Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-145233

Employee: Robert Church

Employer: Fastrak Erectors, Inc. (Settled)

Insurer: Virginia Surety Co., Inc. (Settled)

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

Date of Accident: May 9, 2002

Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 20, 2007. The award and decision of Administrative Law Judge Linda J. Wenman, issued June 20, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 20th day of February 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

_____
Alice A. Bartlett, Member

_____ John J. Hickey, Member

Attest:

_____
Secretary

AWARD

Employee: Robert Church

Injury No.: 02-145233

Dependents: N/A

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

Employer: Fastrak Erectors, Inc. (settled)

Additional Party: Second Injury Fund

Insurer: Virginia Surety Co., Inc. (settled)

Hearing Date: April 11, 2007

Checked by: LJW:tr

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 9, 2002

5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO

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: While carrying an oxygen welding tank on his back, Employee fell forward hitting his head on the ground.

12. Did accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: Cervical spine

14. Nature and extent of any permanent disability: 30% BAW referable to cervical spine previously paid by Employer,

and 30.75 weeks from the Second Injury Fund.

15. Compensation paid to-date for temporary disability: $36,206.68

16. Value necessary medical aid paid to date by employer/insurer? $42,439.98

Employee: Robert Church Injury No.: 02-145233

17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: Sufficient for maximum rates

19. Weekly compensation rate: $628.90 / $329.42

20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Second Injury Fund liability: Yes

30.75 weeks of permanent partial disability from Second Injury Fund $10,129.67

Total: $10,129.67

22. Future requirements awarded: None

Said payments to begin immediately 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 in favor of the following attorney for necessary legal services rendered to the claimant: Richard Grossman

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Church Injury No.: 02-145233

Dependents: N/A

Employer: Fastrak Erectors, Inc. (settled)

Additional Party: Second Injury Fund

Insurer: Virginia Surety Co., Inc. (settled)

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

Checked by: LJW:tr

PRELIMINARIES

A hearing for final award was held regarding the Second Injury Fund portion of the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on April 11, 2007. Post-trial memorandums were received, and the case was submitted on May 11, 2007. Attorney Richard Grossman represented Robert Church (Claimant). Assistant Attorney General Kevin Nelson represented the Second Injury Fund (SIF). The hearing for this injury number was held in conjunction with companion case #02-146173.

Prior to the start of the hearing the parties identified the issue for disposition in this case as the liability of SIF for permanent total disability (PTD), or permanent partial disability (PPD) benefits. Claimant offered Exhibits A-Q, SIF objected to Exhibit D under the seven day rule, but the remaining exhibits were admitted into the record without objection. SIF's objection to Exhibit D is overruled, and Exhibit D is admitted into evidence.

Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

Findings of Fact

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is fifty-six years old, and obtained a GED after leaving school in the 9th grade. After serving in the Marine Corps, Claimant installed equipment for Western Electric, worked on the line for Ford and Chrysler, and performed unskilled construction and factory labor.

2. Claimant has worked as an ironworker/welder since 1978, leaving the trade briefly due to a lack of work. Claimant began working for Employer during the mid 1990's. By the late 1990's Claimant was promoted to foreman. In addition to his ironworking duties, as a welder Claimant was required to carry oxygen bottles weighing approximately 100 pounds.

3. On May 9, 2002, Claimant was carrying a large oxygen bottle when he tripped over electric cables lying on the ground, and fell forward striking his head. Employer did not immediately authorize treatment, but later authorized treatment with Dr. Petkovich. Claimant last worked on December 12, 2002.

4. On October 16, 2003, Dr. Petkovich performed a C5-6, C6-7 cervical spine fusion. By April 12, 2004, Claimant complained of dizziness and numbness/tingling in both arms. A CT/myelogram demonstrated solid fusions at C5-6 and C6-7, and an EMG/NCV found no abnormalities of Claimant's upper extremities. Dr. Petkovich ordered more aggressive physical therapy, and a functional capacity examination (FCE).

5. On August 23, 2004, Dr. Petkovich noted Claimant's FCE demonstrated he could work in a medium demand work level. Dr. Petkovich restricted Claimant's lifting to ten pounds with his right upper extremity, and no overhead work with his right arm. Dr. Petkovich commented he had no medical explanation for Claimant's complaints.

6. On September 20, 2004, Claimant was found to be at maximum medical improvement (MMI). Due to his restrictions, Claimant was unable to return to work as an ironworker. On September 25, 2006, Claimant settled his claim with Employer for 30% BAW PPD referable to his cervical spine.

