

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

Injury No.: 03-039309

Employee: Willie Clark
Employer: Superior Essex (Settled)
Insurer: Zurich North America (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

I. Introduction

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ Having reviewed the evidence, read the briefs and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the ALJ dated September 20, 2010, as supplemented herein.

II. Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

Dr. Musich found that the primary injury resulted in 15% permanent partial disability of the body as a whole referable to the cervical spine and 30% permanent partial disability referable to the lumbosacral spine "over and above the preexisting disability that ... employee suffered before [the primary injury]." With regard to employee's preexisting disabilities, Dr. Musich found that the disability ratings listed in his April 11, 2002, independent medical evaluation are ongoing and have not changed significantly. In said independent medical evaluation, Dr. Musich found that employee is 60% permanently partially disabled of the left upper extremity at the shoulder level, accompanied by an additional permanent partial disability of 50% of the right upper extremity at the shoulder level.

Dr. Musich ultimately opined that the combination of employee's past and present disabilities is significantly greater than their simple sum and will continue to produce a chronic hindrance in his routine activities of daily living. Dr. Musich deferred to a vocational expert's opinion as to employee's capability of obtaining and maintaining employment in the open labor market. Dr. Musich stated that if a vocational expert determined that there were no jobs available for employee, it would be his opinion that employee is permanently and totally disabled.

Mr. Weimholt provided the only vocational expert opinion in the case. Mr. Weimholt concluded that employee is totally disabled from employment. Mr. Weimholt opined that his disability is a result of his work-related injuries combining with his medical conditions.

¹ Statutory references are to the Revised Statutes of Missouri 2002 unless otherwise indicated.

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III. Conclusions of Law

The ALJ concluded that employee sustained 20% permanent partial disability of the body as a whole referable to the primary injury. The ALJ further concluded that employee's primary injury combined with his preexisting bilateral shoulder disabilities to result in 15% enhanced permanent partial disability against the Second Injury Fund.

In arriving at the aforementioned conclusions, the ALJ somewhat summarily denied employee's claim for permanent total disability benefits against the Second Injury Fund. The ALJ largely based this determination on a finding that Dr. Musich and Mr. Weimholt's opinions are not credible. While we agree with the ALJ's ultimate conclusions, additional support is needed.

We find that the treatment records of Dr. Petkovich competently and substantially support the ALJ's findings.

Dr. Petkovich released employee to return to work with light duty restrictions on March 17, 2003, and later released employee to his "regular job as tolerated," on May 5, 2003. Dr. Petkovich's records indicate that employee's neck and low back complaints worsened after two subsequent injuries. One of these subsequent injuries was of such significance that in Dr. Petkovich's June 10, 2003, note he listed employee's pain complaints under the subheading, "NEW PROBLEM" and stated that this subsequent injury caused employee "[p]ain in lower back with some occasional discomfort in the right lower extremity."

Dr. Petkovich's records clearly show that employee had pain complaints following both of the subsequent injuries and that employee did not stop going to work for employer until after both of those injuries had occurred. Neither Dr. Musich nor Mr. Weimholt, acknowledged these subsequent work injuries in their reports.

By not accounting for, or even addressing, employee's subsequent injuries, Dr. Musich and Mr. Weimholt's opinions do not accurately assess employee's permanent partial disability attributable to the primary injury. Without accurately assessing employee's permanent partial disability attributable to the primary injury, it is nearly impossible to accurately assess the nature and extent of Second Injury Fund liability. For the foregoing reasons, we find their opinions are not credible.

In addition to the aforementioned, Dr. Petkovich's treatment records competently and substantially support the ALJ's finding that employee is not permanently and totally disabled. Employee was released to return to his "regular job as tolerated" a mere 10 weeks after the primary injury. Contrary to employee's testimony, employee worked at least another month after being released by Dr. Petkovich. In fact, it was not until after he suffered two additional injuries before he stopped working for employer.

Section 287.020.7 RSMo defines "total disability" as the "inability to return to any employment"

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. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Gordon v. Tri-State Motor Transit Company, 908 S.W.2d 849, 853 (Mo.App. 1995) (citations omitted).

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We find that after the primary injury, employee was competent to compete in the open labor market and demonstrated the same by actually returning to work and maintaining his employment for at least another month. Whether employee was competent to compete in the open labor market after his two subsequent injuries in May and June 2003 has no bearing on our determination in this case. Our determination is based on employee's condition at the time the primary injury occurred. We find, as did the ALJ, that employee's primary injury combined with his preexisting disabilities to result in enhanced permanent partial disability, but employee was not permanently and totally disabled following the primary injury.

IV. Decision

We affirm the ALJ's award with supplementation as provided herein.

The award and decision of Administrative Law Judge Maureen Tilley, issued September 20, 2010, is affirmed, as supplemented herein, and is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 1st day of September 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: Willie Clark

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the ALJ should be modified and employee should be awarded permanent total disability benefits against the Second Injury Fund.

First, there is no dispute that employee suffered an accident that arose out of and in the course of his employment on February 22, 2003, and that the injuries resulting from said accident combined with employee's preexisting disabilities to trigger Second Injury Fund liability. The issue is whether the combination of employee's primary injury and preexisting disabilities resulted in employee's permanent and total disability.

Permanent and total disability is defined by § 287.020.7 RSMo as the "inability to return to any employment"

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. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Gordon v. Tri-State Motor Transit Company, 908 S.W.2d 849, 853 (Mo.App. 1995) (citations omitted).

In this case, the only rating doctor, Dr. Musich, stated that if a vocational expert determined that there were no jobs available for employee, it would be his opinion that employee is permanently and totally disabled. The only vocational expert, Mr. Weimholt, then concluded that employee is totally disabled from employment. There were no contradictory expert opinions offered.

The ALJ and the majority found that Dr. Musich and Mr. Weimholt's opinions are not credible based solely on the fact that they did not discuss two minor subsequent work-related injuries employee suffered after he attempted to return to work. While Dr. Musich and Mr. Weimholt did not discuss these two minor injuries, they did review the records evidencing the same. In addition, at the time of Dr. Musich's evaluation, he obtained a history from employee regarding the injuries that he sustained. The only logical explanation for the two experts not discussing said injuries is that they did not find them significant enough to discuss. In further support of the insignificance of these injuries, employee did not even remember said injuries when he was questioned about them at the final hearing.

The majority finds that Dr. Petkovich's treatment records support the ALJ's finding that Dr. Musich and Mr. Weimholt are not credible. However, Dr. Petkovich never opined as to the amount, if any, of permanent disability attributable to these two subsequent injuries.

The only expert opinions provided in this case establish that employee is permanently and totally disabled as a result of his February 22, 2003, primary injury combining with his preexisting disabilities. The ALJ and the majority cling to two insignificant notes in Dr. Petkovich's treatment records to find that these expert opinions are not credible.

I disagree with the ALJ and the majority's conclusions and find that the weight of the evidence substantially and competently supports the conclusion that employee is permanently and totally

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disabled as a result of his February 22, 2003, primary injury combining with his preexisting disabilities. As such, I would modify the award of the administrative law judge merely awarding employee permanent partial disability benefits and award employee permanent total disability benefits against the Second Injury Fund.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Curtis E. Chick, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Willie Clark Injury No. 03-039309
Dependents: N/A
Employer: Superior Essex
Additional Party: Second Injury Fund
Insurer: Zurich North America
Hearing Date: June 7, 2010 Checked by: MT/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? February 22, 2003
5. State location where accident occurred or occupational disease contracted: Scott County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee injured his back while he was using a wrench on a machine.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Back.
14. Nature and extent of any permanent disability: See findings
15. Compensation paid to date for temporary total disability: \$4,434.20
16. Value necessary medical aid paid to date by employer-insurer: \$13,410.35
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$665.13
19. Weekly compensation rate:
 Temporary total disability and permanent total disability: \$443.42
 Permanent partial disability: \$340.12
20. Method wages computation: By agreement.
21. Amount of compensation payable: See findings.
22. Second Injury Fund liability: See findings.
23. Future requirements awarded: N/A

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Mark Moreland.

FINDINGS OF FACT AND RULINGS OF LAW

On June 7, 2010, the employee, Willie Clark, appeared in person and with his attorney, Mark Moreland, for a hearing for a final award. The primary case had previously been settled therefore, no attorney for the employer was present. The Second Injury Fund was represented by attorney, Frank Rodman. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. Superior Essex was operating under and subject to the provisions of the Missouri Workers' Compensation Act and liability was fully insured by Zurich North America.
2. On February 22, 2003, Willie Clark was an employee of Superior Essex and working under the Missouri Workers' Compensation Act.
3. On February 22, 2003, Employee sustained an accident arising out of and in the course of his employment.
4. Superior Essex had notice of the employee's accident.
5. Employee's claim was filed within the time allowed by law.
6. Employee's average weekly wage was \$665.13 and the applicable rate for TTD/PTD is \$443.42 and PPD is \$340.12.
7. Employee's injury was medically causally related to his accident.
8. Superior Essex furnished medical aid in the amount of \$13,410.35.
9. Superior Essex furnished ten weeks of temporary total disability in the amount of \$4,434.20.

ISSUES

1. Whether Employee is entitled to permanent total disability benefits from the Second Injury Fund.
2. Whether Employee is entitled to permanent partial disability benefits from the Second Injury Fund.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Deposition Transcript of Dr. Thomas Musich dated 1/15/09
- B. Deposition Transcript of Gary Weimholt, Vocational Rehabilitation Consultant, dated 7/13/09

- C. Records of Ferguson Medical Group covering the period of 5/20/99 to 7/23/04
- E. Dr. Frank O. Petkovich's records covering the period of 3/7/03 to 12/10/03, and Activity release Forms dated 3/7/03 to 12/10/03, and Work/Activity Release Forms dated 3/7/03, 3/12/03, 4/11/03, 5/5/03, 5/14/03, 6/24/03, 11/5/03 and 12/3/03
- G. Records of Health Facilities Rehab Service of Sikeston, Missouri, covering the period of 5/4/99 to 12/1/03
- H. Records of Missouri Baptist Medical Center covering the period of 3/7/03 to 3/14/03
- I. Records of Kirkwood MRI and Imaging dated 6/17/03, which include an MRI Report of the Lumbar Spine without contrast
- J. Report of Injury prepared by Essex Group on D/A: 4/2/02
- K. Essex Group, Inc. Certification of Physician or Practitioner under the Family and Medical Leave Act of 1993 form completed by Dr. Stephen E. Carney dated 12/13/99
- L. Records of Orthopedic Associates (Dr. Richard Hulsey) covering the period of 6/24/99 to 1/12/00
- M. Dexter Memorial Hospital Emergency Room and Admission Record of 1/11/00
- N. Office records of Dr. Alan Chen
- O. Office records from Dr. James Emanuel
- P. Saint Francis Medical Center MRI Report of the left shoulder dated 7/12/99 and MRI report of the right shoulder
- Q. U.S. Military Clinical Record office note dated 6/12/78
- R. Sikeston Imaging Center MRI report of the right shoulder dated 10/23/99
- S. Stipulation from case 03-039309
- T. Stipulation from case 99-033480
- U. Stipulation from case 02-040910

The record was left open for 30 days for Exhibit D, Missouri Delta Medical Records to be submitted. The record was closed on July 7, 2010. The exhibit was not received by the Division of Workers' compensation, and therefore not admitted into evidence. Exhibit's K and Q were taken under advisement and later admitted into evidence. Exhibit V, a deposition of Dr. Musich on August, 26, 2002 was offered and not admitted into evidence because the Second Injury Fund was not a party to the case on the day of the deposition. The employee did not offer an Exhibit F.

The Second Injury Fund did not submit any exhibits.

FINDINGS OF FACT

Employee's testimony

The employee testified that he is currently 57 years of age and resides with his second wife, Ann. The employee testified that he has grown children from a previous relationship.

The employee testified that he continues to live in Sikeston, Missouri, where he has lived for most of his life. He reports that he graduated high school in 1973. Thereafter, he took approximately a one-year course in auto mechanics but did not ever obtain employment in that field.

The employee then testified that he joined the military and served for approximately 15 years as a cook. This required him to be on his feet all day. He was required to bend and stoop to pick up pots and pans for food preparation. He would also have to clean up the pots, pans and leftovers and put them away. He would often have to pack them and assist in moving them if the unit he was on maneuvers or in the field.

After he left the military in 1994, he took two jobs. One job was at a local cotton gin which was seasonal. The job required him to watch the cotton run through the gin. This lasted for a few months. He also obtained employment for approximately 10 weeks at Arvon, a manufacturer of automobile parts, before coming to work at Essex Wire.

The employee testified that he was employed at Essex Wire as a machine operator from approximately 1994 to approximately 2003. The job required him to stand on his feet all day. It required him to move spools of wire, some were relatively small, weighing less than 50 pounds, other were very, very heavy, weighing more than one-half a ton. The employee did not have part-time employment while employed at Essex Wire.

The employee also testified that he is not computer literate. He has been able to send emails with the help of a daughter but he does not know any type of office software nor does he have any keyboard or typing skills.

The employee also testified that he has no professional licenses or certificates. He testified further that he has not worked in retail sales or customer service jobs before, he has never attempted to sell anything nor has he operated a cash register.

He testified that he sustained a traumatic injury to both shoulders and his right wrist in 1999. He testified that, at that time, a large spool of electrical wire had ejected from his machine and was rolling towards him. He attempted to push the rolling wire away from him as it was pinning him against a wall. He immediately had complaints of pain in both shoulders and his right wrist following the accident.

He testified that ultimately he had surgery performed by Dr. James Emanuel on both shoulders. He missed substantial periods of work from the date of this injury in March of 1999 up through November of 2001.

The employee testified that he continues to have pain in both shoulders on a regular basis. He continues to have significant limitations of motion in both shoulders. He reports further that the pain goes down the arm, particularly on the right side. At times there is a numb or tingly feeling. He testified that in November of 2001, he made an effort to return to work. They would only take him back to work on regular duty. He noted that he attempted to obtain help at his job after

that. He testified that when he had to roll a spool of wire to load it into a machine, he would have help and he would often wait for equipment in an effort to load it. He testified that sometimes he would be idle for significant periods of time because he simply lacked the ability to place large spools of wire in the machines that he was operating.

The employee testified that he has daily bilateral shoulder pain. He testified that he does not do overhead work on a consistent basis. He reports that even changing a light bulb is more difficult than it used to be. He also testified that he has limited some of his activities, including some outdoor maintenance because of the pain that he experiences in both shoulders. In addition, he testified that he injured his low back and neck in February of 2003, and that prior to that injury he had occasional low back discomfort on a level of 2, on a scale of 1 to 10. He noted that previous to the injury of February of 2003, this discomfort occurred several times weekly.

The employee testified that on February 22, 2003, he was attempting to loosen a large commercial nut with a large wrench and cheater bar. While doing this, he testified that he needed to get into a difficult position where he was squatting while lifting up with the cheater bar. While doing this, he felt pain in his neck, low back, left upper back and legs.

The employee testified that he came under the care of Dr. Frank Petkovich for complaints of low back and neck pain. On direct exam, the employee stated that did not go back to work for Essex after the February 22, 2003 injury.

The employee testified that he continues to have low back pain, that this pain significantly restricts his motion in his low back. He reports that it is difficult to get into and out of his truck, especially after a drive of half an hour or so. He reports that he has significant limitations of motion in his low back. In addition, he has neck pain. He reports that the pain limits his motion, particularly side to side in the cervical spine. He reports that the neck pain is fairly consistent and can be aggravated by turning of the head.

In reference to his low back pain, he noted that the pain is approximately a 7 and this is accompanied by persistent right-sided pain, numbness and tingling down the leg and into the right foot. The employee testified that currently the low back limits how much he can lift as well as how long he can sit comfortably.

The employee stated that that these limitations in his back and shoulders have affected his ability to do laundry, including washing and folding clothes. The employee stated that his back injury has limited his ability to do cooking and meal preparation. He testified that when he assists with meal preparation for a family gathering or church, he has to spend the next day recovering. He testified that he no longer performs vehicle maintenance or home improvements because of his back and shoulders. He testified that he no longer does a great deal of outdoor activities, including mowing the grass.

The employee also testified that he has been a diabetic since approximately 2000. He reports that this condition requires him to urinate more frequently. He also believed that he was missing work frequently as a result of his diabetic condition.

Dr. Musich Testimony

Dr. Thomas F. Musich testified by way of deposition. He is board-certified in family practice. Dr. Musich testified concerning the employee's disabilities which pre-existed his 2003 neck and back injuries.

Dr. Musich stated that the employee was treated by Dr. Hulsey on October 14, 1999. This examination of the left shoulder demonstrated a partial tear of the rotator cuff. Dr. Hulsey also diagnosed an impingement syndrome in the right shoulder with increasing symptoms. Thereafter, an MRI on the right shoulder was performed which showed degenerative arthritis in the joint as well as tendinopathy of the supraspinatus tendon. Thereafter, additional physical therapy was performed. The employee also received a cortisone injection in both shoulders.

Dr. Musich stated that the employee was eventually referred to Dr. James Emanuel. Dr. Emanuel ultimately performed surgery on both of the employee's shoulders.

Concerning the left shoulder, Dr. Musich stated that the operative report gave a diagnosis of a torn rotator cuff in the left shoulder with AC joint arthritis as well as subacromial bursitis and impingement and tearing of the anterior superior posterior glenoid labrum. He also noted the tearing of the anterior superior and posterior glenoid labrum of the left shoulder.

Dr. Emanuel also performed surgery on the right shoulder. He did an open rotator cuff repair as well as a distal clavicle resection with an anterior acromioplasty.

Dr. Musich evaluated both shoulders on April 11, 2002, less than a year before the injuries of February of 2003. He found visual muscle atrophy over the lateral aspect on the front of the shoulders. This is in the area of the deltoid region. His findings demonstrated a significant loss of musculature in that area.

Dr. Musich also stated that the employee underwent a functional capacity evaluation performed on July 16, 2001, in reference to his shoulders. At that time, it was found that he should not lift more than 20 pounds from floor to waist, 10 pounds from waist to overhead and that he be restricted from crawling, climbing and frequent reaching.

Dr. Musich evaluated the employee for the primary injury on May 18, 2004. Dr. Musich testified that the employee sustained an acute injury affecting his neck and low back on February 22, 2003. Dr. Musich stated that the employee was evaluated by Dr. Frank Petkovich who prescribed muscle relaxants with therapy. Dr. Petkovich treated the employee for this injury from approximately March of 2003 to approximately December of 2003. During this time, the employee underwent a myelogram study of his low back. This demonstrated mild stenosis throughout the lumbar spine. It was also noted that it showed a prominent lumbar disc at L4-L5.

The employee had an MRI of the low back in June of 2003. This showed multi-level disc degeneration of the entire lumbar spine. Dr. Musich testified that both of these conditions pre-existed the injury of February 22, 2003.

Dr. Musich noted that the employee had lost approximately 50% of flexion and 50% of extension in the low back. He also noted a positive Faber test which is indicative of sacroiliac joint dysfunction. He also noted muscle atrophy in the right calf as well as paresthesia at the L5 nerve root. These findings are consistent with radiculopathy in the right leg caused by the abnormalities in his low back.

Dr. Musich stated that the employee's February 2003 injury resulted in 15% permanent partial disability referable to the cervical spine and 30% permanent partial disability referable to the lumbosacral spine over and above the pre-existing disability that the employee suffered before February of 2003. Dr. Musich also opined that the combination of the employee's pre-existing disability and the disability from February of 2003 is significantly greater than their simple sum and will continue to produce a chronic hindrance in his routine activities of daily living.

Dr. Musich also examined the employee's cervical spine. He noted a loss of flexion and extension as well as cervical rotation. Dr. Musich recommended that he see a vocational expert. Dr. Musich noted the restrictions of Dr. Petkovich of no lifting over 35 pounds. In addition, he recommended that the employee refrain from climbing, squatting, kneeling and prolonged positioning of his neck and back.

Dr. Musich did not address the new injuries that the employee saw Dr. Petkovich for on May 14, 2003 and June 10, 2003.

Gary Weimholt Testimony

Gary Weimholt, a vocational expert, reviewed the medical records which are in evidence. In his evaluation, Mr. Weimholt did not address the new injuries that the employee saw Dr. Petkovich for on May 14, 2003 and June 10, 2003.

Mr. Weimholt conducted an interview of Mr. Clark on March 26, 2005. He also prepared a report which was placed in evidence as Exhibit #2. Mr. Weimholt noted that the employee had pre-existing shoulder injuries. These injuries had resulted in functional capacity limitations suggested by a Functional Capacity Evaluation of 20 pounds floor to waist and 10 pounds waist to overhead as well as restrictions on pushing and pulling of 200 pounds with a 4-wheel cart, crawling, climbing, frequent reaching and carrying over 10 pounds.

Mr. Weimholt also noted Dr. Musich's restrictions of no climbing, squatting, kneeling or prolonged positioning of the lumbar spine and neck. He also noted Dr. Petkovich's opinion of a 35-pound lifting restriction.

Mr. Weimholt testified that the employee has a high school degree but no college, was not computer literate, had no keyboard or typing skills and had not ever had any professional licenses or certificates.

Mr. Weimholt noted that after high school, the employee served 15 years in the U. S. Armed Forces, primarily as a cook. After the employee was discharged, he became a machine operator at Essex Wire from 1994 through 2003. Mr. Weimholt testified that the job at Essex Wire required him to move heavy spools of wire. It also required heavy and light lifting and it required him to be on his feet all day. Mr. Weimholt testified that the employee had never worked in retail sales or operated a cash register.

Mr. Weimholt performed a wide range of achievement tests and found the employee to have only a 5th grade spelling level and a 5th grade math level. He noted that these were serious limitations when considering less physical jobs. Mr. Weimholt noted that the employee had been driven up from Sikeston to St. Louis and that, during the course of the examination and testing, he had to stand up twice in an effort to relieve some of the low back pain. Mr. Weimholt also noted that the employee had complaints of pain in his shoulders, back, neck, right hip, knee and both hands which significantly limit his activities of daily living. In the vocational profile and capabilities section of his report, Mr. Weimholt noted that the employee's physical limitations indicate that he should refrain from activities requiring climbing, squatting, kneeling or prolonged positioning of the cervical or lumbar spine, with no lifting over 35 to 40 pounds. In addition, he noted that the employee demonstrated considerable difficulties in fine finger dexterity and bilateral hand arm coordination during a Purdue Pegboard Test that was performed.

Mr. Weimholt testified that the employee did not have experience handling money or retail sales type of experience in his work history. Mr. Weimholt opined that the employee is not a candidate for work of that type because of long periods of standing and positioning of the lumbar spine which would be required.

Given these restrictions, it was Mr. Weimholt's opinion that the employee did not have any transferable job skills. It was Mr. Weimholt's opinion that he could not perform food service jobs because these require one to be on their feet, stand and walk beyond what he would be able to perform.

In addition, Mr. Weimholt performed a job search within 30 miles of Sikeston and found no suitable results for the employee. He concluded that the employee was totally disabled from employment.

It was Mr. Weimholt's opinion that the employee was totally disabled from employment, that there was no reasonable expectation that an employer, in the normal course of business, would hire the employee for any position or that he would be able to perform the usual duties of any job that he was qualified to perform.

Dr. Petkovich

On March 7, 2003, the employee saw Dr. Petkovich for the first time. AP and lateral x-rays of the lumbosacral spine were taken and showed significant degenerative lumbar disc disease throughout his lumbosacral spine at L3-4, L4-5 and L5-S1. He also reviewed outside plain films of his cervical and lumbosacral spine and the outside CT scan. He stated that he believed that the

employee has acute muscular and ligamentous lumbosacral strain and a muscular cervical strain. He stated that the employee needs further diagnostic evaluation with a cervical and lumbar myelogram and post myelogram CT scan. The employee work restrictions included that he not lift more than 10 to 15 pounds with his upper extremities and not do repetitive bending, stooping, kneeling or squatting.

On March 12, 2003, the employee was admitted to Missouri Baptist medical center for cervical and lumbar myelogram and post myelogram CT scan. The employee saw Dr. Petkovich later in the evening. Dr. Petkovich stated that the cervical myelogram and post myelogram CT scan films were reviewed which show the employee has some degenerative cervical disease at C5-6. The lumbar myelogram and post myelogram CT scan films were also viewed. These showed some underlying stenosis. The diagnosis was muscular and ligamentous cervical strain with degenerative lumbar disc protrusions. Dr. Petkovich stated that the employee would be started on an aggressive physical therapy program two to three times a week for the next three to four weeks. He was given a new prescription today for Bextra 10mg one p.o. daily with food and Skelaxin 20mg as a muscle relaxer.

On April 11, 2011, the employee saw Dr. Petkovich. Dr. Petkovich stated that the employee "is doing somewhat better at this time." He also stated that the employee "is having residual discomfort in his lower back and also discomfort in his neck." The employee did not describe any radicular-type symptoms. The employee was diagnosed with spinal stenosis and cervical disc protrusion C5-6. The employee was to continue physical therapy two to three times a weeks for the next three to four weeks. He was given a prescription for Bextra 10mg one p.o. daily with food and Skelaxin 400 mg one p.o.q. 8 hours muscle spasm.

On March 17, 2003, the employee saw Dr. Petkovich. The work restrictions were that he not lift more than 15-20 pounds with his upper extremities and that he not do repetitive overhead work.

On April 11, 2003, the employee saw Dr. Petkovich. The work restrictions included that he not lift more than 20 to 25 pounds and not do repetitive overhead work. Otherwise he "may work within these restrictions."

On May 5, 2003, the employee saw Dr. Petkovich. The employee was diagnosed with lumbosacral strain and underlying degenerative arthritis and degenerative disc disease. The employee was to continue physical therapy. The employee was given a prescription for physical therapy. The employee was encouraged to try and return to his regular job as tolerated. He was cautioned not to "overdo it."

Employee settled his previous worker's compensation claim for the injury occurring on March 19, 1999 for 30% PPD of the right shoulder, 25% PPD of the left shoulder, and 5% of the right wrist. Employee also had a 1999 claim for a back injury. He underwent conservative treatment for a lumbar strain and settled the claim for 3.25% of the BAW. Employee was diagnosed with diabetes prior to the February 22, 2003 work injury, but was not insulin dependent at the time of the work injury. He testified he missed work because of diabetic problems. The employee settled his primary case for 20% of the body as a whole.

On May 14, 2003, the employee saw Dr. Petkovich for "pain in neck and lower back". Dr. Petkovich stated "This gentleman is seen by me today with a new problem. Specifically, pain in his neck and lower back. He is employed at Superior Essex in Sikeston, Missouri. He states he injured himself while at work on 5/9/03 when he was doing some loading and unloading and developed pain in his neck and lower back. He apparently was seen at a local emergency room and evaluated. He is now seen for an evaluation by me with the above subjective complaints of pain in his neck and lower back. He denies any radicular type symptoms throughout either of his upper or lower extremities". Dr. Petkovich diagnosed the employee with muscular ligamentous soft tissue cervical strain and muscular lumbosacral strain. He also stated "I have told the patient that his condition is soft tissue in nature. No further treatment for this is indicated today. He was given no new prescriptions by me today."

On June 10, 2003, the employee saw Dr. Petkovich. Under "New problem chief complaint" Dr. Petkovich noted "Pain in lower back with some occasional discomfort in the right lower extremity." Dr. Petkovich stated "This is a 50-year-old man who is seen today with complaints of pain in his lower back and some discomfort in his right lower extremity. The patient states he is employed by Superior Essex in Sikeston, Missouri. He states he injured his lower back again while at work last week, twisting some very heavy wire. He describes an aching type pain in his lower back with some occasional discomfort in his lower extremity. He has previously been seen by me for an evaluation regarding his lower back and cervical spine. He was seen on several occasions and ultimately released by my care on 5/14/03. He states he was still having persistent discomfort at that time. He is now seen today with the above subjective complaints. The diagnosis was muscular and ligamentous lumbar strain with underlying degenerative lumbar disc disease." Dr. Petkovich noted that the above findings were explained to the patient. He stated that he would start the patient back on physical therapy for his lumbosacral spine. He stated that the employee would do this two or three times a week for the next two or three weeks. He stated that the patient was given Vicodin for pain and Flexeril as a muscle relaxant. He also stated that the patient will be sent for an MRI on his lumbosacral spine. Under "work status" Dr. Petkovich noted "He will remain off work until he is seen in follow up." Under "follow up" he stated "I will see the patient back in follow up in two weeks for reevaluation along with the results of the MRI and response to the physical therapy and the above medications. We should have a definitive answer as to what is going on. It is my clinical opinion today that his pain is muscular and ligamentous in nature with the above degenerative changes."

On July 15, 2003, the employee was seen by Dr. Petkovich for a follow-up visit. Dr. Petkovich stated that the employee is doing somewhat better. He stated that the employee has less discomfort in his lower back. He also stated that the employee denies any radicular symptoms and that the employee is going through physical therapy. He stated that the AP and lateral views of the spine taken by the x-rays, show adequate structural alignment. He also stated that there are significant arthritic changes. He diagnosed the employee with muscular and ligamentous lumbosacral strain with underlying degenerative disc disease with disc bulge at L3-4 and L4-5. Dr. Petkovich stated that the employee was to continue with physical therapy two times a week for the next three weeks. He was given a prescription for Vicodin for pain and Flexeril as a muscle relaxant. Under "work status" Dr. Petkovich noted "He may work with the restrictions

that he not lift more than 15-20 pounds and not do repetitive bending, stooping, kneeling, or squatting.

The employee had a follow up visit with Dr. Petkovich on August 5, 2003. The diagnosis, prescription medicine and work restrictions of the employee remained the same. Dr. Petkovich stated that the employee had some persistent subjective complaints of pain in his lower back with some non-specific lower extremity pain.

On September 5, 2003, the employee had a follow up with Dr. Petkovich. The diagnosis, prescription medicine and work restrictions of the employee remained the same. Dr. Petkovich stated that the employee had some persistent subjective complaints of pain. The employee was given a prescription for Vicodin for pain and Flexeril as a muscle relaxant. The employee was to continue on a home exercise program.

On October 3, 2003, the employee had a follow up visit with Dr. Petkovich. The diagnosis and prescription medicine of the employee remained the same. The employee's work restriction was to not lift more than 25-30 pounds and not do repetitive bending, stooping, kneeling or squatting. The employee was to continue physical therapy two to three times a week for the next two to four weeks. Dr. Petkovich stated that the employee was doing somewhat better at this time, having less discomfort in this area. Dr. Petkovich stated that the employee denies any radicular type symptoms throughout either of his lower extremities.

On November 5, 2003, the employee saw Dr. Petkovich for a follow up appointment. The diagnosis remained the same. The employee's work restrictions were no lifting more than 50 pounds and not do repetitive bending, stooping, kneeling or squatting. The employee was to continue his home exercise program. He was also given a prescription for Vicodin. Dr. Petkovich stated that he would see the employee again in four weeks. At that time he would evaluate the employee's response to the epidural steroid injections and his further physical therapy.

The employee saw Dr. Petkovich for a follow up visit on December 3, 2003. The employee's diagnosis remained the same. Dr. Petkovich stated that the employee was not presently working. He stated that the employee's only medication includes an occasional Vicodin for pain. The employee's work restrictions included that he not lift more than 35-40 pounds. Dr. Petkovich stated that the employee was released from his care. He further stated "He is at maximum medical improvement from an orthopedic surgical point of view. He has persistent multiple subjective complaints of pain. I did give him the above prescriptions for Vicodin for pain but told him that I would not be able to give any further refills. He will need to contact his family physician for any other medications. He is released from my care today".

On December 10, 2003, Dr. Petkovich wrote a letter to Shelly Wahle, an adjustor for Zurich Services. He state that he believed that the employee sustained a 3% permanent partial disability to the body as a whole as a result of his lumbosacral spine injury that occurred at work on 2/22/03. He also stated that the employee sustained a .5% permanent partial disability to the body as a whole as a result of his cervical spine injury from 2/22/03.

Employee's Workers' Compensation Settlements

The employee settled his Workers' Compensation case, injury number 99-033480, regarding his bilateral shoulders, for 30% of the right shoulder and 25% of the left shoulder and 5% of the right wrist. There was a 15% loading factor. This injury occurred on March 8, 1999.

The employee settled his Workers' Compensation case, injury number 02-040910, regarding his low back, for 3.25% of the body as a whole. This injury occurred on April 1, 2002.

The employee settled his primary injury for 20% of the body as a whole.

APPLICABLE LAW:

The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer is liable at the time of the last injury is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

Section 287.020.7 RSMo. provides as follows:

The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

The phrase "the 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. *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. *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". *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's physical condition,

reasonably expecting the employee to perform the work for which he or she is hired. Reiner at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).

287.220.1: All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing 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 pre-existing disability. 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 the 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, hereinafter provided for.

RULINGS OF LAW:

Issue 1 . Permanent total disability

The employee's primary injury occurred on February 22, 2003. Dr. Petkovich's medical records state that the employee had two subsequent injuries at work. The first subsequent injury occurred on May 14, 2003. The second subsequent injury occurred on June 10, 2003. Based on the medical records, it is clear that the employee continued to work after the February 22, 2003 injury and was reinjured twice. Furthermore, the May 14, 2003 injury and the June 10, 2003 injury could have potentially had an effect on the employee's ability to work.

The employee was evaluated by Dr. Musich after his subsequent injuries. Unfortunately, Musich did not address the employee's subsequent injuries. Therefore, I find that the opinion of Dr. Musich was not credible. Furthermore, the employee was evaluated by Mr. Weimholt after his subsequent injuries. Mr. Weimholt did not address the subsequent injuries either. Therefore, I find that Mr. Weimholt's vocational opinion was not credible.

Based on all of the evidence presented, I find that the employee did not prove that an employer would not have hired the employee based on his physical condition. Furthermore, I find that the employee did not prove that he could not compete in the open labor market. Based on all of the evidence presented, I find that the employee did not meet his burden of proof on the issue of permanent total disability. I find that the employee is not permanently and totally disabled from the February 22, 2003 injury or a combination of the February 22, 2003 injury and his pre-existing injuries.

Issue 2. Permanent partial disability

The employee has alleged that the Second Injury Fund is liable for permanent partial disability benefits. Under Section 287.220.1 RSMo., the employee has the burden of proving that his pre-existing injury was of such a serious nature as to constitute a hindrance or obstacle to employment or re-employment. The employee also has the burden of proving that his last injury and pre-existing disabilities met or exceeded the applicable statutory threshold of 12½% for the body as a whole rating or 15% of a major extremity. Further, the Second Injury Fund is only liable if the combination of the employee's pre-existing injuries and the last injury had a synergistic effect which causes the employee's total disability to exceed the sum of the disabilities from the pre-existing injuries and the last injury.

As to the employee's primary injury, I find that the employee sustained a disability of 20% body as a whole referable to the back.

I find that the pre-existing diabetes does not meet the required threshold of 12½% for Second Injury Fund liability. Based on all of the evidence presented, I find that the employee sustained permanent partial disability in the amount of 5% of the body as a whole for the pre-existing diabetes. Based on all of the evidence presented, I find that this injury is not found to have constituted a hindrance or obstacle to employment as to justify Fund liability.

I find that the pre-existing injury to the employee's right wrist does not meet the required threshold of 15% for Second Injury Fund liability. Based on all of the evidence presented, I find that the employee sustained permanent partial disability in the amount of 5% to the employee's right wrist. Based on all of the evidence presented, I find that this injury is not found to have constituted a hindrance or obstacle to employment as to justify Fund liability.

I find that the pre-existing injury to the employee's low back, that occurred on April 1, 2002, does not meet the required threshold of 12½% for Second Injury Fund liability. Based on all of the evidence presented, I find that the employee sustained permanent partial disability in the amount of 3.25% to the employee's low back. Based on all of the evidence presented, I find that this injury is not found to have constituted a hindrance or obstacle to employment as to justify Fund liability.

Based on the medical and the testimony of the employee, I find that the employee's pre-existing right shoulder injury was of such seriousness as to constitute a hindrance or obstacle to

employment or obtaining re-employment. I find that the pre-existing right shoulder injury resulted in a 30% permanent partial disability of the right shoulder at the 232 week level. Based on the medical and the testimony of the employee, I find that the employee's pre-existing left shoulder injury was of such seriousness as to constitute a hindrance or obstacle to employment or obtaining re-employment. I find that the pre-existing left shoulder injury resulted in a 25% permanent partial disability of the left shoulder at the 232 week level. I further find that the aforementioned disabilities combine with the disability associated with his back such that the overall disability is greater than the parts and a load factor of 15% should be applied to account for the synergistic disability that exceeds the sum of the parts.

Therefore, employee is entitled to compensation in the amount of $((0.30*232+0.25*232+.20*400)*.15*\$340.12=)$ \$10,591.34. Therefore, the Second Injury Fund is directed to pay to the employee the sum of \$10,591.34.

ATTORNEY'S FEE

Mark Mooreland, 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: Willie Clark

Injury No.: 03-039309

Date: _____

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Person
Division of Workers' Compensation