

**FINAL AWARD ALLOWING COMPENSATION**

Injury No.: 08-009264

Employee: Dwight Cobb

Employer: J.D. Crow & Associates, LLC (Settled)

Insurer: First Comp Insurance (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.<sup>1</sup> We have read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record. We find 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, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision correcting the award and decision of the ALJ, as modified herein. We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

We understand the ALJ's concern on sufficiency of evidence in this case. However, we believe there are numerous facts that support an award of permanent total disability against the Second Injury Fund. Claimant requires narcotic pain medications to ease his pain, which would cause concern to many employers. Dr. Marquis and Dr. Bridges both testified to the likelihood that claimant would frequently miss work due to pain from the combination of the work injury and his pre-existing conditions. Additionally, claimant is unable to sustain the level of activity from the FCE on a regular basis. Ultimately, we agree with the ALJ that claimant was a very credible witness, and based on his level of pain we believe he is no longer able to secure and sustain gainful employment. We agree with the ALJ that claimant's condition is from the combination of the work injury and his pre-existing back condition. Therefore, we find it is proper to award permanent total disability against the Second Injury Fund in this case.

In all other respects, we affirm the award of the ALJ.

We further approve and affirm the ALJ's allowance of attorney's fees herein as being fair and reasonable.

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

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2007, unless otherwise indicated.

Employee: Dwight Cobb

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The award and decision of Administrative Law Judge Margaret Ellis Holden, issued April 25, 2013, is attached and incorporated by reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 13<sup>th</sup> day of February 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED  
James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Dwight Cobb

**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 administrative law judge should be affirmed. Therefore, I adopt the decision of the administrative law judge, in its entirety, as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

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James G. Avery, Jr., Member

## AWARD

Employee: Dwight Cobb Injury No. 08-009264  
Dependents: N/A  
Employer: J.D. Crow & Associates, LLC  
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund  
Insurer: First Comp Insurance  
Hearing Date: 1/31/13 Checked by: MEH

### 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: 2/12/2008
5. State location where accident occurred or occupational disease was contracted: CHRISTIAN 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:  
CLAIMANT SLIPPED ON ICE AND CAUGHT HIMSELF WITH HIS RIGHT ARM, INJURING HIS SHOULDER.
12. Did accident or occupational disease cause death? NO Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: RIGHT SHOULDER
14. Nature and extent of any permanent disability: 30%
15. Compensation paid to-date for temporary disability: \$33,285.10
16. Value necessary medical aid paid to date by employer/insurer? \$59,582.46

Employee: Dwight Cobb

Injury No. 08-009264

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$835.74
- 19. Weekly compensation rate: \$557.16/\$389.04
- 20. Method wages computation: BY AGREEMENT

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

PREVIOUSLY SETTLED

22. Second Injury Fund liability: Yes  No  Open

21.1625 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:  
weekly differential (0) payable by SIF for 0 weeks, beginning N/A  
and, thereafter, for Claimant's lifetime

**TOTAL: SEE AWARD**

23. Future requirements awarded: N/A

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 hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

JONATHAN PITTS

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Dwight Cobb Injury No. 08-009264  
Dependents: N/A  
Employer: J.D. Crow & Associates, LLC  
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund  
Insurer: First Comp Insurance  
Hearing Date: 1/31/13 Checked by: MEH

The parties appeared before the undersigned administrative law judge on January 31, 2013, for a final hearing. The claimant appeared in person represented by Jonathan Pitts. The employer and insurer did not appear as they had previously settled their claim with the claimant. The Second Injury Fund appeared represented by Barbara Bean. Memorandums of law were filed by February 28, 2013.

The parties stipulated to the following facts: On or about February 12, 2008, J.D. Crow & Associates, LLC, was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by First Comp Insurance. On the alleged injury date of February 12, 2008, Dwight Cobb was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. On or about February 12, 2008, the claimant sustained an accident which arose out of and in the course and scope of employment. The accident occurred in Christian County, Missouri. The claimant notified the employer of his injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the alleged accident, the claimant's average weekly wage was \$835.74, which is sufficient to allow a compensation rate of \$557.16 for temporary total and permanent total disability and a compensation rate of \$389.04 for permanent partial disability compensation. Temporary

disability benefits have been paid to the claimant in the amount of \$33,285.10. The employer and insurer have paid medical benefits in the amount of \$59,582.46. The attorney fee being sought is 25%. The parties agree that the claimant reached maximum medical improvement on August 5, 2009. The parties further agree that if the claimant is not found to be permanently and totally disabled, he has sustained a permanent partial disability of 30% of the right shoulder as a result of the last injury and 25% of the body as a whole referable to the back for a pre-existing condition, and a loading factor of 12.5% is appropriate.

#### ISSUES:

1. The nature and extent of permanent disabilities.
2. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The claimant testified at the hearing. He was a very credible witness. He is currently 58 years old. He lives with his wife and grandchildren. He is a high school graduate although he testified that he made poor grades and received special education services. He applied to the service twice but was denied due to hearing problems and Osgood-Schlauhters disease which caused him to fail the physical both times.

All the work he had performed before working for the employer required heavy lifting. The longest period he was unemployed was a month. He was a hod carrier; worked at Meeks as a yard and delivery driver; he worked at a paper company in Colorado; was a warehouse department manager at Wal Mart; he worked for Wil Fisher Distributing and Coors of the Ozarks in their warehouses; was a mechanic for a year; worked at a machine shop; at Sparta Schools performing maintenance; and then had his own auto repair business from 2000-2002.

In 2002 claimant had a back injury resulting in a sacral fusion by Dr. Ferguson. He testified that after this, his back bothered him a lot. Dr. Ferguson told him that he would only perform the surgery if the claimant gave up mechanic work, so the claimant closed his shop. The doctor also warned him to be careful when pushing, pulling, lifting and long driving.

The claimant went to work for the employer, J.D. Crow & Associates, in 2003. He initially worked in shipping and receiving, and was later promoted to running the machine shop. He did not handle any payroll or hiring or firing in this position. He was a working foreman who worked along with the other employees over 80% of the time. He said he made sure the work was done. Between 2003 and 2008, claimant took no narcotic medications and had no medical treatment for his back.

After his back surgery, the claimant said that because his back continued to bother him, he regularly took 16-18 Ibuprofen a day, and would sit on a heating pad and take hot baths and showers at night. He also used a cane which he left in his car. He also had to make special arrangements with his employer. The employer allowed accommodations for claimant's back including raising his table, allowing him to sit and stand as needed, and allowing him help lifting. He said the heaviest he lifted was 120 pounds, but that he would regularly lift an average of 10-15 pounds. He said before the back surgery he could have lifted the weights alone.

On February 12, 2008, the weather was bad. The claimant decided to start his vehicle in order to melt ice that had accumulated on it. He fell on the ice and caught the door with his right arm as he fell. He suffered a rotator cuff injury which was repaired by Dr. Clothiaux on March 12, 2008. After surgery he had physical therapy.

On September 16, 2008, claimant underwent a Functional Capacity Evaluation (FCE) performed by Brad Johnson. He concluded that the claimant would have no problem standing for an entire day and he could perform low level work. Lifting restrictions were imposed. Mr.

Johnson said claimant could frequently lift 33 pounds floor to knuckle and 23 pounds knuckle to above shoulder. He could occasionally lift floor to knuckle 60 pounds, knuckle to shoulder 30 pounds, shoulder to overhead 15 pounds, and he could carry 50 pounds. He concluded the claimant could not meet all the requirements to return to his previous job of shop foreman. On November 3, 2008, Dr. Clothiaux concluded the claimant was at maximum medical improvement and that claimant would need permanent restrictions and should be referred for a rating.

Claimant continued to have problems with his shoulder, and called and told the employer his shoulder was worse.

Dr. Christopher Miller performed an independent medical exam in February 2009 at the request of the employer. A second rotator cuff repair was performed in April 2009. Claimant received physical therapy. On July 13, 2009, Dr. Miller gave claimant a cortisone shot in his shoulder. Claimant testified that Dr. Miller told him he was getting him ready so he would not do poorly on his upcoming Functional Capacity Evaluation (FCE). The parties agree he reached maximum medical improvement on August 5, 2009.

