

FINAL AWARD ALLOWING COMPENSATION

(Modifying Amended Award and Decision of Administrative Law Judge)

Injury No.: 03-077312

Employee: Larry D. Calvert
Employer: Noranda Aluminum Incorporated
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the March 11, 2011, amended award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and amended award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Introduction

The administrative law judge found the Second Injury Fund liable for 22.98 weeks of permanent partial disability benefits under § 287.220.1 RSMo. Employee filed an Application for Review arguing that he proved permanent total disability or, alternatively, that a 20% load factor would better represent the synergism between his preexisting conditions of ill and his primary injury. Employee also raises an argument that the administrative law judge improperly excluded some of his exhibits.

We agree with the administrative law judge that employee failed to prove permanent total disability, and we are not persuaded that the administrative law judge erred in ruling certain of employee's exhibits inadmissible, but we are of the opinion that the administrative law judge applied an improper analysis to the issue of Second Injury Fund liability. Because employee's Application for Review implicates that analysis, we write this opinion to modify the amended award and decision of the administrative law judge as follows.

Discussion

On page 20 of his amended award, the administrative law judge noted that, while he found the Second Injury Fund liable for permanent partial disability enhancement, he did not include some of employee's preexisting disabling conditions in his analysis: "The Court finds that the other injuries that the employee had prior to July 12, 2003, do not meet threshold levels required to trigger Second Injury Fund liability. The Court further finds that the disabilities constitute a hindrance or obstacle to employment and synergistically combine with the injuries from the accident of July 12, 2003, that also meet threshold requirements to trigger Second Injury Fund liability." These comments suggest the administrative law judge was of the opinion that if one of a worker's preexisting or primary disabilities, considered in isolation, fails to meet one of the thresholds in § 287.220.1, then that condition is ignored for all purposes when

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considering the liability of the Second Injury Fund. Such an approach has no support in the Missouri Workers' Compensation Law or in Missouri case law. We reject the administrative law judge's reasoning regarding the triggering of Second Injury Fund liability. Our analysis of the operation of the Second Injury Fund thresholds follows.

Purpose of the Second Injury Fund

The purpose of the Second Injury Fund is "to encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury." *Pierson v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 126 S.W.3d 386, 390 (Mo. 2004) (citation omitted). The Second Injury Fund statute encourages such employment by ensuring that an employer is only liable for the disability caused by the work injury. Any disability attributable to the combination of the work injury with preexisting disabilities is compensated, if at all, by the Second Injury Fund.

Purpose of the thresholds

Before 1993, any preexisting disability that was a hindrance to employment or reemployment could open the door to possible Second Injury Fund liability. The Second Injury Fund statute was amended in 1993 to limit permanent partial disability awards against the Second Injury Fund to those cases where both the preexisting disabilities and the disabilities from the work injury are more than de minimis. The provision defining what disabilities will trigger Second Injury Fund liability now states:

If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability.

The thresholds found in the quoted provision serve to protect the Second Injury Fund from enhanced permanent partial disability claims of claimants with de minimis disabilities. And that is where the service of the thresholds ends. Section 287.220.1 goes on to say:

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After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to **all injuries or conditions existing at the time the last injury was sustained** shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund...(emphasis added).

Under the plain language of the statute, once it is determined that the thresholds are met, all disabilities that exist at the time of the work injury should be considered in the calculation of Second Injury Fund liability. Likewise, the plain meaning of the phrase "disability resulting from the last injury" provides no support for discounting certain less disabling effects of a work injury, but rather clearly instructs that we include all of that disability in our calculation.

Application of the thresholds

The second threshold applies when a claimant has preexisting or primary permanent partial disability of a single major extremity ("if a major extremity injury only"). In all other circumstances, the first threshold applies.

The legislature chose two different units of measurement to describe the thresholds: "fifty weeks of compensation" for preexisting disabilities of the body as a whole; and "fifteen percent permanent partial disability" for a preexisting or primary disability to a major extremity only. We believe the legislature rested on different units of measurement to foster arithmetic simplicity.

Where a claimant has only a preexisting or primary disability to a major extremity, the legislature made "a simple 15% disability to a major extremity the threshold rather than attempt a more complex formula based on weeks of disability to various body parts at various levels." *Motton v. Outsource Int'l*, 77 S.W.3d 669, 675 (Mo. App. 2002).

But where there is more than one preexisting or primary disability, the simplicity described above cannot be achieved. In that event, we need a method to combine the various disabilities to determine claimant's overall preexisting disability as of the moment of the primary injury, as well as the overall disability resulting from the work injury. In order to combine the disabilities for comparison to the threshold, the disabilities must be converted to a common unit of measure. The legislature selected weeks of compensation as the common unit of measure.

This claim

In the instant case, employee had more than a single preexisting disabling condition and the work injury resulted in more than one disabling condition, so the first threshold applies. For both the preexisting disability and primary disability, we must determine if employee's overall disability – stated in weeks – meets or exceeds this amount.

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As to employee's preexisting disabilities, we find appropriate and affirm the administrative law judge's findings that employee suffered a 22% permanent partial disability of the body as a whole referable to his neck, 15% permanent partial disability of the body as a whole referable to his back, and 15% permanent partial disability of the left knee. In addition, based on the testimony from employee as well as the evidence of his prior workers' compensation settlements in connection with preexisting right thumb and right knee conditions, we find that employee suffered a 15% permanent partial disability of his right thumb at the 60-week level, and a 5% permanent partial disability of his right knee.

Converting employee's preexisting disabilities into weeks of compensation yields the following results: 88 weeks for the neck, 60 weeks for the back, 24 weeks for the left knee, 9 weeks for the right thumb, and 8 weeks for the right knee. The sum equals 189 weeks. Employee has met the 50-week threshold. We proceed now to analyze whether employee met the threshold for permanent partial disability resulting from the primary injury.

We find appropriate and affirm and adopt the administrative law judge's findings as to the permanent partial disability resulting from the primary injury, which are as follows: 15% of the right wrist plus one week scarring, 15% of the left elbow plus seven weeks scarring, 7.5% of the body as a whole referable to the lumbar spine, and 7.5% of the body as a whole referable to the cervical spine.

Converting employee's permanent partial disability resulting from the primary injury into weeks of compensation yields the following results: 27.25 weeks for the right wrist, 38.50 weeks for the left elbow, 30 weeks for the lumbar spine, and 30 weeks for the cervical spine. The sum is 125.75 weeks. Employee has met the 50-week threshold.

We have found that employee's preexisting conditions amount to 189 weeks of permanent partial disability, and his primary injury resulted in 125.75 weeks of permanent partial disability. The sum of these two amounts is 314.75 weeks. When we multiply the sum by the 10% load factor, the result is 31.475 weeks.

We conclude that the Second Injury Fund is liable for 31.475 weeks of permanent partial disability benefits.

Award

We modify the award of the administrative law judge as to the extent of Second Injury Fund liability.

The stipulated rate of compensation is \$347.05. The Second Injury Fund is liable to employee for \$10,923.40 in permanent partial disability benefits.

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.

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The amended award and decision of Administrative Law Judge Gary L. Robbins, issued March 11, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 8th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Larry D. Calvert

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Although I agree with the majority's analysis with respect to the thresholds under § 287.220.1 RSMo, I am convinced that the thresholds are inapplicable in this matter. This is because the evidence shows that employee is permanently and totally disabled. As a result, I believe the decision of the administrative law judge should be modified to award permanent total disability benefits from the Second Injury Fund.

Employee worked as a laborer for employer. On July 12, 2003, employee tripped over a piece of rebar and fell backwards. Employee sustained significant injuries to both arms as well as injuries to his low back and neck. At the time of this accident, employee suffered from a number of preexisting disabling conditions, including a neck fusion surgery, multiple low back strains, a right thumb injury, hearing difficulty, and problems with both knees. Following the work injury of July 2003, employee's level of functioning worsened as a result of the combination of all his disabling conditions. Employee suffers from daily neck and back pain for which he takes Norco and Celebrex and uses a TENS unit and hot packs. Employee also suffers from headaches. Employee walks with a limp. Employee has trouble driving due to the stiffness in his neck. Employee has to lie down during the day two to three times a week. The heaviest thing employee lifts is a case of soda approximately once a month. Employee has to hire a cleaning lady because he can't even sweep or mop his own floors due to his back problems. Employee has been unable to return to work.

In his appeal to this Commission, employee argues he is permanently and totally disabled due to a combination of his disabilities and limitations stemming from the work injury and his preexisting conditions of ill. Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, employee must establish that: (1) he suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

Dr. Cohen evaluated employee and opined that the disabilities resulting from employee's work injuries and his preexisting conditions combine in such a way as to render employee permanently and totally disabled. Dr. Cohen explained that employee's permanent restrictions include no prolonged standing, sitting, bending, stooping, lifting, twisting, squatting, kneeling, crawling, climbing, ladder work, or walking on uneven surfaces, and that employee should not lift more than 10 pounds. Susan Shea also evaluated employee and provided her expert vocational opinion that employee is permanently and totally disabled as a result of the combination of his disabilities stemming from the work injury and his preexisting conditions. Ms. Shea noted that employee cannot stand long enough or lift enough to perform light duty work, and that employee cannot sit long enough to perform sedentary work.

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I find the testimony from Dr. Cohen and Ms. Shea more credible than the contrary opinions from Dr. Coyle and Mr. England. Dr. Coyle was unwilling even to acknowledge that employee suffered any effects from the primary work injury. Notably, Dr. Coyle's opinion is not really a medical opinion but rather a judgment call as to whether employee really is suffering from the pain and limitations of which he complains. Dr. Coyle's basic premise is that employee is exhibiting symptom magnification, or in other words, employee is not being honest about the degree of his complaints and limitations. From a medical standpoint, I consider the testimony from Dr. Coyle to be entirely unhelpful, and while he is certainly entitled to his own views on employee's sincerity, it is our province to determine whether the witnesses in a workers' compensation proceeding are credible. I am convinced the overwhelming weight of the evidence establishes that employee is permanently and totally disabled due to a combination of his disabilities stemming from the July 2003 work injury and his preexisting disabling conditions.

The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

Treasurer of the State - Custodian of the Second Injury Fund v. Cook, 323 S.W.3d 105, 110 (Mo. App. 2010) (citations omitted).

The administrative law judge's award fails to explain how an individual who can't lift enough or stand long enough to do light duty work, can't sit down long enough to perform sedentary work, suffers from disabling pain which requires him to need to lie down unexpectedly, who walks with a limp, and who takes multiple narcotic medications to control his pain will be able to compete for jobs in the open labor market. I believe the administrative law judge inappropriately focused his analysis on employee's ability, in the past, to return to heavy labor following previous injuries. That employee was able to do so says much about employee's stoicism and his ability to overcome his limitations to be a competitive employee before July 2003, but it does not support the administrative law judge's choice to completely ignore employee's current condition. Notably, the administrative law judge stopped short of saying employee is being dishonest about his current complaints. The administrative law judge hinted that he disbelieved employee's testimony, but in his findings, he seems to dodge the question of employee's credibility: "The Court questions the accuracy or at least the degree of severity of the disabilities presented by the employee." *Award*, page 18. This is not a question we can avoid. Either employee is being honest about his present difficulties or he is not. I believe he is, and that his present condition and complaints render him permanently and totally disabled.

In sum, while I agree with the majority's analysis with respect to the thresholds for triggering Second Injury Fund liability for permanent partial disability, I believe the thresholds are inapplicable to this matter because I am convinced employee is permanently and totally disabled due to a combination of the July 2003 injury and his

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numerous preexisting conditions of ill. I would modify the decision of the administrative law judge to award permanent total disability benefits from the Second Injury Fund.

Because the majority has determined otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**AMENDED
FINAL AWARD**

Employee: Larry D. Calvert Injury No. 03-077312
Dependents: N/A
Employer: Noranda Aluminum Incorporated
Additional Party: Second Injury Fund
Insurer: Self Insured
Hearing Date: November 30, 2010 Checked by: GLR/rf

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? July 12, 2003.
5. State location where accident occurred or occupational disease contracted: New Madrid County, Missouri.
6. Was above employee in employ of above employers at time of alleged accident or occupational disease? Yes.
7. Did the employers receive proper notice? Yes.
8. Did the accidents or occupational diseases arise out of and in the course of the employment? Yes.
9. Were the claims for compensation filed within time required by law? Yes.
10. Was the employers insured by above insurers? Yes.

11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee tripped on a piece of rebar sticking out of concrete and fell backwards landing on his buttocks and arms.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Body as a whole.
14. Nature and extent of any permanent disability: Permanent partial disability. See Award.
15. Compensation paid to date for temporary total disability: \$73,964.55.
16. Value necessary medical aid paid to date by employer-insurer: \$108,053.60.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$964.76.
19. Weekly compensation rate: \$643.17 per week for temporary total and permanent total disability. \$347.05 per week for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See. Award.
23. Future requirements awarded: See Award.

The Compensation awarded to the employee 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 employee: Michael A. Moroni.

FINDINGS OF FACT AND RULINGS OF LAW

On November 30, 2010, the employee, Larry D. Calvert, appeared in person and by his attorney, Michael A. Moroni, for a final award. The employer-insurer was represented at the hearing by their attorney, Lawrence H. Rost. Assistant Attorney General Jonathan J. Lintner represented the Second Injury Fund. 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 a 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 was duly qualified as a self-insured insurer.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Noranda Aluminum Incorporated and was working under the Workers' Compensation Act.
3. On or about July 12, 2003 the employee sustained an accident or occupational disease that arose 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 is \$964.76. His rate for temporary total disability and permanent total disability is \$643.17 per week. His rate for permanent partial disability is \$347.05 per week.
7. The parties agreed that the employer-insurer paid \$108,053.60 in medical aid.
8. The parties agreed that the employer-insurer paid \$73,964.55 in temporary disability benefits.
9. The employee had no claim for previously incurred medical bills.
10. The employee had no claim for any temporary disability benefits.

ISSUES

1. Medical Causation-Whether the employee's injury was medically causally related to his accident or occupational disease?
2. Mileage-Whether the employer-insurer owes the employee any compensation for mileage?
3. Future Medical Care-Whether the employer-insurer is responsible to provide the employee future or additional medical care?
4. Permanent Partial Disability-Whether the employer-insurer has any liability for permanent partial disability compensation?
5. Permanent Total Disability-Whether the employer-insurer has any liability for permanent total disability compensation?
6. Second Injury Fund Liability-Whether the Second Injury Fund has any liability for either permanent partial or permanent total disability?

EXHIBITS

The parties offered the following exhibits:

Employee's Exhibits that were offered and received into evidence:

- A. Deposition of F. Raymond Cohen, D.O.
- B. Deposition of Susan Shea.
- C. Deposition of Bret Derrick.
- F. Medical records from Cape Neurological Associates, P.C.
- G. Medical records from Advanced Pain Center.
- H. Medical records from Advanced Pain Center.
- J. Medical records from Ferguson Medical Group.
- K. Division of Workers' Compensation records containing Stipulations For Compromise Settlement in Cases 98-132880, 91-091810, 86-093522, 87-024470 and 88-089833.
- L. Medical records from Neurologic Associates of Cape Girardeau, Inc.
- O. Medical records from Neurologic Associates of Cape Girardeau, Inc.

Employee's Exhibits that were not received into evidence:

- S. Medical records from Neurologic Associated of Cape Girardeau, Inc.
- U. Medication Lost.

Employee's Exhibits that were offered and not received into evidence:

- D. Medical records from Missouri Delta Medical Center.
- E. Medical records from Brain & NeuroSpine Clinic, P.C.
- I. Records from PT Company.
- M. Records from Health Facilities Rehab Service.
- N. Records from Health Facilities Rehab Service-Work Capacity Evaluation
- P. Medical records of Carl W. Huff, M.D. and Donald Lyerly, M.D.
- Q. Ferguson Medical Group Workmen's Compensation Report.
- R. Medical records.
- T. Various medical records.

At trial the Second Injury Fund objected to all of the employee's exhibits that were not certified. The record was left open for twenty-nine days to give the employee the opportunity to provide certifications for the objected to exhibits. As of December 3, 2010, the employee only provided certifications for Employee Exhibits, F, G, H, L, O, and S. Those exhibits are received into evidence along with the other employee exhibits that were received into evidence at trial. Employee counsel suggests that despite the provisions of Section 287.140 RSMo., the questioned records are admissible under Section 536.070 (10) RSMo. as "Business Records", even though he did not have them certified at trial and chose not to have them certified and even though the

record was specifically left open at the employee's request for this purpose. Chapter 287 provides for certification of records under the circumstances of this case. At trial, counsel laid no foundation showing that the records were made "in the regular course of business". The Second Injury Fund's objections to Employee's Exhibits D, E, I, M, N, P, Q, R, and T are sustained and those exhibits are not received into evidence. All other objections to exhibits are overruled and denied.

Employer-insurer Exhibits

1. Deposition of James J. Coyle, M.D.
2. Deposition of James M. England, Jr.
3. Records from Mid America Rehab.
4. Agreement for Compromise Settlement in Case 85-048787.
5. Agreement for Compromise Settlement in Case 88-089833.
6. Stipulation for Compromise Settlement in Case 91-091810.
7. Stipulation for Compromise Settlement in Case 98-138220.

Second Injury Fund Exhibits

None.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT-

Larry D. Calvert, the employee, and Lloyd Daughettee were the only witnesses to provide live testimony in this case. All other evidence was presented in the form of written reports, medical records or deposition testimony.

Larry D. Calvert

At trial time, Mr. Calvert was fifty-nine years old. He is a high school graduate and a marine veteran. He has worked for the employer for about thirty years and has performed a lot of different duties for them that always involved physical labor.

On July 12, 2003 he was working as a furnace operator and was involved in an accident. He tripped and fell backwards over a piece of rebar that was sticking out of the concrete as he was trying to get out of the way of a forklift. He fell backwards landing on his buttocks and both arms.

The employee has seen many medical professionals since his accident. The employee was first treated at Missouri Delta Medical Center emergency room and then saw a physician at Ferguson Medical Group. He was sent to and treated by Dr. Vaught. He was also evaluated by Dr. Yingling and Dr. Brown. Dr. Naushad first saw the employee in 2005 and provides pain

management up through 2010. The employee testified that he has to drive seventy-five miles round trip to get treatment from Dr. Naushad.

Dr. Vaught provided left elbow surgery and right hand carpal tunnel surgery. The employee has about a seven inch scar on his left elbow and about one inch of scarring on his right wrist.

The employee testified that he never returned to work after the accident.

During trial the employee asked to stand up. He testified that he says he did this as he cannot sit very long due to his back. He indicated that his neck and back hurt daily and are the two worst of his problems. He sat down after two to three minutes. He testified that he can bathe and get groceries but the heaviest thing he lifts is a case of soda from the store to the car to the house and he does this about once a month. He testified that he cannot do mopping and sweeping because of his back and he hires a cleaning lady. He testified that he mows his lawn with a riding lawn mower but this takes two to three days. He indicated it hurts his back to do so, but he cannot afford to hire anyone to mow. He further testified that he has to lie down in the day probably two to three times a week depending on how he feels. He uses a heat pad for his neck and back and he also uses a TENS unit. He does these activities two to three times a week and lies down or gets in recliner to do these activities.

The employee testified that he supports himself on \$ 1,848.00 per month from social security disability and \$451.73 from Noranda. He indicated that Noranda concluded that he could not come back to work for them.

Prior Injuries

In Case No. 85-487787 the employee settled his workers' compensation claim for right knee surgery for 5% permanent partial disability.

In Case No. 88-089833 the employee settled his workers' compensation claim for left knee surgery for 15% permanent partial disability.

In Case No. 91-091810 the employee settled his workers' compensation case for back strain/no surgery for 15% permanent partial disability of the body as a whole.

In Case No. 98-138220 the employee settled his workers' compensation for neck fusion surgery for 22% permanent partial disability of the body as a whole. This surgery was performed by Dr. Yingling.

The employee also had workers' compensation settlements involving his right thumb and hearing loss and Second Injury Fund settlements as appropriate. The employee also had a 1990 back injury that was treated conservatively. He testified that this problem flared up now and then

The employee testified that all of his employment with Noranda has involved heavy physical labor. He testified that all of the jobs required bending at the waist, kneeling, squatting, climbing

and reaching above the shoulder and head. He also agreed that he put in lots of overtime prior to his 2003 accident. He also agreed that after all of his prior surgeries no doctor imposed permanent restrictions and he always returned to his job at Noranda performing his full range of duties. The employee also testified that he had trouble doing his job at Noranda over the years. While he had no knee restrictions for his knee surgeries, the employee testified that his knees gave him trouble over the years. The employee testified that Dr. Gardner saw him after the 1998 neck injury and he still had problems with pain and turning his head. He also reported that he had hand problems, problems with his lower back and throbbing headaches that occurred one to two times a week.

The employee testified about the medication he is currently taking:

- Norco.
- Celebrex.
- Lidoderm patches.
- Xanax.

The employee in general indicated that he moved to less demanding physical jobs as a result of his injuries prior to 2003 and stated that he had to use a lighter thirty-five pound jack hammer as opposed to a bigger one. The employee's position is that he is unable to perform any work due to his disabilities.

Lloyd Daughhtee

Mr. Daughhtee has been a very good friend of the employee for a long time. He has worked with the employee on various jobs since 1976 and from 1994 to 2003 worked with him full time.

He testified that he drove his friend to St. Louis for the examination with Dr. Coyle as the employee cannot drive in the city because he cannot turn his neck. He testified that he was in the office when Dr. Coyle examined the employee. He indicated that Dr. Coyle became aggravated in the heel to toe walk as he thought the employee was faking. He testified that due to the physical set up, Dr. Coyle could not have seen the employee walk in the parking lot.

Mr. Daughhtee testified that the 2003 incident has affected the employee very much. He cannot do the things he used to do.

Medical Professionals Who Provided Treatment

On July 23, 2003 the employee came under the care of Dr. Vaught. A cervical myelogram CT was performed, and a post-myelogram CT scan was obtained on October 13, 2003. That test revealed no significant canal stenosis and only mild foraminal stenosis. A lumbar myelogram CT also did not demonstrate any evidence of significant root cutoff or central canal stenosis. Dr. Vaught did not recommend any cervical or lumbar surgical intervention.

On January 20, 2004, Dr. Yingling saw the employee for a second opinion. He reviewed the prior testing. Dr. Yingling indicated that the employee had muscular pain in his neck and lower

back but no clear cut myelopathic signs or symptoms. He indicated that the employee did not need any surgical intervention for his neck or back. He felt that the etiology of the employee's pain was musculoskeletal and unlikely to respond to surgery. He also stated that he did not believe that the employee had significant carpal tunnel syndrome and did not recommend that surgery.

As of February 4, 2004, Dr. Vaught had a long discussion with the employee and opined that no surgical intervention was warranted to address the employee's continued back and neck pain. He expressed concern that the employee continued to take narcotic medication. As of May 13, 2004, another lumbar and cervical myelogram and post-myelogram CT were obtained with no abnormalities other than a prior cervical fusion at C5-6.

On August 4, 2004, Dr. Vaught performed a left ulnar nerve decompression. On October 19, 2004, Dr. Vaught performed a right carpal tunnel release. Dr. Vaught reviewed the June 10, 2005 FCE that was performed at Mid America Rehab. As of July 6, 2005, Dr. Vaught felt that the employee could safely return to work in an office environment with a five pound lifting restriction. He did not feel that the employee could return to his job at Noranda because of his high dose of narcotic medication. Dr. Vaught opined that from a surgical standpoint, the employee was at MMI and released him from care. He did recommend that the employee continue to work with Dr. Naushad for a chronic pain management plan.

As of May 31, 2005, Dr. Naushad began treating the employee for pain management. He ordered an MRI and diagnosed a bulging disc and spinal stenosis at L4-5 and L5-S1, degenerative disc disease and neck pain after cervical fusion. Dr. Naushad continued to treat the employee and sees him on a monthly basis through 2010.

Medical Professionals Who Provided Evaluations/Ratings

Dr. Cohen

Employee's counsel sent the employee to be examined by Dr. Cohen on July 18, 2006. Dr. Cohen took a history from the employee, reviewed medical records that were provided to him, performed a physical exam on the employee, and prepared a report dated July 18, 2006. He testified that while he did have access to the report prepared by Dr. Coyle on August 17, 2005, he did not have any x-rays of the employee's lumbar spine performed in 2005 and after, did not review recent MRI's, and did not have the FCE prepared by Vic Zuccarello where symptom magnification was reported.

Dr. Cohen indicated that the employee reported prior medical problems including a 1999 neck fusion surgery performed by Dr. Yingling, a 1991 lumbar disc problem treated by Dr. Huff, left and right thumb injuries that were recovered from with no problems, a 1986 right knee surgery and a 1988 left knee surgery. Dr. Cohen testified that the employee described his prior problems and told him that he had muscle spasms and headaches after the neck surgery that required him to switch jobs at Noranda that did not require as much bending and lifting and that he was off work for six months after the back problem.

Dr. Cohen provided diagnoses due to the employee's July 12, 2003 accident:

- Status post right carpal tunnel release.
- Status post left ulnar decompression at the elbow.
- Aggravation of cervical degenerative spine disease with bilateral cervical radiculitis.
- Aggravation of lumbar degenerative spine disease.

He also provided diagnoses regarding the employee's pre-existing disabilities:

- Status post cervical fusion at C5-6 for right herniated nucleus pulposus.
- Status post left knee surgery for internal derangement.
- Status post right knee surgery for internal derangement.
- Cervical degenerative spine disease.
- Lumbar degenerative spine disease.

Dr. Cohen opined that there is a causal relationship between the four diagnoses and the employee's July 12, 2003 accident. He testified that the diagnoses are a direct result of the accident and the injuries are a substantial factor in the diagnoses. In addition, he testified that all of the employee's treatment was medically necessary and that the employee needs to continue his medical care with Dr. Naushad as he needs to be on pain medication for the rest of his life.

Dr. Cohen testified as to permanent partial disability ratings due to the primary accident:

- Forty-two percent (42%) of the cervical spine of which twenty-two percent (22%) is pre-existing and twenty percent (20%) is from the primary work-related injury.
- Thirty percent (30%) of the lumbar spine of which fifteen percent (15%) is pre-existing and fifteen percent (15%) as a direct result of the primary work-related injury.
- Thirty percent (30%) of the left elbow from the work-related injury.
- Thirty percent (30%) of the right wrist from the work-related injury.

Dr. Cohen also rated the employee's pre-existing disabilities:

- 30% of the left knee.
- 30% of the right knee.

Dr. Cohen opines that the employee's pre-existing disabilities combine, or have a synergistic effect to create a greater overall disability than their simple sum; and due to the combination of disabilities they render the employee permanently and totally disabled. Dr. Cohen also assigned permanent restrictions of no work where prolonged standing, sitting, bending, stooping, lifting, twisting, squatting, kneeling, crawling, climbing, ladder work, or walking on uneven surfaces and he should not lift more than ten pounds.

Dr. Cohen further testified that the employee's pre-existing conditions or disabilities were a hindrance or obstacle to employment or re-employment.

Counsel for Noranda asked Dr. Cohen about Dr. Vaughn's records concerning the employee's left ulnar nerve surgery and whether that injury was work related. Dr. Cohen agreed those records

state “Again, he states that he’s very pleased with the clinical results of his left ulnar decompression”. Despite agreeing that the Report of Injury is different, Dr. Cohen maintained his opinion that the ulnar nerve entrapment was caused by the July 12, 2003 accident and he based that opinion on the history where the employee said that he fell to the ground and broke his fall with his right arm. He did concede that if history received is correct then it is work-related, but does agree if the history is not correct then it would not be work related.

Upon questioning by the Second Injury Fund, Dr. Cohen confirmed that the employee was working full duty for his position at the time of his June 12, 2003 accident. He also agreed that the employee attributed more than half of his current complaints to the July 2003 accident. Dr. Cohen agreed that there were no permanent restrictions from the 1999 neck fusion, also that there were no permanent restrictions from the 1991 back injury and there were no permanent restrictions from the right knee surgery. He agreed that the employee was still doing jack-hammering at work at the time of his 2003 accident, however, he pointed out that the employee reported that he had to use a lighter jack-hammer.

Upon further questioning Dr. Cohen also confirmed that during his physical he found no muscle wasting or atrophy of the employee; that motion testing of a person is subjective in nature; the straight leg test was negative and the employee had no radiculopathy; and prior to the accident the employee was not taking any of the pain medications he was presently taking in 2005.

Dr. Coyle

The employer sent the employee to be evaluated by Dr. Coyle. Dr. Coyle is a board certified orthopedic spine surgeon. He saw the employee on August 17, 2003, took a history from the employee, reviewed medical records and conducted a physical exam. The employee complained of neck pain, back pain, pain between his shoulder blades, right arm numbness, bilateral lower extremity numbness and tingling that he dated to July 12, 2003. Dr. Coyle prepared a report dated August 17, 2003 and prepared an addendum dated August 23, 2003 after he received cervical and lumbar MRI’s to review.

At the time Dr. Coyle saw the employee he had already seen Dr. Vaught and Dr. Naushad and was on social security disability. Dr. Coyle performed a physical examination of the employee. Dr. Coyle reported that the employee presented in his office with a limp, but he had the opportunity to observe the employee walking in the parking lot and noticed a marked difference in gait. Dr. Coyle further reported that the employee groaned and winced when he got up from sitting to standing and that he declined to perform most movements that were asked of him. Dr. Coyle indicated that the employee made slight attempts. Dr. Coyle testified that he found symptom magnification/“breakway” to motor strength testing during his examination.

After his examination, Dr. Coyle reported that the objective findings were normal. He indicated that he reviewed testing (two myelograms, lumbar x-rays, CT myelogram of the cervical spine that showed the prior fusion) and said the findings were normal. He also testified that he reviewed Dr. Vaught’s records and found that there was no diagnosis but the doctor did note chronic cervical and low back pain as the employee reported that verbally. The report was that the findings were normal except that he also found give way to both upper and lower extremities.

Dr. Coyle reviewed the FCE report from Mid America Rehab and said that at that time it was reported that it indicated that the employee was not giving his best effort (heart rate not elevated, symptom magnification). Dr. Coyle testified that the employee had no muscle wasting. He said he has only said symptom magnification in about five times in twenty years of practice. He testified that his conclusion was not subjective as it was backed up by multiple normal studies. He indicated that he could not see any credible injury mechanism to explain the employee's claims of disability.

To be sure and give the employee any benefit of the doubt, Dr. Coyle testified that he wanted more films and therefore requested lumbar and cervical films be done. He said those films were done on August 23, 2005. In his supplemental evaluation, he agreed with the radiologist's interpretation which was basically normal findings with the fusion and degenerative changes noted.

Dr. Coyle's diagnosis from the July 12, 2003 accident was that the employee did not sustain an injury when he fell. He testified that there was symptom magnification responsible for the subjective findings that the employee presented. He also testified that he does not see any evidence of any permanent disability referable to the claim. Furthermore, he indicated that keeping the employee on narcotics with no diagnosis and no end in sight is inappropriate treatment.

Dr. Coyle confined his opinion to the employee's cervical and lumbar spine. He indicated that he has no opinion regarding the employee's ulnar nerve decompression or his carpal tunnel release. He testified that from an objective view point there was nothing wrong with the employee's lumbar or cervical spine other than he had a prior cervical fusion.

On cross examination by employee's counsel, Dr. Coyle was asked whether he had seen the 2009 FCE from Bret Derrick, that reported that the employee had demonstrated significant impairment. Dr. Coyle responded by saying he would be interested in seeing the details and comparing the two reports. He said there are good and bad FCE reports. He said there are internal checks such as whether a person's heart rate increases. He further testified that the 2009 FCE was four years after the 2005 FCE and the employee's status could have changed.

Functional Capacity Evaluators

Victor J. Zuccarello

The employer sent the employee to Mr. Zucharello at Mid America Rehab for FCE testing on June 10, 2005. A report was prepared with the same date. The report indicated that the employee failed 7/10 of the validity tests. Mr. Zuccarello's impressions were reported as "Sub-maximal effort, subjective reports out of proportion with function/behavior". He said that in a few minutes the employee's behavior changed from laughing and joking over the cell phone with his banker to an appearance of distress with the evaluator. His assessment was "Secondary to failed validity criteria, it was not possible to accurately identify his likely true abilities and limitations. The worker may indeed possess dysfunction, however inappropriate illness behavior was a limiting factor during the FCE". Mr.

Zuccarello was of the opinion that the employee was employable on a full-time basis in a job in at least the light work demand level using the data from the testing as a base projection of his current work capacity. He indicated that due to low heart rate levels, the employee only provided submaximal effort.

Bret Derrick

Employee's counsel sent the employee to Bret Derrick for additional FCE testing on July 20, 2009. He prepared a report of the same date. He conducted some testing in the preparation of his report. He performed a Ransford pain diagram which is filled out by the employee and indicates where the employee says his pain is. An Oswestry Low Back Pain Questionnaire was completed by the employee. Mr. Derrick reported that the employee scored 56 which qualified him for a severe disability. A Neck Disability Index was done with the employee scoring 62. Mr. Derrick says this qualified the employee as "crippled".

Mr. Derrick indicated that the 58th percentile is an average score for hand testing. He reported that the employee scored in the 12th percentile for males on his left side and in the 10th percentile on the right hand. Mr. Derrick therefore reported that the employee's right hand is weak compared to the normal population. He also reported that the employee had joint immobility in his hands, arms shoulders and neck and that his dexterity was also very low, less than the 1st percentile.

Other physical findings that were reported were:

- A mild limp on the left.
- The employee could not bend forward at the waist but once and was impaired in this type of testing.
- The employee scored very weak in material handling.
- The employee noted back pain after sitting for 15-20 minutes every time. The report indicated that he could sit for 30 minutes.
- As to standing the employee was uncomfortable after 15 minutes. Mr. Derrick reported this as a huge issue.

Mr. Derrick reported that from his observation he thought the employee was giving good effort; pain did limit him. He indicated that inconsistency of effort can be a symptom of chronic pain but pointed out it has nothing to do with sincerity.

Mr. Derrick summarized by saying that "Mr. Calvert demonstrates continued significant impairment related to his chronic musculoskeletal conditions. His present level of occupational and personal disability is supported by the findings in this FCE test". His assessment was that the employee "... is able to function at the light/sedentary physical demands classification according to the D.O.T., U.S. Department of Labor".

Mr. Derrick was questioned by counsel for the employer. He agreed that the employee marked the pain diagram and that marking the pain diagram is purely a subjective exercise by the employee. He also agreed that there are no tools to measure pain; therefore a person could write

anything they want and exaggerate their pain level. Mr. Derrick responded that they asked people to be truthful and the employee said he would be truthful.

Mr. Derrick also indicated that Oswestry testing is purely subjective and he relies on the honesty of the person being tested. He acknowledged that a person could exaggerate their pain levels. Mr. Derrick said he is not too crazy about Waddell's testing and did not administer such testing as they are little benefit and were never intended for symptom magnification.

When questioned by the Second Injury Fund Mr. Derrick indicated that the employee's right hand is weaker in comparison than the left but the left hand and right hand are within normal limits. He also indicated that the employee complained of neck pain with left shoulder movement and only complained of right shoulder pain with right shoulder movement. Mr. Derrick stated that his objective testing led him to believe that the employee had significant back impairment and this caused him to believe that the employee had significant low back disability. He reported that the employee could function in the light/sedentary level physical demands classification, but also acknowledged that employee told Mr. England he could lift 20-25 pounds occasionally and that would place him in the medium category.

Mr. Derrick also agreed that he did not measure the employee's heart levels. He indicated that he would defer to a vocational rehabilitation expert.

Vocational Evaluators

Susan Shea

Employee's counsel also sent the employee to be evaluated by Susan Shea who is a Certified Rehabilitation Counselor. She saw the employee on October 8, 2008 and prepared her report the same day.

Ms. Shea's ultimate conclusion was that the employee was unemployable in the open labor market; a normal employer would not hire him. She made specific statements which she says justified her opinion:

- The employee cannot do any of his past work.
- The employee's has restrictions that prevent him from performing any work for which he would be qualified.
- The employee's pain precludes him from working.
- That the narcotic medication the employee is taking precluded him from working around hazardous machinery.
- Ms. Shea reported that Dr. Cohen said that the employee had to lie down on the floor at least three times a day for 30 minutes. She says that in and of itself this could have a large effect on work indicating that if the employee has to lie down three times a day that would keep him from regular work.
- The employee was 57 when she saw him. She says that after 50 it is more difficult for an individual to adjust to new types of work from a vocational standpoint.

- The employee's physical limitations prohibit training, his lifting ability, his ability to sit and stand would disallow him to take part in training.
- The employee's numerous surgeries and medical issues would provide a disincentive to the typical employer for hiring him.

On cross-examination she agreed that Dr. Cohen did no testing when he saw the employee and she did not provide any vocational testing. She reported that the employee's restrictions were such that he would not be able to work regardless of his academic level. She agreed that Dr. Cohen's restrictions were based on the subjective complaints of the employee; that is how you would get information regarding pain and so forth. She also stated that Dr. Cohen is a medical doctor who is qualified to impose restrictions and she defers to him as to how he comes to his conclusions.

Ms. Shea also stated that she did not get to review the Mid America FCE and indicated that it would have been helpful. She was aware though that Dr. Cohen's report did indicate symptom magnification. She testified that she agreed with Dr. Cohen's assessment that the employee's pre-existing medical conditions combined with the primary work injury of July 12, 2003 to cause the employee's permanent and total disability.

During questioning by the Second Injury Fund, Mr. Shea acknowledged that she relied heavily on what the employee said in formulating her opinions and specifically relied on what he said about pain in his back, neck, legs and arms. She agreed that the employee had a back strain and neck fusion surgery in the past but always returned to Noranda at full duty after all of his pre-existing injuries. She also agreed that the employee did not have any back or neck surgery as a result of his July 12, 2003 accident. She agreed that prior to the 2003 accident there were no work restrictions that were given by any doctor. She also agreed that prior to the 2003 accident the employee was standing and bending and lifting as part of his job.

Ms. Shea also was aware that the employee did not put forth optimal effort at the FCE testing as his heart rate did not go up, but she did not include that in her report. Ms. Shea agreed that the employee had surgery to his right wrist and left elbow since the accident and confirmed concerning the employee's arms and hand, that Dr. Brown reported that he could return to his job at Noranda.

Ms. Shea was questioned about a person's motivation to work. She knew that the employee was receiving social security income. She stated that a person must be motivated to return to work and that the motivation to work would be affected if a person could get more money by not working than working.

James M. England Jr.

The employer sent the employee to be evaluated by Mr. England. He saw the employee on March 12, 2010 and prepared a report that same day. As is his custom, Mr. England took a history from the employee, reviewed medical records and performed some testing.

Mr. England's ultimate opinion was that the employee could function in the sedentary to light range.

During questioning by employee's counsel Mr. England testified that his opinion that the employee could work in the light and sedentary range depended on the various doctors opinions. He said that several of the doctors did not give restrictions and Dr. Vaught's 20 pound lifting restriction puts the employee in the light range of exertion. He says if Dr. Cohen's restrictions are accurate then the employee would be limited to a sedentary level rather than a light level of exertion. He also agreed that the narcotic pain medication would affect employability depending on the occupation and their effect on the individual.

During cross examination by the Second Injury Fund, Mr. England testified that the employee is unemployable only if you consider Dr. Cohen's findings of total disability. His opinion was that if you do not assume his opinion then the employee is employable in some capacity.

He also testified that prior to 2003 the employee had no specific doctor imposed restrictions. He further indicated that it is a disincentive to work if the employee can get a similar income from retirement and social security to that from working.

RULINGS OF LAW

In reviewing and examining evidence in all cases, credibility, therefore reliability and believability is critical. The trier of fact always has to make critical determinations and value judgments in weighing evidence supporting the same subject.

This especially holds true in this case. It is also true that credibility, believability and reliability can shift depending on whether you are considering straight testimony of a witness, credibility of a witness's testimony that is supported by medical evidence, credibility of testimony when the testifier is talking about pre-existing problems or disabilities, permanent partial disability or permanent total disability.

The Court has gone through this process in this case and has determined that different witnesses have presented credible evidence depending on the subject matter under consideration and were deemed to provide incredible evidence on a different subject.

Medical Causation

The employer admitted accident in this case and spent \$108,053.60 in medical care for the accident. However, the employer is now disputing that the employee's neck, low back, left elbow and right wrist injuries were medically causally related to the accident. The employee fell backwards on July 12, 2003 and testified that he landed on his buttocks and arms. In his amended claim he indicated that he injured his right arm, neck, low back, right wrist, left arm and hand.

As a result of his injury the employee had surgery on his left elbow and right wrist. He did not have any surgery on his back and neck and no such surgery was ever recommended.

The Court finds the employee's testimony credible to the extent that he injured both of his arms, his neck and back when he fell. On this issue his testimony is supported by credible medical evidence. Dr. Vaught performed a left ulnar nerve decompression surgery in August 2004 and a right carpal tunnel surgery in October 2004. It was his testimony that the left ulnar neuropathy and right carpal tunnel release were related to the employee's accident. The Court finds that the testimony of Dr. Cohen is more credible than the testimony of Dr. Coyle on the issue of medical causation.

Based on a consideration and weighing of all evidence, the Court finds that the employee's accident of July 12, 2003 caused injuries to the employee's right arm, neck, low back, right wrist, left arm and that any medical care provided by the employer was medically casually related to the accident.

Mileage

The employee testified that he was not reimbursed for mileage for twelve trips for medical care from Malden, Missouri to Poplar Bluff, Missouri. He testified that a round trip was 78 miles. This issue and the employee's testimony were not contested. The employer is ordered to pay to the employee \$468.00 as reimbursement for mileage for authorized medical care (12 x 78 miles = 936 miles)(936 x \$.050 = \$468.00).

Future Medical Care

In the pre-trial conference employee's counsel claimed that the employee was entitled to additional or future medical care. Employee's counsel did not specifically address this issue in his proposed findings. The Court has found for the employee on the issue of medical causation.

At the time of trial the employee was receiving pain management from Dr. Naushad that was being performed to cure and relieve the employee from the effects of his July 12, 2003 accident. Dr. Coyle saw no evidence of permanent disability; obviously his opinion is that the employee's situation does not justify such care. He also testified that keeping the employee on narcotics was inappropriate. Dr. Cohen testified that all of the employee's medical care was appropriate and that the employee needs to continue his care with Dr. Naushad. During the course of his treatment, Dr. Vaught recommended that the employee continue to work with Dr. Naushad for chronic pain management.

At the time of trial, Dr. Naushad was treating the employee for pain management. On this issue the Court finds that the testimony of Dr. Cohen is more credible than the testimony of Dr. Coyle. The Court orders that the employer provide medical treatment for chronic pain management under the direction and control of Dr. Naushad as is necessary to cure and relieve the employee from the effects of his accident.

Permanent Total Disability

In this case the employee is claiming that he is permanently and totally disabled due to a combination of the disabilities resulting from his July 13, 2003 accident and his pre-existing disabilities. The employer and the Second Injury Fund claim that they are not responsible for permanent total disability compensation, but by argument seem to concede that they may have some liability for permanent partial disability compensation.

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 pre-existing injuries and conditions from the employee’s last injury of July 12, 2003. Under Section 287.220.1, the pre-existing injuries must also have constituted a hindrance or obstacle to the employee’s employment or re-employment.

Given the facts in this case, the Court finds that the employee has not met his burden of proof on the issue of permanent total disability and does not find that the employee is permanently and totally disabled. Therefore, the Court finds that neither the employer nor the Second Injury Fund is liable for permanent total disability compensation.

The Court does not find that the testimony of the employee as to permanent total disability, supported by the expert opinions of Dr. Cohen and Susan Shea constitutes consistent and credible evidence that convinces the Court that the employee is permanently and totally disabled as a result of his July 12, 2003 accident or from a combination of disabilities from his accident of July 12, 2003 and his pre-existing disabilities.

The Court specifically finds that the opinions of Dr. Coyle, Vic Zuccarello, Mr. England and even Bret Derrick are more credible as to the employee's employability than the testimony and opinions of Dr. Cohen and Susan Shea. While it might be difficult for the employee to find suitable employment, the Court believes that the evidence in this case is more credible than not that the employee is able to perform the duties of some jobs and is employable. Multiple witnesses have provided their opinion that the employee is able to find light or sedentary employment.

The Court does not accept the employee's testimony that he is no longer able to work due to the effects of the disabilities from his July 12, 2003 accident alone. The Court does not accept the employee's testimony that he is no longer able to work due to the effects of the disabilities from his last accident and those that existed prior to July 12, 2003.

There is no question that the employee had several accidents and some surgeries prior to his work accident. While they may have affected the employee in some ways, the evidence is that no physician ever placed any permanent work restrictions on the employee prior to July 12, 2003. The employee properly testified that he worked for the employer performing hard physical labor prior to July 12, 2003. However, he always returned to hard physical labor employment and was able to do his job. The employee did testify that some jobs were harder for him to do and that he had to use a smaller jackhammer. This testimony is diminished in value as he also testified that he worked substantial overtime prior to his 2003 accident.

The employee testified that his main disability is confined to his back and neck and involved pain. Despite substantial medical care and testing, despite the evaluations of multiple doctors, the consensus is that no objective evidence can be found that supports the severity of the employee's claims. The FCE testing also brings up the concept of symptom magnification and lack of effort. The reports of Mr. Zuccarello and Mr. Derrick are strikingly different in their assessment of their test results. Did the employee give a good effort? As Dr. Coyle pointed out, an elevated heart rate is a very important factor in determining whether a person put forth effort during their FCE testing. Mr. Zuccarello indicated that there was no heart rate elevation during his testing; he reported the employee's efforts as submaximal. Mr. Derrick indicated that he did not measure heart rate elevation but said the employee gave good effort. The testing was years apart. Interestingly, while aspects of the two FCE's are diametrically opposed, Mr. Zuccarello reported that the employee could work at a light duty level, and Mr. Derrick reported that the employee could function in the light/sedentary level. It is the opinion of Dr. Cohen, supported by Susan Shea that says the employee is permanently and totally disabled. Given all of the other evidence in this case, on this subject their testimony is specifically found to lack credibility, reliability and believability. As they have said they rely on the information provided largely by the employee in support of their opinions. The Court questions the accuracy or at least the degree of severity of the disabilities presented by the employee.

After consideration of all of the evidence, the Court does not find that the employee has met his burden of proof on the issue of permanent total disability to prove that he is unemployable in the open labor either as a result of the accident of July 12, 2003 or the combination of the disabilities

that pre-existed that accident and the disabilities that resulted from that accident. Therefore, neither the employer nor the Second Injury Fund has any liability for permanent total disability compensation.

Permanent Partial Disability as to the Employer

In the pre-trial conference the parties presented permanent partial disability of the employer as an issue. The employee did not choose to address this issue in his proposed findings.

As a result of his accident the employee received medical care for his neck, back, left elbow and right hand. While he did not have surgery to his back or neck, the employee did have right carpal tunnel and left ulnar nerve surgery. The Court ruled in favor of the employee on the issue of medical causation. While the employee may not be permanently and totally disabled, he has presented credible evidence as to the issue of permanent partial disability.

Dr. Cohen provided permanent partial disability ratings for the employee's July 12, 2003 injuries. He rated the employee's cervical spine at 20%, his lumbar spine at 15%, his left elbow at 30% and his right wrist at 30%. Dr. Coyle indicated that the employee did not sustain an injury when he fell and offered no specific rating for the employee's ulnar or carpal tunnel release.

On the topic of permanent partial disability, the Court finds that parts of the opinions of Dr. Coyle and part of the opinions of Dr. Cohen are credible. The Court finds that neither of the doctor's opinions is credible in all contexts.

While the Court found that the employee did not have sufficient evidence to meet his burden of proof for permanent total disability, the Court finds that the employee has presented sufficient evidence to meet his burden of proof for permanent partial disability. After a consideration of all of the evidence offered by the employee and the employer, the Court finds that the employee sustained a 15% permanent partial disability as a result of his right carpal tunnel surgery and one week of scarring ($175 \times 15\% = 26.25$ weeks)(26.25 weeks plus 1 week scarring = 27.25 weeks). The Court additionally finds that the employee has a 15% permanent partial disability of the left elbow and seven weeks scarring ($210 \times 15\% = 31.50$ weeks)(31.50 weeks + 7 weeks scarring = 38.50 weeks). The Court additionally finds that the employee has a 7½% permanent partial disability to his cervical spine ($400 \times 7.5\% = 30$ weeks). The Court also finds that the employee has an additional 7½% permanent partial disability to his lumbar spine ($400 \times 7.5\% = 30$ weeks). The Court does not award multiplicity in this case. In total the Court finds that the employee is entitled to 125.75 weeks of permanent partial disability compensation. The Court orders that the employer pay to the employee \$43,651.80 as compensation for permanent partial disability ($125.75 \times \$347.05 = \$43,641.54$).

Permanent Partial Disability as to the Second Injury Fund

In the pre-trial conference the parties presented permanent partial disability as to the Second Injury Fund as an issue. The employee did not choose to address this issue in his proposed findings.

While the Court found that the employee did not have sufficient evidence to meet his burden of proof for permanent total disability, the Court finds that the employee has presented sufficient evidence to trigger Second Injury Fund liability for compensation due to a consideration of the employee's disabilities that took place before July 12, 2003 and the disabilities that resulted from that accident.

The Court finds the testimony of Dr. Cohen on the topics of hindrance and obstacle and synergism to be more credible than the opinion of Dr. Coyle.

The Court finds that the employee's pre-existing cases/injuries resulted in permanent partial disability as follows:

- In Case No. 88-089833 that Court finds that he employee sustained a 15% permanent partial disability to his left knee.
- In Case No. 91-091810 the Court finds that the employee sustained a 15% disability to his body as a whole.
- In Case No. 98-138220 the Court finds that the employee sustained a 22% permanent partial disability to his body as a whole regarding his neck.

The Court finds that the other injuries that the employee had prior to July 12, 2003 do not meet threshold levels required to trigger Second Injury Fund liability. The Court further finds that the disabilities constitute a hindrance or obstacle to employment and synergistically combine with the injuries from the accident of July 12, 2003 that also meet threshold requirements to trigger Second Injury Fund liability. The Court orders that a load of 10% be applied in this case.

The Court orders that the Second Injury Fund pay to the employee \$7,975.21 (57.75 weeks from the primary case and 172 weeks from the pre-existing injuries = 229.75 weeks. $229.75 \times .10 = 22.98$. $22.98 \times \$347.05 = \$7,975.21$)

ATTORNEY'S FEE

Michael A. Moroni, 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.

Employee: Larry D. Calvert

Injury No. 03-077312

Date: _____ Made by:

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

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

FINAL AWARD ALLOWING COMPENSATION
(After Mandate from the Missouri Court of Appeals
for the Southern District)

Injury No.: 03-077312

Employee: Larry D. Calvert
Employer: Noranda Aluminum Incorporated
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

On November 27, 2013, the Missouri Court of Appeals, Southern District, issued an opinion affirming in part and reversing and remanding in part the December 8, 2011, award and decision of the Labor and Industrial Relations Commission (Commission). *Larry D. Calvert v. Treasurer of the State of Missouri, Custodian of Second Injury Fund*, SD31751 & SD31807 (November 27, 2013). By mandate dated February 5, 2014, the Court confirmed its decision to affirm in part and to reverse and remand in part the Commission's award and remanded this matter to the Commission with directions to recalculate the benefits due employee from the Second Injury Fund to exclude preexisting disability to employee's thumb and any scarring.

We note that the Court left undisturbed our factual findings with respect to the nature and extent of employee's permanent partial disability referable to his preexisting conditions of ill-being and to the primary injury. Excluding, per the Court's mandate, the preexisting disability to employee's thumb and any scarring, our findings referable to employee's other conditions were (and continue to be) as follows.

Preexisting conditions of ill-being

At the time of the primary injury, employee suffered a 22% permanent partial disability of the body as a whole referable to his neck, 15% permanent partial disability of the body as a whole referable to his back, 15% permanent partial disability of the left knee, and a 5% permanent partial disability of his right knee.

Applying § 287.190 RSMo to convert employee's preexisting disabilities into weeks of compensation yields the following results: 88 weeks for the neck, 60 weeks for the back, 24 weeks for the left knee, and 8 weeks for the right knee. The sum equals 180 weeks.

The primary injury

As a result of the primary injury, employee suffered the following permanent partially disabling conditions: 15% of the right wrist, 15% of the left elbow, 7.5% of the body as a whole referable to the lumbar spine, and 7.5% of the body as a whole referable to the cervical spine.

Converting employee's permanent partial disability resulting from the primary injury into weeks of compensation yields the following results: 26.25 weeks for the right wrist, 31.5

Employee: Larry D. Calvert

- 2 -

weeks for the left elbow, 30 weeks for the lumbar spine, and 30 weeks for the cervical spine. The sum is 117.75 weeks.

Pursuant to the Court's mandate, we have calculated 180 weeks of preexisting permanent partial disability and 117.75 weeks of permanent partial disability referable to the primary injury. The sum of these amounts is 297.75 weeks. Applying the 10% synergy factor, the result is 29.775 weeks.

We conclude that the Second Injury Fund is liable for 29.775 weeks of permanent partial disability benefits. The stipulated rate of compensation for permanent partial disability benefits is \$347.05. The Second Injury Fund is liable to employee for \$10,333.41 in permanent partial disability benefits.

Award

Pursuant to the Court's mandate, the Second Injury Fund is liable to employee for \$10,333.41 in permanent partial disability benefits.

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

Given at Jefferson City, State of Missouri, this 26th day of February 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary