

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 09-036335

Employee: Carl Douthit
Employer: Bi-State Development Agency
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having heard oral argument, reviewed the evidence and briefs, 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 Law. Pursuant to §286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 7, 2011, as corrected below.

In the case headings on pages 1 and 3 of the administrative law judge's award, she indicates that both employer and insurer have "previously settled." While employer and insurer may have previously settled with employee with respect to Injury Number 08-117825, it is clear from the body of the administrative law judge's award and the record as a whole that employer and insurer did not settle with employee with respect to this matter, Injury Number 09-036335. Therefore, we find that the administrative law judge's award shall be corrected and every occurrence of the words "previously settled" shall be deleted from the headings on pages 1 and 3.

Based upon the foregoing, the award and decision of Administrative Law Judge Kathleen M. Hart, issued March 7, 2011, is affirmed, as corrected herein, and 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 8th day of November 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION

Attest:

Curtis E. Chick, Jr., Member

Secretary

Employee: Carl Douthit

CONCURRING OPINION

I write separately to disclose the fact that I did not participate in the September 14, 2011, oral argument in this matter. I have reviewed the evidence, read the briefs of the parties, and considered the whole record. I concur with the decision of the majority of the Commission.

Curtis E. Chick, Jr., Member

AWARD

Employee: Carl Douthit

Injury No.: 09-036335

Dependents: n/a

Employer: Bi-State Development Agency (previously settled)

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

Additional Party: Second Injury Fund (only)

Insurer: Self (previously settled)

Hearing Date: December 13, 2010

Checked by: KMH

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 20, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis
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 tripped over a piece of metal while carrying a door and injured his right upper extremity.
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 upper extremity
14. Nature and extent of any permanent disability: 50% right upper extremity from the primary injury, and permanent and total disability benefits as a result of the combination of his primary and pre-existing injuries.
15. Compensation paid to-date for temporary disability: \$6,998.42
16. Value necessary medical aid paid to date by employer/insurer? \$46,358.82

Employee: Carl Douthit

Injury No.: 09-036335

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$923.60
- 19. Weekly compensation rate: \$615.73/\$404.66
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

116 weeks of permanent partial disability from Employer	\$46,940.56
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22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
 weekly differential of \$211.07 payable by SIF for 116 weeks beginning
 April 1, 2010, and, \$615.73 weekly thereafter, for as long as provided by law

TOTAL:	TO BE DETERMINED
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23. Future requirements awarded:

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:

Thomas J. Gregory

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Carl Douthit

Injury No.: 09-036335

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Bi-State Development Agency (previously settled)

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

Additional Party: Second Injury Fund (only)

Insurer: Self (previously settled)

Checked by: KMH

A hearing was held on the above captioned matter December 13, 2010. Carl Douthit (Claimant) was represented by attorney Thomas Gregory. Metro/Bi-State Development Agency (Employer) was represented by attorney Jay Lory. The SIF was represented by Assistant Attorney General Da-Niel Cunningham. Employer and Claimant reached a settlement on Claimant's two 2008 injuries before trial. The case proceeded to trial against the SIF only regarding Injury Number 08-117825, and against Employer/Insurer and the SIF regarding Injury Number 09-036335.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated to the following:

1. Claimant sustained an injury by accident while in the course and scope of his employment on May 20, 2009.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was self insured.
4. Employer had notice of the injury and a claim for compensation was timely filed.
5. Claimant's average weekly wage yields a TTD/PTD rate of \$615.73 and PPD rate of \$404.66.
6. Employer paid TTD and TPD benefits for 11 3/7 weeks totaling \$6,998.42. Employer paid medical benefits of \$46,358.82.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Nature and extent of permanent partial or permanent total disability.
2. Liability of the Second Injury Fund.

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant is a 62 year-old, right handed male, who has an eleventh grade education and completed his GED while in the service in the late 1960's. He has been married to his wife, Helen, for 42 years. He has four children, none of whom are financially dependent on him.
2. After his service in Korea, Claimant attended a Painter Apprentice Program from 1971-1972. He then went to Bailey Technical School and earned certification as an auto and diesel mechanic. He spent the next few years working as a laborer where he was required to lift 40-50 pounds on a regular basis.
3. From October 1974-April 1, 2010, Claimant worked continuously for Employer as a mechanic, and he worked in various departments over the years. He worked in the outside garage for the first five years. He changed oil, batteries and tires, and repaired starters and air compressors. This was heavy work and involved extensive lifting and repetitive use of his upper extremities.
4. Claimant worked in the Body Shop for the next two years doing body repairs after bus accidents. Claimant then worked a few years in the Engine Department. He removed, replaced, and rebuilt engines. He spent most of his time working in the pit under the buses, and reaching overhead. This was hand intensive work, and involved heavy lifting from 30-60 pounds on a frequent basis. Claimant then worked a few years in the Transmissions Department rebuilding transmissions. This was not overhead work, but it was hand intensive and involved heavy lifting.
5. From 1987-1991, Claimant worked in the East St. Louis garage performing general maintenance, repairs, and heating and air conditioner repairs. This involved a lot of overhead work and heavy lifting. In 1991, Claimant injured his left shoulder when removing the cage on a blower motor. He was off work nearly a year and had physical therapy, work hardening and injections. Dr. Ravi and Dr. Gagnani released Claimant to return to a desk job or bench work. Both agreed he should permanently avoid any overhead work or jobs that would strain his left shoulder.

6. In 1992 Claimant was transferred to the Body Shop to accommodate his restrictions. He had a bench job and all his work was in front of him. He did not have to work overhead, but used both hands repetitively. His job involved drilling, chiseling, and grinding. All his tools were air operated.
7. Leading up to his 2008 injuries, Claimant continued to have problems with his left shoulder. Employer accommodated his left shoulder problems by changing his job duties. He had popping and discomfort in the shoulder. His shoulder fatigued easily, and he dropped things. He could not sleep on his left side and had pain on a regular basis. He avoided any overhead work and did not lie on his left side to work on a vehicle. His co-workers helped him when needed.
8. On October 2, 2008, Claimant reported to Employer that he injured his low back the day before. He was picking up a 30 pound door when he had an onset of low back pain on his right side. He had burning and numbness in his right leg and requested treatment. He told his supervisor he also had problems with his hands, and his supervisor instructed him to fill out a report so the doctor could look at his hands and low back.
9. Claimant completed a Report of Injury (Exhibit A) indicating he had problems with both hands. He reported he was dropping things, had to switch hands while driving, his hands went numb and hurt, and he felt tingling in his arms and hands. He attributed this to repetitive use of air tools in the body shop. He had these problems for a number of years, but had not sought treatment or missed work yet.
10. Employer sent Claimant to Dr. Crandall November 14, 2008. Dr. Crandall noted Claimant's job duties, complaints and that his borderline diabetes was diet controlled. After reviewing a CD of Claimant performing his job, Dr. Crandall recommended a left ulnar nerve transposition and right carpal tunnel release. He opined Claimant's work was the prevailing factor in causing his arm conditions and need for treatment.
11. Employer hired a consultant to video tape Claimant doing his job and prepare a Job Analysis Report. Following that report, Dr. Crandall changed his opinion on causation, and Employer would not authorize surgery. Claimant hired an attorney to pursue treatment.
12. Employer did not provide treatment for Claimant's low back and he did not see a doctor on his own. He continues to have sharp pain in his low back on the right side with numbness into the front of his right leg. He again hired an attorney to pursue treatment.
13. Claimant testified his attorney sent him to Dr. Volarich to be examined for both his low back and his hand and arm injuries. He saw Dr. Volarich April 29, 2009. Dr. Volarich issued a report indicating Claimant needed treatment for his back and upper extremities. Dr. Volarich opined Claimant's repetitive work was the prevailing factor in the development of Claimant's bilateral upper extremity complaints and need for treatment. The Job Task Analysis did not accurately reflect Claimant's work, and studies showed no evidence of diabetic peripheral neuropathy. He opined Claimant's work accident was the prevailing factor in causing his back condition and need for treatment. Claimant

continued to work for Employer while his claims were pending, and he had no additional treatment.

14. On May 20, 2009, Claimant injured his right shoulder at work when he was carrying a door to be painted. He tripped over a piece of metal on the floor. He put his right hand out to break his fall, and hit his right shoulder, leg, knee and low back on some doors that were piled on the concrete floor. Claimant was treated at BarnesCare the next day and had physical therapy for several weeks. In July 2009, he had an MRI and was sent to Dr. Milne.
15. On August 26, 2009, Dr. Milne performed surgery on Claimant's right shoulder. The surgery involved subacromial decompression, distal clavicle resection, rotator cuff repair using two ArthroCare speed screws, and biceps tenotomy. Claimant was diagnosed with impingement, AC joint arthrosis, full thickness rotator cuff tear, and SLAP tear.
16. Claimant was off work for approximately two and a half months following surgery. He returned to a light duty job created for him, where he answered phones, did some paperwork, and instructed other workers. He also was sent to various Metro stations to hand out leaflets or Germ-X during flu season. Claimant left work early a number of days to attend physical therapy and work hardening.
17. Claimant continued to have difficulty with both arms, and followed up with Dr. Milne on a monthly basis through January 2010. His January 12, 2010, report indicates the work hardening evaluation showed Claimant did not meet the minimum required job duties to return to his regular job at Employer. He recommended permanent restrictions and an evaluation of Claimant's neck.
18. Employer advised Claimant his light duty job was only a temporary job. Since Claimant could not return to his regular job, he took early retirement April 1, 2010, at the age of 62. He receives retirement and social security benefits at a reduced rate. He would have received more of each benefit if he had worked until 65 as he had intended. Claimant also receives a small monthly check for disability insurance and sick leave that both end in the next few years.
19. Claimant continues to have numbness and tingling in both hands and frequently drops things. He did not have the surgery Dr. Crandall recommended for his arms because the shoulder surgery did not work out well. He was afraid to have more surgery. Claimant continues to have decreased grip strength, and can't even open a soda bottle without pliers. He has pain in both elbows. His pain and numbness in both upper extremities is aggravated by activities such as driving any length of time or operating a riding lawnmower. His hands fall asleep if he drives. He has to switch hands and take breaks after 15-30 minutes of driving. He cannot use a computer keyboard.
20. Claimant testified he continues to have low back problems since his October 2008 injury. He has frequent pain in his low back and can't remain in a fixed position for any length of time. He can only sit longer than 15-20 minutes if he is in his recliner. He is able to lift about 25 pounds on an occasional basis only. He can walk for about ten minutes and

stand 30-45 minutes. Due to his seniority, he was able to get co-workers to help with any job duties that were difficult due to the injuries to his back and upper extremities.

21. Claimant testified the right shoulder surgery did not relieve his complaints. He continues to have constant pain in his right shoulder that radiates up into his neck. The pain radiates down the back of his right arm. He can't raise his arm high enough to use it for any overhead activities. He has limited range of motion and can't reach his arm out to the side.
22. Claimant was diagnosed with sleep apnea several years ago, which requires him to sleep on his side. He was unable to sleep on his left side due to his previous left shoulder injury. He slept on his right side, and was able to sleep several hours a night. Since his right shoulder injury, he is unable to sleep on his right side. He now has to sleep on his back, so he has to wear his breathing machine again at night. He is only able to sleep three or four hours a night. He sleeps in a recliner during the day, and with a wedge pillow in bed with his machine at night.
23. On a typical day, Claimant sits in his recliner and watches television or reads. He does some dishes, light sweeping and some laundry. He can grocery shop if he paces himself. He is not able to mow the lawn due to the vibration of the mower. He does not do much socially outside the home. He no longer plays pool or horsehoes because of his hands, arms and shoulder.
24. Employer's medical expert, Dr. Cantrell, examined Claimant in February 2010 and noted Claimant had low back complaints related to a 2007 fall, had taken Ibuprofen before 2008, and had degenerative changes in his spine. He opined Claimant's 2008 alleged accident was not the prevailing factor in causing his current complaints. He opined Claimant's hand complaints were also not work related since he had a history of diabetic neuropathy, right hand complaints following a fall in 2007, and other risk factors for carpal tunnel syndrome. He opined Claimant's jobs activities did not put him at risk for the development of ulnar neuropathy. He deferred all opinions concerning Claimant's right shoulder injury to Dr. Milne.
25. Dr. Milne testified Claimant had no injuries to his right shoulder before May 2009. He opined Claimant's full thickness rotator cuff tear and biceps tendon tear were related to the work accident. The injury also aggravated pre-existing asymptomatic conditions. He imposed permanent restrictions of no reaching, overhead work, pushing or pulling with the right arm and no lifting over 40 pounds, and he rated Claimant's disability based on AMA guidelines.
26. Employer's vocational expert, Karen Kane, testified vocational evaluations take into consideration a person's medical restrictions, skills, and background, and determine what jobs they can perform. She opined Claimant is not precluded from returning to the workforce. She opined Claimant could work in a sedentary or light capacity based on Dr. Cantrell's restrictions. His restrictions relate only to the cervical spine. She did not take into consideration Dr. Milne's restrictions on Claimant's right shoulder. She also did not have Dr. Crandall's report wherein he recommends surgery. She concluded Claimant

could work if he sought a position within his physical capabilities. Most of the jobs she listed in her labor market survey require computer skills in excess of Claimant's current abilities.

27. Claimant's medical expert, Dr. Volarich, re-examined Claimant after his right shoulder injury. He noted Claimant continues to have significant restrictions with his right arm. He rated Claimant's right shoulder and each of his pre-existing conditions. He opined Claimant's pre-existing conditions were a hindrance or obstacle to his employment, and the combination of all his injuries created a greater overall disability. He deferred to a vocational rehabilitation expert as to whether Claimant was employable or whether there were any jobs he could perform within his restrictions.
28. Claimant's vocational expert, Jim England, noted Claimant was restricted to medium work following his 1991 left shoulder injury. He opined based on the treating doctor's restrictions, Claimant can no longer perform skilled mechanic work. Dr. Volarich's restrictions prevent him from sedentary work. He opined given the combination of Claimant's age; lack of usable, transferable skills; and the combination of his physical problems to his shoulder, hands and back, he is not employable in the open labor market and is likely to remain so into the future.
29. Claimant is credible.

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, I find the following:

- 1. Claimant sustained 50% PPD to his right shoulder as a result of the primary injury, and is permanently and totally disabled as a result of the combination of his work injury and his pre-existing conditions.**

Section 287.020.6 (RSMo 2005) defines total disability as the "inability to return to any employment and not merely...[the] inability to return to the employment in which the employee was engaged at the time of the accident." The appellate courts have interpreted this to mean an injured employee is not required to be completely inactive in order to be totally disabled. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App. 1990). The test is whether he or she can compete in the open labor market. The primary question is whether, in the ordinary course of business, any employer would reasonably be expected to employ the claimant in his or her present condition. *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990).

There is no dispute Claimant cannot return to the work he has done over the past 35 years. Claimant's vocational expert opined Claimant was restricted to medium work after his 1991 injury. Following his 2009 injury, Claimant had restrictions in both shoulders, both hands and his back. In light of those restrictions, he could not even perform sedentary work and was unemployable in the open labor market.