Nancy Dickey Beisswenger performed a FCE on July 31, 2009. She also testified by deposition. She found claimant met the validity criteria which meant he gave maximum voluntary effort, and the test results appeared to measure his functional abilities. She concluded he could occasionally lift 35 pounds, carry 35 pounds, lift 25 pounds to shoulder level and 15 pounds overhead. He could frequently lift and carry 25 pounds but not lift frequently to eye level or overhead. She concluded he could work at the light work level. She also informed him to contact her if he had any increase in pain or swelling following the evaluation. He called her on August 2, 2009, reporting increased pain in his shoulder. The claimant testified that his shoulder

was bothering him after four hours of testing and that he did not believe he could do it for eight hours.

The claimant was sent to Dr. Cary Marquis for an independent medical examination at the request of his attorney. He also testified by deposition. Dr. Marquis evaluated the claimant on September 8, 2009. Dr. Marquis only addressed claimant's shoulder; he did not address any pre-existing or any other conditions. Dr. Marquis concluded the claimant sustained a permanent partial disability of 39% of the right shoulder as a result of the work injury of February 12, 2008.

In December 2009, the claimant fell on the deck of his home. He testified that he felt dizzy and the deck was wet. He walked out and his feet went out from under him. Claimant testified that his back was already bothering him but the fall made it worse. The pain began radiating in his right leg. He began using the cane all the time after this fall.

On May 4, 2010, Dr. Marquis reevaluated the claimant at the request of his attorney to address claimant's preexisting conditions. He found claimant had a permanent partial disability of 25% to the body as a whole secondary to his lumbosacral fusion with subsequent weakness and sensory loss of his right lower extremity along with decreased range of motion of his lumbar spine. He testified that the back injury and the shoulder injury combined to give a greater degree of disability.

Dr. Marquis imposed restrictions of no lifting greater than 10 pounds on a regular basis or 20 pounds occasionally, along with no standing or sitting longer than an hour, no climbing ladders, and no stooping or bending on a repetitive basis. These restrictions are consistent with light duty work. In his report Dr. Marquis states: "Although Mr. Cobb has significant permanent partial impairment of both his back and his shoulder on previous examination, at this time he is not permanently and totally disabled." He continued to state that he felt the claimant would have

difficulty reentering the work force, and he deferred to a vocational rehabilitation expert to determine if the claimant would be able to reenter the workforce.

Mary Titterington, a certified vocational rehabilitation counselor, performed an evaluation at the request of the Second Injury Fund on March 21, 2011. She also testified by deposition. She did not interview the claimant, but reviewed the claimant's deposition as well as other stipulations and medical records. She concluded that the restrictions imposed by Dr. Clothiaux and Dr. Marquis would preclude the claimant from returning to his previous employments because he could not perform the heavy lifting required. She found he could perform light bench repair and assembly. She found he would be eligible for direct entry jobs at a full range of sedentary and light level exertion based on the 2008 FCE results. She ultimately concluded that he was employable under the restrictions imposed by Dr. Miller and the FCE's performed in 2008 and 2009. She found he would not be employable if Dr. Marquis' findings are accepted.

In her deposition of July 26, 2011, she testified to the process she used in arriving at her opinion. She first determined that the claimant could not return to his previous heavy work. She then looked to see if he had any transferable skills. She found that because he was a business owner and a supervisor he has "done a number of semi-skilled to skilled type of occupations that would yield transferable job skills," as well as having knowledge of mechanical repair. Therefore she found he had transferable skills to the sedentary and light level of exertion, primarily the light level based on the FCE's and Dr. Miller. Under Dr. Marquis' restrictions of only sitting an hour a day and standing two hours would preclude him from work. In the unskilled labor market he was clearly within the restrictions of the FCE's and Dr. Miller. Based on the claimant's perception, he was unemployable. She ultimately said, "depending on which factors you accept, they have different conclusions."

She also said that based on an employer's absentee policy the claimant could have difficulty if he missed as much work as Dr. Marquis projected. She said that "Clearly, most employers would have concerns about anybody taking hydrocodone routinely during the day, if they – especially if they didn't know the person."

Dr. Marquis deposition was taken on July 10, 2012. On cross-examination he testified that the restrictions he entered both in May and October of 2010 were in the light range. When asked if these restrictions would have been present before the February 2008 shoulder injury and he said, "Well, I don't know in that I didn't see him at that time and it's hard for me to say what restrictions he would have been on at a time when I didn't see him but, you know, when I made my restrictions on him they are relative to his whole body function and to what I think is going to be best for him. So it's hard for me to say what his restrictions would have been when I didn't see him."

He testified that he thought it would be difficult for the claimant to work an eight hour day, and that he expected the claimant would miss at least once a week. In his deposition he concluded the claimant was not employable due to his shoulder and back along with his age and the medications he is taking.

After reviewing subsequent medical records and Dr. Marquis' deposition, Ms. Titterington issued a subsequent report on August 27, 2012. Her deposition was taken again on October 2, 2012. She testified that based on Dr. Marguis' opinion that placed claimant at a light exertional level of physical demand as defined by the DOT, "that would change my opinion and my opinion would be that he could work within those restrictions as clarified in the deposition on pages 56 and 57."

The claimant testified that currently his right shoulder has constant pain, diminished range of motion, and weakness. He cannot pick up a full gallon of milk. He cannot raise his

right arm straight in front of him or over his head. He also has numbness in his right hand. He uses a TEN's unit, heat and a hot shower on his shoulder and back. Presently his back has pain that radiates to his right foot. He has difficulty lifting and riding in a car. It is worse now than it was in February 2008, before the work injury. He does not believe he can work due to a combination of problems with his right shoulder and back. During the end of 2008 into 2009, after he was released by Dr. Clothiaux, he drew unemployment and applied for 18-20 jobs but did not get any interviews. He disclosed his back and shoulder problems.

He used to be on the school board in Sparta but can no longer do that. He also cannot go to his grandchildren's events any longer. He cannot fish or hunt as often as before. His wife drives, and it is hard for him to sit in a car over 30 minutes.

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater

overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). If the last injury, combined with prior injuries or disabilities, results in the claimant being unable to compete in the open labor market, and is thus permanently and totally disabled, the minimum standards for disability do not apply. If the claimant is found to be permanently and totally disabled, the Second Injury Fund is liable for benefits after the completion of payment by the employer for the disability due to the last injury.

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. The nature and extent of permanent disabilities.

Claimant sustained a compensable last injury which resulted in permanent partial disability equivalent to 30% of the right shoulder at the 232-week level (69.3 weeks).

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: 25% of the body as a whole at the 400-week level referable to the low back (100 weeks).

2. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

I find that prior to February 12, 2008, claimant had injuries that constituted a hindrance or an obstacle to employment; namely, his back condition.<sup>1</sup> As a result of the last injury of

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<sup>1</sup> The hearing and Osgood- Schlaughters conditions which caused the claimant to be denied enlistment to the armed services quite possibly are hinderance or obstacles but these were never addressed by any of the physicians, the vocational expert, or the claimant in his testimony. Nor did the parties did not include them in their stipulations.

February 21, 2008, he sustained an injury to his right shoulder resulting in 30% permanent partial disability at the 232-week level.

After carefully considering all of the evidence, I find that the evidence does not support finding the claimant to be permanently and totally disabled. The only vocational expert to testify, Mary Titterington, found that based on all the doctors' opinions, including Dr. Marquis, the claimant was able to compete in the open labor market. Therefore, I find no basis to support the Second Injury Fund liable for permanent total disability.

On the other hand, the credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 12.5% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 69.3 weeks for last injury + 100 weeks for preexisting injuries = 169.3 weeks x 12.5% = 21.1625 weeks of overall greater disability.

The Second Injury Fund is liable to Claimant for \$8,233.06 in permanent partial disability benefits. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

Attorney for the claimant, Jonathan Pitts, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: \_\_\_\_\_  
Margaret Ellis Holden  
*Administrative Law Judge*  
*Division of Workers' Compensation*