

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

Injury No. 06-042563

Employee: Melvin Campbell
Employer: Vantage Homes (Settled)
Insurer: Cincinnati Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to determine the sole issue of Second Injury Fund liability.

The administrative law judge rendered the following determinations: (1) employee failed to prove by a reasonable certainty that he is permanently and totally disabled as a result of a combination of the work injury of May 1, 2006, and his preexisting conditions or disabilities; and (2) employee met his burden of proving Second Injury Fund liability for permanent partial disability in the amount of 43.18 weeks.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred in finding the Second Injury Fund is not liable for permanent total disability benefits.

For the reasons stated below, we modify the award of the administrative law judge referable to the issue of Second Injury Fund liability.

Discussion

Permanent total disability

The administrative law judge accurately recounted the facts pertinent to the primary injury, employee's preexisting conditions of ill being, employee's medical history, and the testimony provided by the evaluating experts. Accordingly, there is no need for us to supply additional findings, and instead we hereby adopt and incorporate the administrative law judge's findings as to these matters. We also deem appropriate and reasonable, and hereby adopt as our own, the administrative law judge's determinations with respect to the nature and extent of permanent partial disability referable to employee's preexisting conditions of ill-being and the primary injury.

Turning to the question of permanent total disability, we note that, in reaching his determination that employee is not permanently and totally disabled, the administrative

Employee: Melvin Campbell

- 2 -

law judge substantially relied on the opinions from the Second Injury Fund's vocational expert, James England, and on the fact that employee accepted a job offer from a friend and performed the job for about a year and a half after the primary injury. We wish to acknowledge that this is a close case, and that substantial and competent evidence exists on this record to support the administrative law judge's determinations with respect to this issue. Ultimately, however, we disagree for the following reasons.

Employee has a learning disability, a fourth grade education, and an IQ of 63. Mr. England admitted that most individuals with an IQ that low would be limited to working in sheltered workshops. Mr. England further admitted that he could not remember ever seeing someone with an IQ that low functioning in a regular job setting, and that employee's low IQ would present a "tremendous" obstacle to his learning new tasks. Mr. England did testify that employee is "competitively employable," but provided the caveat that this would only be in jobs involving repetitive types of work that can be learned through observation. Mr. England also admitted that he focused on the question of what jobs employee could physically and mentally perform, rather than the question whether any employer would be reasonably likely to hire employee to perform such jobs. The latter question is obviously more relevant for our purposes. Given these important concessions, and after careful consideration, we do not deem Mr. England's testimony to persuasively support a finding that employee is capable of competing for work in the open labor market.

With respect to employee's work for CMS Homes after the primary injury, we note that employee obtained this job from a friend and former supervisor, Jeff Sheets, who knew about employee's physical restrictions and disabilities, and who provided employee with full accommodations with regard to any heavy lifting, overhead work, or other duties employee was unable to perform. Before Mr. Sheets hired employee to work at CMS Homes, employee spent about a year and a half looking for jobs, but no employer would hire him because of his physical restrictions, age, and education. And, even though Mr. Sheets was a friend, he ultimately fired employee from CMS Homes because of employee's inability to keep up with the work. Employee looked for work continuously thereafter, but to date has not found any employer willing to hire him. Given all of these circumstances, we do not deem employee's work for CMS Homes to constitute persuasive evidence supporting a finding that employee is capable of competing for work in the open labor market.

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.

Scott v. Treasurer of Missouri-Custodian of the Second Injury Fund, 417 S.W.3d 381, 387 (Mo. App. 2014).

We deem it appropriate to infer that employee will not be the only candidate applying for any jobs available in today's open labor market, and that in order to secure competitive employment, employee will need to demonstrate his suitability for the work at a level at least equal to that of a competing applicant. When we apply the appropriate standard for permanent total disability, we find it exceedingly difficult to imagine that any reasonably prudent employer will choose employee over virtually any other candidate, given that

Employee: Melvin Campbell

- 3 -

employee cannot read or write or follow even moderately complex directions, has no transferable skills, can only perform repetitive job tasks, and can only learn such tasks through direct observation. Even if we were able to imagine employee securing a job, we find it even less likely that an employer would keep employee once his limitations were fully apparent, especially given the uncontested evidence that employee was not able to keep a job even where he was working for a friend.

In light of the above considerations, we find most persuasive the opinion from the vocational expert Jeffrey Magrowski (and we so find) that employee is unable to compete for any type of employment in the open labor market as a result of the combination of the effects of his preexisting cognitive limitations and disabilities and his physical restrictions and disability resulting from the primary injury.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "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..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have adopted the administrative law judge's findings that employee suffered from preexisting permanent partially disabling conditions referable to a learning disability and a partial right index finger amputation at the time employee sustained the primary work injury. We are convinced these conditions were serious enough to constitute hindrances or obstacles to employment. This is because we are convinced employee's preexisting conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of these preexisting conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Fund liability for PTD under Section 287.220.1 occurs when [the employee] establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. For [the employee] to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.

Lewis v. Treasurer of Mo., 435 S.W.3d 144, 157 (Mo. App. 2014).

Employee: Melvin Campbell

- 4 -

Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Id.*

We have adopted the administrative law judge's finding that, as a result of the accident on May 1, 2006, employee sustained a 45% permanent partial disability of the right shoulder. We conclude that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

We conclude employee is permanently and totally disabled owing to a combination of his preexisting disabling conditions in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total disability benefits.

Conclusion

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

The Second Injury Fund is liable for weekly permanent total disability benefits beginning June 3, 2008, at the differential rate of \$93.51 for 104.4 weeks, and thereafter at the stipulated weekly permanent total disability rate of \$458.59. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued May 7, 2014, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an 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 15th day of December 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Melvin Campbell

Injury No. 06-042563

Dependents: None

Employer: Vantage Homes (settled)

Additional Party: Second Injury Fund

Insurer: Cincinnati Ins, Co. (settled)

Hearing Date: April 30, 2013

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

Checked by: GCG/ln

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: May 1, 2006
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant was shoveling rocks into the back of a truck in the course and scope of employment and injured his right shoulder.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right Shoulder
14. Nature and extent of any permanent disability: Primary: 45% PPD right shoulder.
Pre-Existing: 18% PPD right hand and 20% BAW referable to Claimant's learning disability.
15. Compensation paid to-date for temporary disability: Undetermined
16. Value necessary medical aid paid to date by employer/insurer? Undetermined
17. Value necessary medical aid not furnished by employer/insurer? None

Employee: Melvin Campbell

Injury No. 06-042563

- 18. Employee's average weekly wages: Undetermined
- 19. Weekly compensation rate: \$458.59 TTD/\$365.08 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: Settled

22. Second Injury Fund liability: Yes

43.18 weeks of permanent partial disability from Second Injury Fund \$15,764.15

TOTAL: \$15,764.15

23. Future requirements awarded: None

Said payments to begin as of the date of this award and to be payable and be subject to modification and review as provided by law.

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

Kurt Hoener

Employee: Melvin Campbell

Injury No. 06-042563

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Melvin Campbell

Injury No: 06-042563

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Vantage Homes (settled)

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

Additional Party Second Injury Fund

Insurer: Cincinnati Ins, Co. (settled)

Checked by: GCG/ln

PRELIMINARY STATEMENT

The parties appeared before the undersigned Administrative Law Judge on April 30, 2013 for a final hearing to determine the liability of the Second Injury Fund in the matter of Melvin Campbell ("Claimant"). Attorney Kurt Hoener represented Claimant. Assistant Attorney General Tracey Cordia represented the Second Injury Fund ("SIF"). The Employer, Vantage Homes ("Employer"), and its Insurer, previously settled with Claimant and did not participate in the hearing. Mr. Hoener requested attorney fees in the amount of 25%. The Parties filed post-trial briefs.

The parties stipulated to the following:

1. The employee sustained an accident and injury to his right shoulder arising out of and in the course of his employment on May 1, 2006 in St. Charles County, Missouri.
2. Venue is proper in St. Charles County, Missouri.
3. Employer received proper notice of the injury.
4. The Claim was filed within the time allowed by the law.
5. At the time of the injuries, employee was earning an average weekly wage, which resulted in a compensation rate of \$458.59 for temporary/permanent total disability ("TTD"/"PTD") and \$365.08 for permanent partial disability ("PPD").
6. The employee reached maximum medical improvement on June 3, 2008.

ISSUES

1. Second injury fund liability for partial or total disability

Employee: Melvin Campbell

Injury No. 06-042563

SUMMARY OF THE EVIDENCE

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge. Further, any such markings had no impact on any rulings made in this case.

EXHIBITS

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

- A. Medical records of BarnesCare St. Peters (5/5/06-6/13/06)
- B. Medical records of Dr. David Strege (9/1/06-11/2/07)
- C. Medical records of Dr. Michael Milne (12/13/07-6/3/08)
- D. Physical therapy records of Professional Rehabilitation Services (3/30/07-7/26/07)
- E. Physical therapy records of ProRehab (6/18/07-7/18/08)
- F. Affidavit of claimant re: pre-existing right hand injury dated November 2, 2009
- G. Records of Pinellas County School District (10/5/67)
- H. Report of Dr. Bruce Schlafly dated 4/7/09
- I. Report of Dr. Bruce Schlafly dated 6/7/10
- J. Deposition of Dr. Bruce Schlafly dated 6/23/10
- K. Report of Dr. Timothy Leonberger dated 2/20/12
- L. Report of Dr. Timothy Leonberger re: effects of mental status on ability to do work and related activities dated 2/27/12
- M. Deposition of Dr. Timothy Leonberger dated July 16, 2012
- N. Vocational Assessment of Dr. Jeffrey Magrowski dated April, 30, 2012
- O. Deposition of Dr. Jeffrey Magrowski dated August 27, 2012
- P. Stipulation For Compromise Settlement for Injury
#06-042563

The SIF offered the following exhibit, which was received into evidence without objection:

Exhibit I. Deposition of James England

Claimant is a now a 55 year old male (he was 49 at the time of injury) with a 4th grade level education. Claimant has no other special training. At the time of the primary injury, Claimant worked as a laborer with Vantage Homes. Claimant frequently worked overtime. His job duties required him to caulk overhead, occasionally lift up to 200 pounds a day, power wash, paint, and pick up lumber. Claimant worked for Vantage Homes for approximately nine and a half years and ended his employment in December of 2007.

Employee: Melvin Campbell

Injury No. 06-042563

On May 1, 2006, Claimant sustained an injury at work to his right shoulder. Claimant was shoveling rock and felt a pop in his arms. Claimant felt immediate pain in his neck and right shoulder.

On September 1, 2006, Claimant received a right shoulder injection. (EE Exhibit B). On February 7, 2007, Dr. Strege examined Claimant and recommended surgery. On March 15, 2007, Claimant underwent an acromioplasty and repair of rotator cuff tear of the right shoulder. (EE Exhibit B).

On April 25, 2007, Dr. Strege re-examined Claimant and recommended physical therapy. (EE Exhibit B). On June 13, 2007, Dr. Strege re-examined Claimant and allowed him to resume work activities with no overhead lifting and no lifting greater than 10 pounds. (EE Exhibit B).

On July 11, 2007, Dr. Strege re-examined Claimant and recommended work hardening. On July 27, 2007, Claimant received a right shoulder injection. (EE Exhibit B).

On August 15, 2007, Dr. Strege reviewed a functional capacity evaluation. Dr. Strege found Claimant at MMI and allowed Claimant to return to work activities avoiding frequent overhead activity with left arm and occasional lifting overhead of no greater than 15 pounds. (EE Exhibit B).

On November 2, 2007, Dr. Strege reviewed a MRI which revealed a full thickness tear of the supraspinatus tendon and recommended surgery. (EE Exhibit B).

On December 13, 2007, Dr. Milne examined Claimant and recommended surgery. Dr. Milne diagnosed right shoulder impingement, AC arthrosis, and probably rotator cuff repair failure. (EE Exhibit C). On December 26, 2007, Claimant underwent a right shoulder revision subacromial decompression, revision rotator cuff repair, distal clavicle resection, and extensive glenohumeral and subacromial debridement. (EE Exhibit C).

On May 12, 2008, Dr. Milne reviewed a functional capacity evaluation and indicated that Claimant will be able to return to regular duties in four weeks. (EE Exhibit C). On June 3, 2008, Dr. Milne found Claimant to be at MMI. Dr. Milne noted that he encouraged Claimant to try and work regular duties to see how it goes, but Claimant just does not think he will be able to and does not think his Employer will give him any breaks on the jobs Claimant does. Dr. Milne noted that for this reason, he gave Claimant a 25 pound permanent lifting restriction. (EE Exhibit C).

Claimant continues to have problems and complaints with his right shoulder. Claimant testified to limited range of motion and strength with the right shoulder. Claimant testified that he has to turn different ways when sleeping because of the right shoulder. Claimant testified that he can no longer work on cars because of his right shoulder or lift a gallon of milk. Claimant settled his primary work injury with the Employer for 45% of the right shoulder.

Approximately a year and half after the primary injury, Claimant became employed with CMS. Claimant testified that the owner of CMS came to his home to see if Claimant would

Employee: Melvin Campbell

Injury No. 06-042563

work for him. Claimant testified that the owner knew about Claimant's restrictions and hired him. Claimant testified that he was able to work at CMS within his doctor's restrictions for a year and a half. Claimant testified that he was terminated from CMS.

Claimant testified that after his employment with CMS, he filed for and received unemployment compensation. Claimant testified that he was aware that upon filing, he had to state that he was ready and willing to work. Claimant testified that nothing has changed since he received unemployment compensation.

Claimant testified that he was diagnosed with a learning disability when he was 8 years old. Claimant testified that he cannot read or write. Claimant testified that he memorized the "to do" lists at work with Vantage Homes. Claimant testified that he has problems reading lists but can catch some words on signs. Despite his learning disability, Claimant was able to obtain and sustain employment with various employers. Claimant was also able to learn to change car transmissions, gaskets, and tires. Claimant testified that he was a star employee before his 2006 injury.

Moreover, Claimant sustained a pre-existing injury to his right index finger when he was 16. A part of Claimant's right index finger was amputated. Claimant has difficulties picking up items and frequently drops things. Claimant has problems with grasping and a loss of strength.

Prior to the primary work injury, Claimant sustained an injury to his right arm. He was diagnosed with a right arm fracture and placed in a cast for 6 weeks. Claimant testified that he sometimes gets pain and has weakness in his arm. Claimant testified that this injury made him work his other arm harder.

In addition, Claimant sustained an injury to his eyes before the primary injury. Claimant testified that he experiences blind spots on occasion when in certain lighting. Sometimes, Claimant has pain in his eyes. Claimant testified that this condition has become worse since the primary injury.

Currently, Claimant spends his day watching television, playing with his Grandson, and talking to neighbors. Claimant testified that he watches his Grandson approximately 3 days a week, takes out the trash, and grocery shops.

DR. BRUCE SCHLAFLY

Dr. Schlafly performed an independent medical examination on behalf of Claimant on April 7, 2009. Dr. Schlafly noted that Claimant has an amputation of his right index finger, otherwise has good range of motion at his elbows, forearms, hands, and wrists. Dr. Schlafly noted good thenar and first dorsal interossei muscle function in the hands, and good sensation is also present in the hands and fingers. (EE Exhibit H, p.5). Dr. Schlafly noted that Claimant injured both shoulders on May 1, 2006. Claimant reported that the left shoulder problem was always quite mild and had mild, intermittent complaints at the left shoulder. (EE Exhibit H, p. 5).

Employee: Melvin Campbell

Injury No. 06-042563

Dr. Schlafly found that Claimant had a 65% permanent partial disability of the right shoulder due to the work injury and a 5% permanent partial disability of the left shoulder due to the injury. (EE Exhibit H, p.6). Dr. Schlafly opined that Claimant is no longer fit for duty that requires overhead reaching with the right arm and no lifting greater than 25 pounds using both arms. (EE Exhibit H, p.6). Dr. Schlafly opined that Claimant had a 100% permanent partial disability of the right index finger at the distal joint due to the amputation. Dr. Schlafly opined that Claimant has a combination of disabilities that creates a synergistic effect between the prior disability due to the amputation of the right index finger, and the disability of the right shoulder, giving a combined effect greater than the simple sum of components. Dr. Schlafly opined that these disabilities create an obstacle or hindrance to employment. (EE Exhibit H, p.6).

On June 7, 2010, Dr. Schlafly opined that Claimant had an 18.9% permanent partial disability to the right hand due to the amputation. (EE Exhibit I). Dr. Schlafly testified that Claimant did not complain about pain in the finger. (EE Exhibit J, p.18-19). Dr. Schlafly testified that Claimant did not report any problems or difficulties performing his job up and until the primary work injury. (EE Exhibit J, p.18).

DR. TIMOTHY LEONBERGER

On February 20, 2012, Dr. Leonberger performed a psychological examination on behalf of the Claimant. Dr. Leonberger opined that although Claimant's IQ level was measured in the "dull normal" range when he was 10, it is likely that his intellectual functioning continued to decline compared to same-age peers, as Claimant grew older. Dr. Leonberger opined that it is reasonable to assume that Claimant was functioning in the extremely low range of intellectual ability by the time he reached 18. (EE Exhibit K, p.5).

Dr. Leonberger diagnosed a reading and written expression disorder and mild mental retardation. Dr. Leonberger opined Claimant had a GAF of 60. Dr. Leonberger opined that as a result of his cognitive limitations, it would be very difficult for Claimant to work at any type of job requiring even a minimal amount of reading and/or writing. (EE Exhibit K, p.6).

Dr. Leonberger testified that people with a GAF of 60 can work and do work. (EE Exhibit M, p.31). Dr. Leonberger agreed that jobs do exist that do not involve reading or writing. (EE Exhibit M, p.32-33). Dr. Leonberger did not render an opinion as to whether the Claimant was permanently and totally disabled. (EE Exhibit M, p.36). Dr. Leonberger testified that he based his opinions on Claimant's abilities when he tested Claimant. (EE Exhibit M, p.37).

DR. JEFFREY MAGROWSKI

On April 23, 2012, Dr. Magrowski performed an independent vocational evaluation on behalf of the Claimant. Dr. Magrowski opined that with Claimant's physical restrictions, Claimant could perform light to limited medium work activity such as an usher, cashier, or transporter. (EE Exhibit N, p.7). Dr. Magrowski opined that with Claimant's psychological limitations, Claimant would not be candidate for any type of employment in the open labor market. (EE Exhibit N, p.8). Dr. Magrowski found that Claimant would have some transferable skills involving construction, physical labor, and use of power tools. (EE Exhibit O, p.24).

Employee: Melvin Campbell

Injury No. 06-042563

Dr. Magrowski agreed that there are light duty jobs that do not require reading and writing. (EE Exhibit O, p.26). Dr. Magrowski testified that there are light factory type jobs that do not require reading and writing. (EE Exhibit O, p.27).

MR. JIM ENGLAND

Mr. England performed a vocational records review on behalf of the SIF. Mr. England opined that even though Claimant may be limited to light work activity, that does not disable Claimant. Mr. England opined that there would be no contraindication under restrictions noted by the doctors to prevent Claimant from doing things such as office cleaning, light assembly or packing, bussing of tables in a restaurant, or perhaps working as a dishwasher. (SIF Exhibit I, Depo Exhibit II).

Mr. England admitted that he did not specifically review Dr. Leonberger's report or deposition. (SIF Exhibit I, p.16). However, Mr. England testified that he did see Jeff Magrowski's report which referred to Dr. Leonberger's report. (SIF Exhibit I, p.16). Mr. England testified that in doing the evaluation, he factored into his opinions the fact that Claimant cannot read or write. (SIF Exhibit I, p.28). Mr. England testified that he never assumed that Claimant could learn to read or write in rendering his opinions. (SIF Exhibit I, p.29).

Mr. England testified that in many cases someone with an IQ of 63 would probably be in a sheltered workshop rather than in a regular work setting. (SIF Exhibit I, p.20). Mr. England testified that Claimant performed well beyond what this kind of IQ of 63 would indicate. (SIF Exhibit I, p.20). Mr. England testified that in 39 years of doing his job, he cannot remember seeing somebody with an IQ this low that was able to function in a regular job setting and work independently with that low of an IQ. (SIF Exhibit I, p.20-21).

Mr. England testified that age would not really matter for these kinds of jobs that he thought Claimant could perform. (SIF Exhibit I, p.25). Mr. England testified that the Claimant is competitively employable but only in simple repetitive kinds of work that can be learned through observation and that do not require reading and writing. (SIF Exhibit I, p.35). Mr. England testified that if Claimant truly has an IQ of 63 and was able to work before, Claimant should still be able to do similar types of work to that now. (SIF Exhibit I, p.37).

FINDINGS OF FACT & RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those

Employee: Melvin Campbell

Injury No. 06-042563

elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing *Cook v. Sunnen Prods. Corp.*, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)). However, the employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995); *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1974).

PERMANENT TOTAL DISABILITY

Claimant suffered a work related injury on May 1, 2006. The injury to the right shoulder required two surgeries to cure and relieve the effects of the injury. Based on the testimony of Claimant, the medical evidence, and other evidence, including but not limited to the stipulation for compromise settlement, I find Claimant suffered a permanent partial disability of 45% of the right shoulder due to the injury of May1, 2006. This injury is not totally disabling in and of itself.

In computing permanent and total disability in the situation where claimant suffers from a previous disability, the ALJ ... first determines the degree of disability as a result of the last injury. *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D. 1995). The ALJ ... then determines "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....*" § 287.220.1, RSMo. Cases have repeatedly held the nature and extent of the preexisting disability is measured as of the date of the primary injury. See, i.e. *Gassen v. Lienbengood* 134 S.W.3d 75, 80 -81 (Mo.App. W.D.,2004), citing *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo.App.1997); and § 287.220.1. ("In order to calculate Fund liability, the [fact finder] must determine the percentage of the disability that can be attributed solely to the preexisting condition *at the time of the last injury.*") [T]he claimant must establish that an actual or measurable disability existed at this time. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App.1999 *Id*; see also *Tidwell v. Kloster Co.*, 8 S.W.3d 585, 589 (Mo.App. 1999).

Regarding the pre-existing Injuries to Claimant's right forearm and eyes, Claimant did not testify as to their effect on his ability to work, nor did any medical expert provide an opinion regarding the nature of the injury or disability which may have resulted from those injuries.

Regarding the pre-existing injury to Claimant's right hand, based Claimant's testimony regarding his limitations, and the opinion of Dr. Schlafly, Claimant has a pre-existing permanent partial disability of 18% of the right hand at the 175 week level.

Regarding Claimant's learning disability, there is no specific disability rating provided. However, based on the findings of Dr. Leonberger and his opinions regarding the Claimant's ability, the assessments of the vocational experts, and the testimony of Claimant regarding how the pre-existing learning disability affects his ability to work, Claimant has a 20% permanent partial disability to the body as a whole regarding the pre-existing learning disability.

Section 287.020.7 RSMo. (2000) defines total disability as the "inability to return to any employment and not merely...[the] inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment"

Employee: Melvin Campbell

Injury No. 06-042563

mean "that the employee is unable 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." *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo. App. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition." *Id.* at 922; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo. App. 1990). The primary determination for permanent-total disability is whether the claimant is able to compete in the open labor market given her physical condition and situation. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 210 (Mo.App. E.D. 1999)

The substantial and competent evidence in the testimony of Mr. England, Dr. Magrowski, Dr. Leonberger, and Claimant supports that Claimant is employable in the open labor market. Therefore, the SIF is not liable for permanent and total disability benefits.

No medical doctor finds Claimant to be permanently and totally disabled. Dr. Schlafly and Dr. Leonberger did not find Claimant to be permanently and totally disabled. Based on the restrictions of Dr. Milne and Dr. Schlafly, Claimant may no longer be able to work in a heavy labor position. However, Mr. England, a vocational rehabilitation expert, found jobs in the open labor market Claimant could perform that do not require reading or writing such as office cleaning, light assembly or packing, bussing of tables in a restaurant, or perhaps working as a dishwasher. (SIF Exhibit I, Depo Exhibit II). Importantly, Mr. England stressed that even though Claimant may be limited to light work activity, it does not permanently disable Claimant.

Furthermore, Dr. Magrowski is the only expert to find Claimant permanently and totally disabled in his report. However, Dr. Magrowski conceded that there are light duty jobs and light factory jobs that do not require reading and writing. (EE Exhibit O, p.26-27). Dr. Magrowski's admission is consistent with the opinions of Mr. England and enhances Mr. England's credibility. As Dr. Magrowski found, the Claimant is physically capable of light duty work. Thus, Claimant can perform a light duty job which does not require reading or writing. Therefore, the Claimant is employable in the open labor market. Claimant focuses his argument on the fact that he cannot return to jobs which require hard physical labor due to his shoulder injury, and that no other type of jobs exist that do not require reading and writing, however, the credible evidence is to the contrary.

The testimony from Dr. Leonberger supports that Claimant is employable in the open labor market. While Dr. Leonberger found that Claimant had a GAF of 60, Dr. Leonberger testified people with a GAF of 60 can work and do work. (EE Exhibit M, p.31). Even more, Dr. Leonberger agreed that jobs do exist that do not involve reading or writing, which is consistent with the opinions of Mr. England. (EE Exhibit M, p.32-33). Based on this testimony, Claimant could find work in the open labor market that does not require reading and writing despite having a GAF of 60.

Additional evidence supports that Claimant is employable in the open labor market. Claimant was able to secure a job at CMS for a year and a half after the work injury. Although he testified that accommodations were made for him regarding lifting and working overhead, he was able to complete such tasks as caulking, power washing, and other general labor duties. As

Employee: Melvin Campbell

Injury No. 06-042563

Claimant worked for a year and a half, this is more than a failed work attempt. Claimant also admitted that he was ready and willing to work when he filed for, and collected unemployment benefits. Claimant also argues he cannot compete in the open labor market because he cannot adequately fill out a job application due to his learning disability. However, even excluding the post injury job at CMS which he testified was offered by a friend, Claimant testified to having at least ten prior places of employment including Employer Vantage Homes prior to his injury of May 1, 2006. This work history negates the credibility of the assertion of Claimant's inability to apply for jobs. Further, as noted by Mr. England, not all of the former jobs were heavy labor jobs. For instance, one was sorting recyclable products at a recycling center.

In addition, Claimant has asserted Mr. England is not credible because he did not specifically read the report of Dr. Leonberger. Yet, Mr. England testified that in performing the vocational evaluation, he factored into his opinions the fact that Claimant cannot read or write. (SIF Exhibit I, p.28). Mr. England testified he never assumed Claimant could learn to read or write in rendering his opinions. (SIF Exhibit I, p.29). Mr. England also saw the conclusions of the report when reviewing Dr. Magrowski's report. Therefore, Mr. England was fully aware of Claimant's inability to read or write when rendering his opinions and conclusions. Mr. England performed a valid and thorough vocational evaluation, and his report and opinions are credible.

Claimant has failed to prove by a reasonable certainty he is permanently and totally disabled as a result of a combination of the work injury of May 1, 2006 and his pre-existing conditions or disabilities.

SIF LIABILITY

Claimant has met his burden of proof regarding SIF liability for permanent partial disability. Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. Claimant sustained a compensable last injury which resulted in permanent partial disability equivalent to 45% of the right shoulder (104.4 weeks).
2. As of the time the last injury was sustained, Claimant had the following preexisting permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:
 - a. 18% of the right hand. (31.5 weeks).
 - b. 20% of the body for learning disability. (80 weeks).

Total weeks for preexisting disabilities: 111.5

Employee: Melvin Campbell

Injury No. 06-042563

3. The credible evidence establishes that the last injury, combined with the preexisting permanent partial disabilities, causes 20% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 104.4 weeks for last injury + 111.5 weeks for preexisting injuries = 215.9 weeks x 20% = 43.18 weeks of overall greater disability.

The Second Injury Fund is liable to Claimant for \$15,764.15 in permanent partial disability benefits.

Attorney Kurt Hoener is entitled to a lien in the amount of 25% of all sums recovered as and for attorney fees for necessary legal services provided.

Made by: /s/ GRANT C. GORMAN
GRANT C. GORMAN
Chief Administrative Law Judge
Division of Workers' Compensation