Employer's vocational testified medical restrictions are the most important factor in determining employability, yet she did not consider the restrictions from Dr. Milne. Most of the jobs she opined Claimant can perform require computer skills substantially greater than possessed by Claimant. She did not consider that Dr. Crandall recommended surgery on Claimant's arms and that would greatly impact his ability to keyboard. She simply concluded Claimant could work if he sought a position within his physical capabilities, yet she didn't have a complete picture of his physical capabilities and restrictions. Ms. Kane's opinion does not take into consideration much of the relevant evidence and is not persuasive.

I find the opinion of Mr. England more persuasive and find Claimant satisfied his burden of proving he is permanently and totally disabled and not able to compete in the open labor market.

The next question is whether he is permanently and totally disabled as a result of his work injury or as a result of the combination of all his disabilities. In *Hughey v. Chrysler Corp.*, 34 S.W.3d 845 (Mo. App. E.D. 2000), the court held that:

"In deciding whether the Second Injury Fund has any liability, the first determination is the degree of disability from the last injury. Until that disability is determined, it is not known whether the second injury fund has any liability. Accordingly, a claimant's preexisting disabilities are irrelevant until employer's liability for the last injury is determined. If a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount."

Id at 847 (citations omitted)

Regarding Claimant's last injury, the treating doctor, Dr. Milne, imposed restrictions and opined Claimant cannot return to his regular job as a result of his right shoulder injury. He provided a rating, which is not persuasive. It is based on AMA guidelines which are inapplicable under Missouri law. They rate impairment, and do not take into account many factors that are important in determining disability. In addition, he gave Claimant's underlying mild arthritis the same rating as he did the injury which required extensive surgery and treatment to Claimant's dominant arm.

I find the rating of Dr. Volarich more persuasive as it is based on Claimant's functional losses and the impact they have on Claimant's ability to work. This shoulder injury involved extensive surgery to Claimant's dominant arm, resulted in severe restrictions, and eliminated Claimant's ability to return to the work he had performed his entire career.

I find Claimant sustained 50% PPD to his right shoulder as a result of his May 20, 2009, work injury. He is entitled to \$46,940.56 in compensation from Employer.

Section 287.220 RSMo provides in order to assess permanent total disability against the SIF, the fact finder must make three findings respecting disability: (1) there must be a determination of the percentage of disability resulting from the last injury standing alone; (2)

there must be a finding that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or re-employment; and (3) there must be a determination that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

The evidence supports a finding Claimant had a number of pre-existing permanent partial disabilities that were a hindrance or obstacle to his employment. He had a longstanding left shoulder injury that eliminated his ability to do overhead work. His job duties were modified in order to accommodate that disability. He had a low back injury that limited his ability to lift, sit, stand, and walk. He had repetitive trauma to his upper extremities that caused bilateral cubital tunnel and bilateral carpal tunnel syndrome. These conditions have caused significant restrictions and eliminate Claimant from any type or repetitive work, including keyboarding.

There is also ample evidence Claimant's pre-existing disabilities combined with his primary injury to render him permanently and totally disabled. James England testified the combination of Claimant's age, lack of transferable skill, and physical limitations from his pre-existing and primary injuries render him permanently and totally disabled. While Claimant's last injury eliminated his ability to return to his past employment, it is the combination of his primary and pre-existing injuries and disabilities that eliminate his ability to compete for any work in the open labor market.

Claimant is permanently and totally disabled as a result of the combination of his primary injury and pre-existing disabilities. He became totally disabled April 1, 2010. He is entitled to 116 weeks of compensation from Employer at a rate of \$404.66. The SIF is liable for the differential of \$211.07 during those 116 weeks, and thereafter, \$615.73 per week in permanent total disability benefits. The SIF shall remain liable for such benefits for as long as provided by law.

An attorney lien of 25% for all compensation awarded herein is allowed Thomas J. Gregory, Claimant's attorney, for necessary legal services rendered.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation