hard time squatting or sitting. Mr. Burger testified that he was out of work for 7 months due to this accident. (While Dr. Volarich and Dr. Stillings and Mr. England testified that they had access to some of the medical records regarding the employee's pre 2004 injuries and accidents, no specific medical records were presented at trial outlining the specific medical care that the employee received from this accident, therefore the only evidence concerning this matter came from the employee's memory and relevant medical opinions.)
2. 1986 injury to the left knee-The employee testified that he had surgery to his left knee.
3. 1988 injury to left knee and fractured right ankle-The employee testified that he fell off a roof. He indicated that he had surgery on his right ankle but did not have another surgery on his knee. The employee settled this case with the employer-insurer on March 23, 1989 for 5% permanent partial disability of the right ankle and 5% permanent partial disability of the left knee. See Employee Exhibit A.
4. 1991 back injury-The employee testified that he was taking down a "chain fall" and tore loose all of the muscles in his chest and back. He indicated that Dr. Eller treated him and he missed work for 18 months. He also indicated that Dr. Eller told him to avoid surgery

until he could not stand the pain any more. In addition Dr. Eller referred the employee to psychiatric/psychological care for depression. The employee never had back surgery but testified that he has had back problems ever since this accident. He indicated that he had trouble sitting at trial, can only drive about 30 minutes, has pain in both legs and avoided lifting due to these problems. In addition he indicated that he can walk for about ½ hour and that if he tried to stoop his back hurts and his knees locks up so he avoids these activities. The employee settled this case with the employer-insurer on October 1, 1993 for 27 ½ % permanent partial disability of the body as a whole. See Employee Exhibit B.

5. September 1999 right ankle injury-The employee testified that he did not have to have surgery for this injury.
6. June 2000 surgery to right knee-the employee testified that this was a non work related matter that caused him to miss work for some time.

On March 24, 2004, the employee injured his right shoulder while he was using a power drill. Dr. Knight performed surgery on this shoulder on May 13, 2004. Dr. Emanuel performed a second right shoulder surgery on January 5, 2005. The employee settled this case with Bloomsdale Excavating on August 3, 2007 for 40% permanent partial disability of the right shoulder and 30% permanent partial disability of the body as a whole for psychological disability. See Employee Exhibit C.

The employee was diagnosed with bilateral carpal tunnel problems in 2002. Dr. David Brown performed right hand carpal tunnel surgery on December 15, 2006 and left hand carpal tunnel surgery on January 5, 2007. He settled this case with Bloomsdale Excavating on August 3, 2007 for 20% permanent partial disability of each wrist, 10% load and 4 weeks disfigurement. See Employee Exhibit D.

Mr. Burger began working for Bloomsdale Excavating in 1994 and worked mostly for them until June 20, 2005 when he was finally released. He testified that his initial employment was mostly concrete work and then later as doing millwright work. He indicated that he switched more to the millwork work in 2000-2004 as he had problems with his knees and his back etc. from the past. In general he said he was wearing out. He described the millwright work as being less physical than the concrete work. As a millwright the employee testified that he spent most of his time welding. In addition, the employee indicated that his prior knee injuries affected his ability to work- he used climbing as an example and testified that this was another reason why he switched to millwright work. He also testified that his foreman liked him and gave him easier jobs to do and his coworkers helped him-they took care of him.

Mr. Burger had his first right shoulder surgery on May 13, 2004. He testified that he returned to work for several months after that surgery, maybe working for 3 days a week; but that the pain got so bad in November 2004 that he could not take it anymore. His second right shoulder surgery was done on January 5, 2005. He said that he was paid workers' compensation until June 20, 2005 and it was at that time that he was released. He indicated that he tried to return to work but they laid him off. In addition he sought employment through the union hall but no one would ever hire him. He testified that he was able to draw some unemployment through October 2005, but after that time has not received any benefits from workers' compensation or unemployment.

Mr. Burger described his carpal tunnel problems as beginning in 2002; however he never had such surgeries until after he left employment with Bloomsdale Excavating.

In addition to the physical problems that the employee described that resulted from his accidents prior to March 2004, he also testified about the physical problems he presently has including his two right shoulder surgeries and his bilateral carpal tunnel surgeries. The employee describes pain in his right shoulder with movement and weather. He stated that his pain occurs daily as a dull ache but that if he uses his arm or turns it wrong he gets a sharp pain. He gave an example that just reaching for a cup of coffee causes sharp pain. Due to these problems, he indicated that he uses his left arm more. In addition he testified that his sleep is interrupted every night and that he only sleeps 15-20 minutes at a time. Mr. Burger describes aches and pain in his hands on a daily basis. He indicated that drops things easily and has trouble gripping. Mr. Burger testified that he could not go to a lighter job as he cannot use his hands, his back hurts, and he has trouble with sitting and standing.

The employee testified about his life and daily activities. He lives with his mom and dad and two brothers most of the time, but also has a camper that he stays at in Wayne County. His daughter visits him per visitation. He reported that he watches a lot of television and reads. He usually lies in recliner or on the couch-the recliner is more comfortable. He testified that he falls asleep during the day as does not sleep at night-he tried sleeping pills but they made him groggy. He does not take pain pills as they make him sick. But he reported that he takes ibuprofen-about 12 pills a day on an average day.

Mr. Burger was first sent for psychiatric/psychological care in 1991 following his back injury. This was the time that Dr. Eller treated him and referred him to psychiatric counseling as he felt Mr. Burger was suffering from depression. The reports indicate that the employee was treated by Dr. Jordan who felt that the employee was depressed and prescribed Prozac for those problems. At trial Mr. Burger testified that he thinks that he has his depression under control. However he testified that he had issues with depression following his most recent injuries. He described problems of anger, lack of self worth, having a hard sleeping and difficulty with remembering. He testified that the Prozac that he took in 1991 made him violent and he therefore does not want to take any such pills.

During trial, Mr. Burger asked the Court permission to stand up after about 20 minutes indicating that he was in pain. The Court also observed that overall the employee's presentation and mood appeared to be flat. By the Court's observations, Mr. Burger gave the impression of someone who was in pain.

During cross examination Mr. Burger admitted that:

1. He is not seeing any doctors for depression and is not receiving any such treatment.
2. That he was not placed on any permanent restrictions due to his prior injuries.
3. No treating doctor reported that he could not work at full duty.
4. He is currently not treating for any medical condition and is not currently taking any medications for any medical condition.

David T. Volarich, D.O.

Dr. Volarich was retained and evaluated the employee at the request of the employee's counsel. He first saw Mr. Burger on March 14, 2006 and prepared a report about that visit. Dr. Volarich saw the employee again on September 17, 2007 and also prepared a report as a result of that visit. He testified by deposition on September 12, 2008. Dr. Volarich is a physician that testifies for the employee's side of the case most of the time.

Dr. Volarich took a history from the employee concerning his preexisting problems and the problems from his right shoulder and carpal tunnel surgeries, performed a physical examination and reviewed medical records as a basis for his comments and opinions.

One of Dr. Volarich's opinions was that Mr. Burger was depressed. In addition he reached a diagnosis regarding the employee's injuries from the March 24, 2004 accident: (the drill incident)

1. Internal derangement of the right shoulder in the form of a labral tear, partial rotator cuff tear and impingement. Status post arthroscopic labral debridement, debridement of the rotator cuff and subacromial decompression.
2. Persistent right shoulder pain, status post redo labral repair, rotator cuff repair, and subacromial decompression with distal clavicle excision.

In addition, at that time Dr. Volarich reached a diagnosis regarding the employee's injuries from the March 26, 2006 accident: (bilateral CTS)

1. Repetitive trauma right upper extremity causing medical nerve entrapment at the wrist or carpal tunnel syndrome, nonsurgical repair.
2. Repetitive trauma left upper extremity causing medical nerve entrapment at the wrist or carpal tunnel syndrome, nonsurgical repair.

Dr. Volarich also reached a diagnosis regarding the employee's preexisting injuries:

1. Closed head trauma causing skull fracture with residual short-term memory loss.
2. Left knee internal derangement. Status post arthroscopic medial meniscectomy.
3. Recurrent bilateral contusions.
4. Right ankle sprain/strain.
5. Right foot and lateral compartment laceration.
6. Chronic lumbar syndrome secondary to disc bulging at L4-5 causing bilateral lower extremity radicular symptoms.
7. Left foot plantar fasciitis.
8. Right foot fifth metatarsalgia.
9. Depression.

Dr. Volarich felt that Mr. Burger was at maximum medical improvement as to the March 24, 2004 injury, but that he had not reached maximum medical improvement as to the March 26, 2004 injury, (bilateral CTS) and further felt that Mr. Burger needed surgery. (At the time of Dr. Volarich's first evaluation, the employee had carpal tunnel problems but had not yet had carpal tunnel surgery).

Dr. Volarich also provided permanent partial disability ratings about the employee's disabilities after his first evaluation:

1. 35% permanent partial disability of the left lower extremity rated at the knee due to a torn medical meniscus that required arthroscopic repair.
2. 30% permanent partial disability of the right lower extremity rated at the knee due to a torn medical meniscus that required arthroscopic repair.
3. 25% permanent partial disability of the right lower extremity rated at the ankle due to recurrent strain and laceration over the distal fibula at the lateral ankle compartment.
4. 30% permanent partial disability of the body as a whole at the lumbrosacral spine due to a disc bulge at L4-L5.
5. 50% permanent partial disability of the right upper extremity rated at the shoulder due to a torn rotator cuff and torn labrum and impingement that required two surgical repairs.
6. 40% permanent partial disability of both upper extremities at the wrist level assuming that no surgery would be performed, and that if surgery was performed, his disability would be less.

Dr. Volarich again provided similar ratings after his second evaluations with some additional information. He reported that the injuries are permanent injuries and create a hindrance to his employment or reemployment.

1. 50% permanent partial disability of the right upper extremity at the shoulder due to the torn rotator cuff, torn labrum and impingement that required two separate surgical repairs. The rating accounted for pain, lost motion, weakness, crepitus and atrophy in the dominant arm.
2. 35% permanent partial disability of the right upper extremity at the wrist due to the severe carpal tunnel syndrome that required open carpal tunnel release. The rating accounted for ongoing paresthesias and weakness in the dominant hand. It's noted his pain syndrome improved with surgical repair.
3. 35% permanent partial disability of the left upper extremity at the wrist due to the severe carpal tunnel syndrome that required open carpal tunnel release. The rating accounted for pain, paresthesias and weakness in the non dominant hand. Again his pain syndrome improved after surgery.
4. 15% permanent partial disability of the body as a whole that he offered as a multiplicity factor due to the combination of injuries to both upper extremities.
5. 35% permanent partial disability of the left lower extremity at the knee due to the torn medical meniscus that required arthroscopic repair. The rating accounted for pain, lost motion, crepitus and weakness in the left lower extremity.
6. 30% permanent partial disability of the right lower extremity at the knee due to the torn medical meniscus that required arthroscopic repair. The rating accounted for pain, weakness and lost motion, as well as crepitus in the right lower extremity.
7. 25% permanent partial disability of the right lower extremity at the ankle due to the recurrent strain injury and laceration over the distal fibula and lateral ankle compartment. It accounted for pain and lost motion of the right ankle.
8. 30% permanent partial disability of the body as a whole rated at the lumbrosacral spine due to the disc bulge at L4-5. The rating accounted for back pain, lost motion and lower extremity paresthesias.
9. Dr. Volarich deferred as to a psychiatric evaluation for depression.

10. A small amount of additional disability in each foot because of the right foot metatarsalgia and the left plantar fasciitis but did not quantitate that since he had not sought nor received medical care for those conditions.

Dr. Volarich additionally offered further opinions in Mr. Burger's case:

1. "It is my opinion that the work accident that occurred on March 24, '04 when Mr. Burger was using a drill to drill metal and the drill bit got caught, jerking his right shoulder back and forth causing pain in the right shoulder is the substantial contributing factor as well as the prevailing factor causing the labral tear, rotator cuff tear and impingement that required two separate surgical repairs".
2. "It's my opinion the repetitive nature of Mr. Burger's work as described in the History and Job Activities section of my reports leading up to 3/26/04 are the substantial contributing factors as well as the prevailing or primary factors causing the severe bilateral carpal syndrome that required open carpal tunnel releases in each hand".
3. Mr. Burger was permanently and totally disabled as a result of the work related injury of 3/24/04 and leading up to the 3/26/04 in combination with each other as well as in combination with his preexisting medical conditions and disability from his psychiatric illnesses as opined by Dr. Stillings.
4. Mr. Burger was permanently and totally disabled prior to the development of any additional foot difficulties that he continues to have.
5. At the time of his initial evaluation Mr. Burger was permanently and totally disabled from a physical standpoint alone, and at the time of his second evaluation he took into consideration Dr. Stillings' evaluation with respect to the depression. Dr. Volarich opined that the psychiatric disabilities are on top of the physical disabilities, the physical disabilities in and of themselves would render him permanently disabled.
6. Any restrictions placed on the employee as of the March 14, 2006 evaluation are the same after the September 17, 2007 evaluation.

During cross examination by the Second Injury Fund, Dr. Volarich agreed with several statements that were presented to him:

1. He did not treat Mr. Burger and evaluated him for his attorney.
2. There were no restrictions after the employee's release after the drill incident.
3. The employee worked about one year after the claimed injuries.
4. He had no records regarding the 1978 skull fracture or injury of Mr. Burger. He relied on the employee's history alone.
5. He agreed to the same things regarding the employee's 1970's and 1980's knee problems.
6. He had no work records to review.
7. The employee gave subjective complaints.
8. The employee never had any back surgeries. Also that he was performing as a carpenter, that he was doing pretty heavy labor leading up to the shoulder injury in March of 2004. Dr. Volarich reported that the employee was doing more millwright work at that point-the employee was doing medium to heavy type work.
9. He did not see any work or medical restrictions that the employee had prior to March 24, 2004.
10. As to pain he had to trust that what the employee was telling him was accurate, and that anything that is inaccurate could change his opinion.

11. The ratings he gave for the employee's preexisting injuries are based in part on what the employee told him.
12. He had records on the back, part of the ankle and foot injury as well as the knee problems. He stated he lacked records on the skull and early knees.
13. He did not see where the employee was missing additional time from work, other than treatment for these conditions. Also, he saw no job duty modifications.
14. The employee told Dr. Volarich that he went back to full duties-that is the way it has to be in construction.
15. He agreed that he is not a vocational expert.
16. He agreed that he did not mention the Mid America report that indicated that it was the employee's intention not to return to work. He further agreed that it is possible that this information could demonstrate a lack of motivation for the employee to return to the work force.
17. He agreed that Dr. Jordan's report said that the employee denied being depressed.
18. He is aware that the employee disagreed with some things that Dr. Stillings stated in his report.
19. He agreed that he relied on Dr. Stillings for the psychiatric report but that he felt the employee was permanently and totally disabled just from the physical standpoint.

Dr. Volarich also testified about the permanent restrictions he recommended for Mr. Burger's situation. (Those are summarized later in this award).

James P. Emanuel, M.D.

Dr. Emanuel was the surgeon retained by the employer-insurer to perform the second surgery on the employee's right shoulder. His records are contained in SIF Exhibit 1.

Dr. Emanuel first saw the employee in December 2004 and performed surgery on January 5, 2005. Prior to the surgery, Dr. Emanuel put work restrictions on the employee. The records indicate that the employee had a serious shoulder injury and had a significant shoulder surgery. However, as of June 20, 2005, the employee was found to be at maximum medical improvement as to his right shoulder and was released to full duty without restrictions. At that time Dr. Emanuel referenced physical therapy reports of Vic Zuccarello and noted that Mr. Burger's subjective complaints are out of proportion to objective findings and do not match objective findings by x-ray or what was found during arthroscopic surgery.

James M. England Jr.

Mr. England was retained and evaluated the employee at the request of the employee's counsel. Mr. England is a vocational expert that is routinely employed by both employers and employees. He saw Mr. Burger on June 6, 2006 and prepared a report about that visit. He testified by deposition on April 15, 2008.

Mr. England took a history from the employee concerning his current and past disabilities and details about the problems that the employee was having both before March 24, 2004 and after.

He reviewed the medical records and opinions that were provided to him. In addition he did some of his own testing. Mr. England made some general observations about the employee:

1. The employee looked really tired.
2. He was physically uncomfortable.
3. The employee stood, sat and moved around in the interview.
4. The employee seemed down emotionally and admitted to that.

Mr. England reported that absent Mr. Burger's degrees of impairment, he had transferable skills down to a light level of exertion. He also said that Mr. Burger has the cognitive ability to do a variety of alternative work; academically he would be in good shape for further skill development.

Mr. England noted that there certainly was a difference of opinion as far as the employee's physical abilities. He indicated that Dr. Emanuel released Mr. Burger to full duty without restrictions while Dr. Volarich outlined restrictions as follows:

1. Avoid overhead use of the right arm or prolonged use of the right arm away from the body- especially above chest level.
2. Minimize pushing and pulling as well as traction maneuvers with the right arm.
3. Not to handle more than 5 pounds with the right arm out away from the body or overhead and only when needed.
4. 15 pound lifting with the right arm alone.
5. Was to avoid use of the hands in an awkward or blind fashion.
6. Minimize repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotary motions, and similar tasks.
7. Avoid impact and vibratory trauma to his hands.
8. Not to stoop, squat, crawl, kneel, pivot, climb, or do impact maneuvers.
9. To be cautious on uneven terrain or slopes and ladders especially if he was handling weight.
10. Avoid prolonged weight bearing for more than 45 to 60 minutes at a time or to tolerance.
11. Avoid all bending, twisting, lifting, pushing, carrying, climbing and similar tasks.
12. 30 pound lifting limit with regard to the back-only on an occasional basis.
13. Do not handle weight overhead or out from his body, and not to carry it over long distances or over uneven terrain.
14. Avoid being in a fixed position for more than an hour at a time-including both sitting and standing.
15. To change positions frequently to maximize comfort and to rest when needed.
16. Dr. Volarich felt the combination of these problems rendered him incapable of any type of work.
17. Mr. England saw Dr. Stillings' report indicating he felt the man's combination of problems rendered him totally disabled from a psychiatric standpoint.

Mr. England testified about how the employee was functioning and testified that it was his understanding that Dr. Emanuel's findings and opinions referred only to the employee's right shoulder.

After all of his review, testing and evaluating, Mr. England testified as to his opinions regarding Mr. Burger's disabilities:

1. I do not believe that this man could successfully compete for employment.

2. From a vocational standpoint it would appear to be based on the overall evidence that he's likely to remain totally disabled from a vocational standpoint.
3. From a vocational standpoint looking at the overall information that I have reviewed that his lack of ability to work would be due to a combination of all the different injuries and medical problems that he has rather than just due to the last two-the injury to his right shoulder and hands.
4. After reviewing all of the evidence, it appeared to me that based on the combination of the physical and emotional problems there wouldn't be anything left that he would be able to do vocationally.

Mr. England reviewed the report of Dr. Jordan from 2006, Dr. Brown's medical records and the supplemental report of Dr. Volarich after he did his initial report. He testified that nothing in those reports changed his opinions.

During cross examination, Mr. England agreed with many of the statements posed by the Second Injury Fund:

1. The employee had no work restrictions prior to March 24, 2004.
2. No treating doctor gave Mr. Burger any permanent restrictions either before or after his shoulder injury, and that Dr. Volarich was the only doctor who gave restrictions from a physical standpoint.
3. If you only look at the restrictions or the lack thereof of the treating physicians, Mr. Burger is employable.
4. If you look at the opinions of Dr. Stillings and Dr. Volarich, and what Mr. Burger reported, Mr. Burger is unemployable.
5. He had no records for the 1978 automobile accident but had other medical records for the prior injuries.

Wayne A. Stillings, M.D.

Dr. Stillings was retained and evaluated the employee at the request of employee's counsel. He saw Mr. Burger on June 13, 2006 and prepared a report about that visit. He testified by deposition on March 17, 2008. Dr. Stillings is a psychiatrist that regularly and mostly testifies for employees.

As all the other experts, Dr. Stilling reviewed the medical records that were provided to him. He also performed his own testing. Dr. Stillings took a history from the employee concerning both his physical and psychological problems. Dr. Stillings testified that the employee reported sleep disturbance due to pain in his right shoulder, that he was depressed, chronic low moods, loss of interest in life, 40 pound weight gain, fatigue, intermittent feelings of worthlessness, helplessness, uselessness, poor concentration, irritability, forgetfulness, and morbid thoughts that life is no longer worth living with his type of pain and disability. The employee did not report any suicidal ideation. Mr. Burger denied prior mental health care in his lifetime, however the records show that Dr. Eller treated and referred the employee for such care in 1991. At that time the employee was prescribed Prozac. There also were medical records from Dr. Skaggs that could be considered psychiatric. After his evaluation and MMPI testing, Dr. Stillings reported that the employee's mood was quite depressed. He reported opinions using Axis analysis:

Axis I-substance abuse recovering, 2. traumatic brain injury by history, 3. adjustment disorder with mixed emotional features related to his low back injury around 1991, mostly resolved, 4. mood disorder due to general medical condition, that being the right shoulder injury sustained on 3/24/04, 5. pain disorder associated with both psychological factors and GMC.

Axis II-nothing offered

Axis III-is based on medical records

Axis IV-disabled from employment, financial, and interaction with the legal system.

Axis V-his global assessment of functioning was 55 which transfers to a narrative of moderate symptoms and impairment.

In addition, based on the information he had, Dr. Stillings testified about his professional opinions:

1. "The 3/24/04 work injury is a substantial and the prevailing factor in causing Mr. Burger to suffer from a mood disorder and a pain disorder".
2. The mood disorder and the pain disorder are both permanent.
3. The mood disorder has an associated 30% permanent partial psychiatric disability.
4. The pain disorder has an associated 30% permanent partial psychiatric disability, 10% of which is preexisting due to the low back condition and 5% to the cumulative trauma to his upper extremities.
5. The employee has a 30% permanent partial disability related to the mood disorder as a result of the March 2004 injury.
6. The employee has a 15% permanent partial disability of the body due to the pain disorder related to the shoulder injury and 5% related to the bilateral carpal tunnel syndrome.
7. Mr. Burger does have a portion of his pain disorder, 10% preexisting permanent partial psychiatric disability due to the low back condition, 5% to the cumulative trauma leading to bilateral CTS. He also has preexisting TBI, traumatic brain injury, with associated permanent partial neuropsychiatric disability of 15%.
8. His preexisting substance abuse disorder and the preexisting adjustment disorder had no permanent partial disability because they had resolved.
9. From the neuropsychiatric standpoint he is permanently and totally disabled from gainful employment in the open labor market.
10. His permanent total disability is due to a combination of the primary injury and his preexisting injuries from the synergistic interaction.

During cross examination, Dr. Stillings agreed with many of the statements posed by the Second Injury Fund:

1. He did not treat Mr. Burger and only saw him one time in conjunction with his workers' compensation claim.
2. He indicated that he was not made aware that when the employee saw Dr. Jordan, he denied that he was depressed, had low moods, had irritability, had morbid thoughts, or that he had feelings of worthlessness and forgetfulness. He also testified that Mr. Burger lacks self insight to his psychiatric status and that he has a problem with the word depression.
3. He agreed pain is subjective in nature but that it depends on what the objective findings or correlates are.
4. He was asked if he was aware that Mr. Burger was fully functioning-full work duties as a carpenter at the time he was injured. Dr. Stillings testified that the employee said he was

- limping due to his back pain. While he agreed that the employee was working full time, he also testified that he did not know if he was working at full capacity.
5. Dr. Stillings testified that the employee told him pain was a chronic problem and that he did the best he could while enduring pain.
 6. He agreed that he did not see any permanent work restrictions for anything prior to the shoulder injury.
 7. He agreed that other than the one incident with Dr. Eller in the 1990's, the employee had no professional mental healthcare other than the one Community Counseling visit.
 8. He agreed that Mr. Burger's treatment for alcohol abuse was pastoral through the church. He saw no church records.
 9. He agreed that he had no past records from the employee's 1978 motor vehicle accident. He relied on what the employee told him. He had no way to verify memory loss or that employee was in a coma.
 10. He saw no records that the employee missed any work prior to the shoulder injury on a regular basis.
 11. He agreed that in making his assessments he relies extensively on the information provided by the employee, and as to the pain component he relied totally on what the employee told him. Dr. Stillings also testified that he saw no signs of symptom magnification or exaggerated pain behavior, and that the MMPI has many disguised questions in it that people really do not know what they are being asked.
 12. He did not do a physical exam of Mr. Burger.
 13. He agreed that he had the rating of Dr. Volarich. He said it would not have changed his conclusions but it certainly buttressed his opinions.

RULINGS OF LAW in 04-027294 (March 24, 2004)-

Liability of the Second Injury Fund

Paramount in making a decision in this case is whether the employee is believed to have provided credible and accurate information to the doctors and when he testified at trial. Just as critical is whether the testimony and professional opinions of Dr. Volarich, Dr. Stillings and Mr. England were based on accurate, truthful information thus making their opinions credible and worthy of belief. The only other medical evidence available is the medical records of Dr. Emanuel concerning the employee's last shoulder surgery and physical therapy notes for the same surgery. Those notes are generally confined to the shoulder surgery in 2005. They do not address the issue of whether the employee is permanently totally disabled.

The Second Injury Fund questions the credibility of the employee's evidence due to the absence of medical records for preexisting injuries, mainly the motor vehicle accident in 1978. While the employee did not offer the medical records concerning his prior injuries, the medical professionals reviewed and testified about that evidence with the exception of the 1978 records. Their opinions were based on those records, their examination and testing of the employee and on their professional experience and expertise. In addition the Second Injury Fund also questioned the employee's evidence as he worked a strenuous job and had no specific physical restrictions placed upon him prior to his March 24, 2004 shoulder surgery. The Second Injury

Fund also questions the employee's evidence as Dr. Emanuel placed no physical restrictions on the employee after the second shoulder surgery.

The employee is claiming that he is permanently and totally disabled. The term "total disability" in Section 287.020.7 RSMo, means 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. The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. See Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1992). The test for permanent total disability is whether; given the employee's situation and condition, he or she is competent to compete in the open labor market. See Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the "inability to return to any reasonable or normal employment." An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of State of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990).

The key question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she entered. See Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo. App. 1993), and Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995). The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo.

The first question that must be addressed is whether the employee is permanently and totally disabled. If the employee is permanently and totally disabled, then the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the preexisting injuries and conditions and the employee's last injury of March 24, 2004. Under Section 287.220.1, the preexisting injuries must also have constituted a hindrance or obstacle to the employee's employment or reemployment.

There is both medical and vocational evidence that addresses whether the employee is permanently and totally disabled. The opinions of Dr. Volarich, Dr. Stillings and Mr. England were that the employee was permanently and totally disabled, and this evidence was not disputed by any other professional or credible evidence. The employer-insurer settled with the employee on the primary issue concerning the shoulder injury. The Second Injury Fund did not challenge the employee's expert's opinions with other expert opinion.

Based on a review of all of the evidence, the Court finds the opinions of Dr. Volarich, Dr. Stillings and Mr. England are credible regarding whether the employee is permanently and totally disabled.

In addition to both the medical and vocational evidence, the Court found that the employee was a very credible and persuasive witness on the issue of permanent total disability. The Court assessed the employee as being a person who has worked hard his entire life and is not happy with his current situation where he cannot work. The employee offered detailed information to

the examining doctors and the Court concerning the impact that his physical conditions have had on his daily ability to function at home or in the work place. His testimony supports a conclusion that he will not be able to compete in the open labor market. The employee was observed during the hearing. In the Court's opinion his manner was flat and he exhibited characteristics of someone who was in pain. Contrary to most witnesses, the employee even asked permission to stand up and move around due to his discomfort. In the psychiatric/psychological area, the Court agrees with the general assessment of Dr. Stillings that the employee does not fully understand the concept of depression. The Court's opinion is that the employee worked hard physically all of his life and is not willing to admit to his true psychological issues due to work ethic/pride. The testimony and the observed behavior of the employee were important on the issue of permanent total disability.

Based on the credible testimony of the employee and the supporting medical and vocational rehabilitation evidence, the Court finds that no employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition and reasonably expect the employee to perform the work for which he was hired. The Court further finds that the employee is unable to compete in the open labor market and is permanently and totally disabled.

There is no credible evidence that the last injury alone caused the employee to be permanently and totally disabled. Dr. Volarich's offered his opinions as to the employee's disabilities from the March 24, 2004 injury. At the time of his initial evaluation he opined that Mr. Burger was permanently and totally disabled from a physical standpoint alone, and at the time of his second evaluation he took into consideration Dr. Stillings' evaluation with respect to the depression. Dr. Volarich opined that the psychiatric disabilities are on top of the physical disabilities, the physical disabilities in and of themselves would render the employee permanently disabled.

A Stipulation for Compromise Settlement was entered into by the employee and the employer-insurer and approved by the Division. The amount was \$73,852.24 which was based upon an approximate disability of 40% of the right shoulder and 30% of the body as a whole for psychological disability. The Court finds that as a result of the March 24, 2004 accident, the employee sustained permanent partial disability. Based upon the evidence I find that as a direct result of the last injury the employee sustained a permanent partial disability of 40% of the right shoulder and 30% permanent partial disability of the body as a whole for psychological disability. The Court further finds that the employee's last injury alone (right shoulder) did not cause the employee to be permanently and totally disabled.

The next issue to be addressed is whether the employee's pre-existing conditions were a hindrance or obstacle to his employment or reemployment. The employee testified as to the effects of his preexisting conditions/injuries on his ability to work prior to March 24, 2004. Just as importantly he discussed these preexisting disabilities with the various experts who testified in his behalf. These experts based their opinions in part on what Mr. Burger told them. There is no question that the statements and credibility of the employee are critical in assessing the concept of hindrance or obstacle. There is no credible evidence disputing whether the employee's prior injuries were debilitating in some sense and created some hindrance/obstacle, some difficulty in completing his job assignments. No evidence was introduced disputing the

testimony of the employee that he changed from heavy concrete work to millwright work due to problems that he was experiencing from his prior accidents. The employee provided multiple examples of how his prior injuries affected him physically or the steps he took to continue working. The employee testified that he was wearing out. The Court is not willing to punish the employee because he had a strong work ethic and completed his job assignments irrespective of his physical disabilities. Again the Court found the employee's testimony to be reliable and credible in this area. The experts also found that the employee's prior injuries were debilitating and provided ratings of permanent partial disability.

Based on a review of all of the evidence, the Court finds that the employee's pre-existing disabilities and conditions constituted a hindrance or obstacle to his employment or reemployment.

It was Dr. Stillings' opinion that the pre-existing disabilities and the disability associated with the injury of March 24, 2004 combined to create a greater overall disability. He specifically testified that the employee's permanent total disability is due to a combination of the primary and his preexisting injuries from the synergistic interaction. Dr. Volarich testified that the employee was permanently and totally disabled in combination from a physical standpoint despite the psychological disability. Mr. England testified that the employee was permanently and totally disabled in combination stating that it appeared to him that based on a combination of the physical and emotional problems there wouldn't be anything left that Mr. Burger would be able to do vocationally.

The Court therefore finds that the prior injuries combined synergistically with the primary shoulder injury to cause the employee's overall condition and symptoms. Based on the credible and undisputed testimony of Mr. Burger supported by the uncontradicted testimony of Dr. Volarich, Dr. Stillings and Mr. England, the Court finds that the employee is permanently and totally disabled as a result of the combination of his pre-existing injuries and conditions and the March 24, 2004 injury and conditions said injury caused.

The Court finds that the employee reached maximum medical improvement on June 20, 2005, the date that the employee was released from employment and the date that Dr. Emanuel stated that the employee reached maximum medical improvement.

Notwithstanding the fact that the employee settled his claim against the employer-insurer for a lump sum, I find that for the purpose of determining liability of the Second Injury Fund, the 40% permanent partial disability to the right shoulder and the 30% permanent partial disability to the body as a whole would have been payable in 212 and 6/7 weekly installments commencing on June 20, 2005, the end of the healing period, and continuing through July 19, 2009. Since the compensation rate for permanent partial disability is less than the amount payable for permanent total disability under Section 287.200 RSMo, the Second Injury Fund is liable for the difference between what the employee is receiving for permanent partial disability from the employer-insurer and what he is entitled to receive for permanent total disability under Section 287.220.1 RSMo. The difference between the permanent total disability rate of \$662.55 per week and the permanent partial disability rate of \$347.05 per week is \$315.50 per week. The Second Injury Fund is therefore ordered to pay to the employee the sum of \$315.50 per week for 212 6/7 weeks

commencing on June 20, 2005 and ending on July 19, 2009. Commencing on July 20, 2009 the Second Injury Fund is responsible for paying the full permanent total disability benefit to the employee at the rate of \$662.55 per week.

These payments for permanent total disability shall continue for the remainder of the employee's lifetime or until suspended if the employee is restored to his regular work or its equivalent as provided in Section 287.200 RSMO.

RULINGS OF LAW IN 04-145230 (March 26, 2004)

As the Court found the employee to be permanently and totally disable as a result of his preexisting injuries in combination with the disabilities from his accident of March 24, 2004, any decision regarding disabilities in 04-145230 is moot. Thus the employee's claim for permanent partial and permanent total disability is denied.

ATTORNEY'S FEE

Thomas J. Gregory, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: _____

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Naomi Pearson
Division of Workers' Compensation

Employee: Burger, Bradley

Injury No.: 04-027294 & 04-145230

Employee: Burger, Bradley

Injury No.: 04-027294 & 04-145230