7. As of hearing, Claimant complains of pain, limited range of motion, headaches, and trouble swallowing due to his cervical spine fusion.

8. Claimant has preexisting injuries to his left foot, low back, left eye, and right hand. In the 1990's Claimant fractured his left foot. Claimant first injured his low back in 1991, and settled his case for 5% BAW. During 1993, Claimant injured his low back, was off work for several months, and later settled his case for 12.5% BAW. Claimant also injured his left eye in 1993, and later settled his case for 13.75% referable to his eye. During 1999, Claimant suffered a severe injury to his right index finger, which left Claimant with a severe chronic flexion contracture.

9. Dr. Cohen examined Claimant on March 14, 2005. Upon examination Dr. Cohen noted: muscle weakness and loss of sensation in the C6 dermatome pattern; decreased range of motion of Claimant's cervical spine; trigger points at C3-T1; a severe flexion contracture of Claimant's right index finger DIP joint; and lumbar spine tenderness with decreased range of motion. Dr. Cohen rated Claimant's cervical fusion at 47-48% BAW, right index finger at 20% at the 175 week level, and his low back at 20% BAW. Dr. Cohen opined Claimant's right hand and lumbar injuries were a hindrance or obstacle to employment. Dr. Cohen also opined Claimant should be restricted from any prolonged sitting, standing, climbing, grasping, lifting, ladder work, or any activities that would keep his head or neck in a single position.

10. Mr. England performed a vocational examination on April 18, 2005. Upon testing, Claimant demonstrated sufficient educational skills that would allow him to handle basic clerical functions found in entry level service employment. Mr. England did not find Claimant possessed transferable skills, and noted Claimant would be unable to return to work as an ironworker or welder, but noted Claimant would be capable of learning new skills. If Mr. England applied the work restrictions imposed by Dr. Petkovich, Mr. England indicated Claimant would be capable of performing sedentary to light work. However, when Mr. England applied the restrictions placed by Dr. Cohen, and factored in Claimant's bilateral hand problems, Mr. England opined Claimant was PTD and unable to perform in the open labor market.

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:

Claimant seeks permanent total disability benefits from SIF. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled in part). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled in part). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled in part). The Second Injury Fund

is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone. §287.220.1 *RSMo*. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995).

Claimant's medical and vocational experts have found Claimant PTD and unable to be employed in the open labor market due to a combination of his last injury (bilateral hands), and his preexisting conditions. Claimant testified regarding preexisting injuries to his right eye and left foot, but his rating physician, Dr. Cohen, did not assign disability to these body parts. The most serious of Claimant's preexisting conditions include his right index finger, his low back, and his cervical spine fusion. Claimant's right index finger does affect the use of his right hand as recognized by Dr. Petkovich's restrictions involving use of his right upper extremity. But despite his limitation, it cannot be overlooked Claimant has worked with this impairment since 1999. Claimant has also worked without restrictions placed on his low back. Claimant has never required surgery to his low back, and a review of his private physician's records, Dr. Seria, demonstrated Claimant has not sought care for lumbar spine complaints since May 1993. Regarding Claimant's cervical spine, aside from his subjective complaints, a thorough medical work-up by Dr. Petkovich demonstrated solid bony fusions at C5-6 and C6-7 with stable hardware placement, and expected range of motion limitation. Claimant's current bilateral hand complaints have also been thoroughly medically investigated. Numerous EMG/NCV's have been conducted, and the only consistent finding has been a "very mild left CTS, similar to the study done three years ago." None of the various physicians who examined Claimant have indicated he is a surgical candidate for any form of nerve entrapment. Only Dr. Cohen has termed this condition to be an "overuse disorder."

Dr. Cohen indicated he would defer to a vocational expert to determine if jobs existed within Claimant's restrictions. Mr. England testified Claimant would be capable of sedentary to light work and employable in the open labor market if the restrictions imposed by Dr. Petkovich were applied. Only when the restrictions of Dr. Cohen are considered does Mr. England conclude Claimant is PTD and unemployable in the open labor market. Dr. Cohen was not a treating physician, and he evaluated Claimant on one occasion. Dr. Petkovich provided medical and surgical care to Claimant over a sustained period of time, and thoroughly explored Claimant's complaints. I find the restrictions placed by Dr. Petkovich to be persuasive, and applying those restrictions find Claimant is capable of sedentary to light work. Claimant's request for PTD benefits from SIF is denied.

Although Claimant is not found to be PTD, a PPD benefit remains in issue. Section 287.220.1 RSMo., provides SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and pre-existing conditions must produce additional disability greater than the last injury standing alone. I find the 30% BAW PPD assigned for Claimant's cervical spine appropriate, and I adopt this percentage when considering Claimant's SIF claim. Further, I find Claimant's cervical spine injury to be a hindrance or obstacle to his employment.

I also find Claimant's lumbar spine injuries, and his 1999 right index finger injury to have been a hindrance or obstacle to his employment. Regarding Claimant's lumbar spine, Dr. Cohen rated Claimant's disability at 20% BAW. Claimant's 1999 right index finger injury was not work related, and must be assigned a percentage of disability when considering possible SIF liability. Dr. Cohen rated Claimant's preexisting disability to be 20% PPD referable to his right hand. Dr. Cohen did not rate Claimant's left foot fracture or left eye injury. Claimant did settle his eye injury for 13.75% at the 140 week level or 19.25 weeks. The Missouri Supreme Court has held that a preexisting injury to an eye is also a partial injury to the body as a whole for purposes of SIF liability. *Pierson v. Second Injury Fund*, 126 S.W.3d 386 (Mo. banc 2004).

Accordingly, based on the stipulation, Claimant's eye injury fails to meet the statutory threshold necessary for SIF liability and cannot be considered.

With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis,* 663 S.W.2d 770, 773 (Mo.App.1983) (overruled on other grounds). Based on the evidence presented, I find Claimant to have a preexisting 12.5% PPD BAW referable to his lumbar spine, and 20% PPD referable to his right hand, which when combined with his work related cervical spine injury synergistically produces a disability greater than the simple sum. I do not find Claimant's left foot or left eye injuries to have met the statutory threshold necessary for SIF liability. Accordingly, I find SIF to be liable for 30.75 weeks of PPD disability.

CONCLUSION

Claimant's work at Employer was a substantial factor in causing injury to his cervical spine. Claimant is entitled to PPD benefits from SIF. Claimant's preexisting lumbar and right index finger injuries meet the statutory threshold for SIF liability. Claimant's primary and preexisting injuries were a hindrance or obstacle to his employment. SIF is liable for 30.75 weeks of additional PPD benefits. Claimant's attorney is entitled to a 25% lien.

Date: _____ Made by:

_____

LINDA J. WENMAN

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

_____

Lucas Boling
Acting Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-146173

Employee: Robert Church

Employer: Fastrak Erectors, Inc. (Settled)

Insurer: Transportation Insurance (Settled)

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

Date of Accident: December 12, 2002

Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 20, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Linda J. Wenman, issued June 20, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20th day of February 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

_____
Alice A. Bartlett, Member

_____
John J. Hickey, Member

Attest:

_____
Secretary

AWARD

Employee: Robert Church

Injury No.: 02-146173

Dependents: N/A

Employer: Fastrak Erectors, Inc. (settled)

Additional Party: Second Injury Fund

Insurer: Transportation Insurance (settled)

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

Hearing Date: April 11, 2007

Checked by: LJW:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No

2. Was the injury or occupational disease compensable under Chapter 287? Yes

3. Was there an accident or incident of occupational disease under the Law? Yes

4. Date of accident or onset of occupational disease: December 12, 2002

5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO

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: Alleged injury to hands due to repetitive motion.

12. Did accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: Bilateral hands

14. Nature and extent of any permanent disability: 5% each hand previously paid by Employer.

15. Compensation paid to-date for temporary disability: None

16. Value necessary medical aid paid to date by employer/insurer? None

17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: Sufficient for maximum rates

19. Weekly compensation rate: $649.32 / $340.12

20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Second Injury Fund liability: None

Total: -0-

22. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Church Injury No.: 02-146173

Dependents: N/A

Employer: Fastrak Erectors, Inc. (settled)

Additional Party: Second Injury Fund

Insurer: Transportation Insurance. (settled)

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

Checked by: LJW:tr

PRELIMINARIES

A hearing for final award was held regarding the Second Injury Fund portion of the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on April 11, 2007. Post-trial memorandums were received, and the case was submitted on May 11, 2007. Attorney Richard Grossman represented Robert Church (Claimant). Assistant Attorney General Kevin Nelson represented the Second Injury Fund (SIF). The hearing for this injury number was held in conjunction with companion case #02-145233.

Prior to the start of the hearing the parties identified the issue for disposition in this case as the liability of SIF for permanent total disability (PTD), or permanent partial disability (PPD) benefits, and the appropriate date of injury. Claimant offered Exhibits A-Q, SIF objected to Exhibit D under the seven day rule, but the remaining exhibits were admitted into the record without objection. SIF's objection to Exhibit D is overruled, and Exhibit D is admitted into evidence.

Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

Findings of Fact

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is fifty-six years old, and obtained a GED after leaving school in the 9th grade. After serving in the Marine Corps, Claimant installed equipment for Western Electric, worked on the line for Ford and Chrysler, and performed unskilled construction and factory labor.

2. Claimant has worked as an ironworker/welder since 1978, leaving the trade briefly due to a lack of work. Claimant began working for Employer during the mid 1990's. By the late 1990's Claimant was promoted to foreman. In addition to his ironworking duties, as a welder Claimant was required to carry oxygen bottles weighing approximately 100 pounds.

3. On May 9, 2002, Claimant was carrying a large oxygen bottle when he tripped over electric cables lying on the ground, and fell forward striking his head. Employer did not immediately authorize treatment, but later authorized treatment with Dr. Petkovich. Claimant last worked on December 12, 2002.

4. Claimant has reported bilateral hand symptoms to health care providers since the late 1990's. On April 30, 2002, a nerve conduction study (NCV) demonstrated mild left carpal tunnel syndrome. After complaints of right hand/finger numbness, a repeat right NCV with EMG was performed on May 20, 2002, and demonstrated possible cervical radiculopathy but was negative for right carpal tunnel syndrome (CTS) or cubital tunnel syndrome. Claimant was referred for cervical evaluation.

5. On October 16, 2003, Dr. Petkovich performed a C5-6, C6-7 cervical spine fusion. By April 12, 2004, Claimant complained of dizziness and numbness/tingling in both arms. A CT/myelogram demonstrated solid fusions at C5-6 and C6-7, and an EMG/NCV performed by neurologist, Dr. Peeples, found no abnormalities of Claimant's upper extremities. Dr. Petkovich ordered more aggressive physical therapy, and a functional capacity examination (FCE). While the FCE was conducted Claimant failed seven out of twelve validity criteria, which indicated a sub-maximal effort.

6. Due to Claimant's continued complaints of numbness in both arms, Claimant was again referred to Dr. Peeples. On July 2, 2004, Dr. Peeples repeated the EMG/NCV studies, and found no abnormalities in either arm.

7. On August 23, 2004, Dr. Petkovich noted Claimant's FCE demonstrated he could work in a medium demand work level. Dr. Petkovich restricted Claimant's lifting to ten pounds with his right upper extremity, and no overhead work with his right arm. Dr. Petkovich commented he had no medical explanation for Claimant's complaints.

8. On September 20, 2004, Claimant was found to be at maximum medical improvement (MMI). Due to his restrictions, Claimant was unable to return to work as an ironworker. On September 25, 2006, Claimant

settled his claim with Employer for 30% BAW PPD referable to his cervical spine, and 5% PPD of each wrist.

9. As of hearing, Claimant complains of pain, limited range of motion, headaches, and trouble swallowing due to his cervical spine fusion. Claimant continues to complain of bilateral hand numbness and cramping. He uses splints, muscle relaxants, and pain medication to control his symptoms, but has not been told he requires surgery.

10. Claimant has preexisting injuries to his left foot, low back, left eye, and right hand. In the 1990's Claimant fractured his left foot. Claimant first injured his low back in 1991, and settled his case for 5% BAW. During 1993, Claimant injured his low back, was off work for several months, and later settled his case for 12.5% BAW. Claimant also injured his left eye in 1993, and later settled his case for 13.75% referable to his eye. During 1999, Claimant suffered a severe injury to his right index finger, which left Claimant with a severe chronic flexion contracture.

11. Dr. Cohen examined Claimant on March 14, 2005. Upon examination Dr. Cohen noted: muscle weakness and loss of sensation in the C6 dermatome pattern; decreased range of motion of Claimant's cervical spine; trigger points at C3-T1; mild loss of sensation in both median nerve distributions; a positive Phalen's sign on the right; a severe flexion contracture of Claimant's right index finger DIP joint; and lumbar spine tenderness with decreased range of motion. Dr. Cohen rated Claimant's cervical fusion at 47-48% BAW, 20% PPD referable to both wrists due to bilateral CTS and right ulnar neuropathy; right index finger at 20% at the 175 week level, and his low back at 20% BAW. Dr. Cohen opined Claimant's injuries were a hindrance or obstacle to employment. Dr. Cohen found Claimant to be PTD due to the combination of his injuries, but also indicated he would defer to a vocational expert to determine if jobs existed within Claimant's restrictions. Dr. Cohen opined Claimant should be restricted from any prolonged sitting, standing, climbing, grasping, lifting, ladder work, or any activities that would keep his head or neck in a single position, and no repetitive work with his hands.

12. Mr. England performed a vocational examination on April 18, 2005. Upon testing, Claimant demonstrated sufficient educational skills that would allow him to handle basic clerical functions found in entry level service employment. Mr. England did not find Claimant possessed transferable skills, and noted Claimant would be unable to return to work as an ironworker or welder, but noted Claimant would be capable of learning new skills. If Mr. England applied the work restrictions imposed by Dr. Petkovich, Mr. England indicated Claimant would be capable of performing sedentary to light work. However, when Mr. England applied the restrictions placed by Dr. Cohen, and factored in Claimant's bilateral hand problems, Mr. England opined Claimant was PTD and unable to perform in the open labor market.

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:

Claimant seeks permanent total disability benefits from SIF. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled in part). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled in part). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled in part). The Second Injury Fund

is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone. §287.220.1 *RSMo*. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995).

Claimant's medical and vocational experts have found Claimant PTD and unable to be employed in the open labor market due to a combination of his last injury (bilateral hands), and his preexisting conditions. Claimant testified regarding preexisting injuries to his right eye and left foot, but his rating physician, Dr. Cohen, did not assign disability to these body parts. The most serious of Claimant's preexisting conditions include his right index finger, his low back, and his cervical spine fusion. Claimant's right index finger does affect the use of his right hand as recognized by Dr. Petkovich's restrictions involving use of his right upper extremity. But despite his limitation, it cannot be overlooked Claimant has worked with this impairment since 1999. Claimant has also worked without restrictions placed on his low back. Claimant has never required surgery to his low back, and a review of his private physician's records, Dr. Seria, demonstrated Claimant has not sought care for lumbar spine complaints since May 1993. Regarding Claimant's cervical spine, aside from his subjective complaints, a thorough medical work-up by Dr. Petkovich demonstrated solid bony fusions at C5-6 and C6-7 with stable hardware placement, and expected range of motion limitation. Claimant's current bilateral hand complaints have also been thoroughly medically investigated. Numerous EMG/NCV's have been conducted, and the only consistent finding has been a "very mild left CTS, similar to the study done three years ago." None of the various physicians who examined Claimant have indicated he is a surgical candidate for any form of nerve entrapment. Only Dr. Cohen has termed this condition to be an "overuse disorder."

Dr. Cohen indicated he would defer to a vocational expert to determine if jobs existed within Claimant's restrictions. Mr. England testified Claimant would be capable of sedentary to light work and employable in the open labor market if the restrictions imposed by Dr. Petkovich were applied. Only when the restrictions of Dr. Cohen are considered does Mr. England conclude Claimant is PTD and unemployable in the open labor market. Dr. Cohen was not a treating physician, and he evaluated Claimant on one occasion. Dr. Petkovich provided medical and surgical care to Claimant over a sustained period of time, and thoroughly explored Claimant's complaints. I find the restrictions placed by Dr. Petkovich to be persuasive, and applying those restrictions find Claimant is capable of sedentary to light work. Claimant's request for PTD benefits from SIF is denied.

Turning next to potential PPD liability of SIF, §287.220.1 RSMo., provides SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and pre-existing conditions must produce additional disability greater than the last injury standing alone. Claimant settled his bilateral hand claim with Employer for 5% PPD referable to each wrist. This settlement percentage does not meet the statutorily set threshold to trigger SIF liability, and Claimant's request for PPD benefits from SIF is denied.

I find the remaining issue involving the appropriate date of injury to be moot.

CONCLUSION

Claimant is not entitled to PTD or PPD benefits from SIF. No benefits are awarded.

Date: _____ Made by:

_____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____
Lucas Boling
Acting Director
Division of Workers' Compensation

Parties are not required to exchange reports that are merely cumulative and contain information already contained in other reports.

See companion case. Treatment for both injury numbers overlapped.

Parties are not required to exchange reports that are merely cumulative and contain information already contained in other reports.