

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

Injury No.: 01-057255

Employee: Edward Dunn, Jr.
Employer: Astoris (Settled)
Insurer: Travelers Indemnity Co. of America (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: February 12, 2001

Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 3, 2007. The award and decision of Administrative Law Judge Suzette Carlisle, issued May 3, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 2nd day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Edward Dunn, Jr.

Injury No.: 01-057255

Dependents: N/A

Employer: Astoris (Settled)

Additional Party: Second Injury Fund

Insurer: Travelers Indemnity Co. of America (Settled)

Hearing Date: February 14, 2007

Before the
**Division of Workers'
Compensation**

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

Checked by: SC:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 12, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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 injured his right shoulder while lifting a lid on a metal container.
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: 47.5% referable to the right shoulder
15. Compensation paid to-date for temporary disability: \$19,774.41
16. Value necessary medical aid paid to date by employer/insurer? \$56,988.16

Employee: Edward Dunn, Jr.

Injury No.:

01-057255

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$1,153.85
19. Weekly compensation rate: \$581.61/\$314.26
20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Second Injury Fund liability: Yes

34.66 weeks of permanent partial disability from Second Injury Fund

TOTAL: **\$10,892.25**

23. Future requirements awarded: None

Said payments to begin 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:

Matthew Sauter

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Edward Dunn, Jr.	Injury No.: 01-057255
Dependents:	N/A	Before the Division of Workers'
Employer:	Astoria (Settled)	Compensation Department of Labor and Industrial
Additional Party:	Second Injury Fund	Relations of Missouri Jefferson City, Missouri
Insurer:	Travelers Indemnity Co. of America (Settled)	Checked by: SC:tr

PRELIMINARIES

Edward Dunn, Jr. ("Claimant") requested a hearing pursuant to §287.450 RSMo. A hearing was held for a final award at the Missouri Division of Workers' Compensation ("DWC") on February 14, 2007. Attorney Matthew Sauter represented Claimant. Assistant Attorney General Da'Niel Cunningham represented the Second Injury Fund ("SIF"). The case against Astoria ("Employer") and Travelers Indemnity Co. ("Insurer") settled prior to hearing for 60% of the right shoulder. Venue is correct and jurisdiction properly lies with the Missouri DWC.

STIPULATIONS

The parties have stipulated to the following:

1. On or about February 12, 2001, Claimant was employed by Employer and sustained an accident which arose out of and in the course of his employment in St. Louis City.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was fully insured by Insurer.
4. Employer had notice of the injury and a Claim for Compensation was filed within the time prescribed by law.
5. Claimant's average weekly wage was \$1,153.85.
6. Claimant's rates for temporary total disability (TTD) and permanent partial disability (PPD) are \$581.61/\$314.26 respectively.
7. Claimant received TTD benefits totaling \$19,774.41.

8. Claimant received \$56,988.16 in medical benefits.

ISSUES

The issues for disposition in this case are:

1. Date Claimant reached maximum medical improvement (MMI).
2. The nature and extent of any SIF liability.

EXHIBITS

Claimant offered Exhibits A through P which were admitted into evidence without objection. It should be noted that reports for Drs. Wagner, Haupt and Strecker are combined in the same certification as they are all in the same office. However, the records have been distributed separately from the certifications. SIF offered no exhibits. Any notations found on the exhibits were present when admitted into evidence.

SUMMARY OF EVIDENCE

Claimant's Live Testimony

Background

1. Claimant was 56 years old at the time of the February 2001 work injury. Claimant has been married 29 years and has four children. He completed tenth grade at St. Mary's High School, but did not graduate high school. Claimant does not possess a GED, or any formal education beyond the tenth grade.
2. Prior to working for Employer, Claimant was employed as a shipping clerk for four years with Schroeder/Tremaine and eleven years as a press operator and quality control clerk with Leonco Container. Claimant later mixed prescription drugs for KV Pharmaceuticals.
3. Claimant began working for Employer in 1981. The company name changed during a series of buyouts. Claimant began as a general laborer, sweeping and emptying trash for three years. Claimant moved to soap production where he worked for nine months. Claimant later transferred to the Pyran Department and lifted bags weighing up to 100 pounds and blended material for two years.
4. He transferred to the Cal-Packer Department where he "swung" 60 pound bags onto pallets, stood four hours a day and worked overtime. He transferred because the pay was better, not because he could not perform the work. He worked in the Cal-Packer Department for four years and used a forklift to move heavy items. Claimant lifted up to two bags weighing 60 pounds each; using his left side to lift; before becoming short of breath. Claimant testified he experienced shortness of breath when climbing stairs.
5. Claimant's initial right shoulder injury occurred in 1982. Following treatment, Claimant continued to perform his regular duties and testified he was not aware of any work restrictions imposed by any doctor.
6. In the early 1990's lifting became more difficult so Claimant transferred to the control room for better pay and the absence of dust. Claimant controlled all the switches for three buildings in one room. He assigned duties to other employees, and monitored temperature control switches. The heaviest item he lifted was a clipboard. He performed his duties mainly from a seated position three out of eight hours each day.
7. Before February 2001, it took longer for Claimant to complete work assignments due to his heart and breathing problems. Claimant required rest every thirty minutes when walking due to his back. It took longer to grocery shop with his wife due to his need to rest.

The Work Injury

8. On February 12, 2001, Claimant, attempted to pull open a lid which would not open. He leaned in, pushed harder and felt his right shoulder give and strain.
9. Claimant testified that following the injury, he worked off and on with restrictions until April 2002 but never returned to his regular job duties. He was able to perform his work duties for several weeks after Dr. Haupt released him on April 22, 2002, although he worked at a slower pace.
10. During this time, Claimant did not perform overhead lifting. Nor did he lift more than 10 pounds. Claimant's helper assisted with valves as they were located near the top of the equipment and two hands were required to operate them.
11. After April 22, 2002, Claimant testified he could no longer perform the work due to age, problems walking, breathing

and his heart.

12. Claimant testified Employer had no jobs within his restrictions after he was released. On cross-examination, Claimant testified the control room job was still available but he did not think he could perform the job as well as he did prior to February 2001.
13. Claimant also testified that he has not sought employment with any employer due to breathing problems and inability to keep up.
14. Claimant believed he could obtain another position with Employer within Dr. Haupt's restrictions; but he was not interested in doing so.
15. Claimant testified he voluntarily retired; and was not released by Employer.
16. Claimant has not received a pension.

Current Complaints

17. Claimant testified his shoulder and back hurt when he sleeps. In the morning, he "slings" his right arm out of bed because it has fallen asleep. Claimant testified he is unable to woodwork; wash the outside of his house, hunt, or bowl because of his right shoulder. It takes him two days to mow the lawn on a riding mower due to arm and back problems. Claimant cannot keyboard long because his hands and arms fall asleep. Claimant breathes hard and his heart pounds after walking up stairs. Claimant can stand 15 to 20 minutes before needing a break. He drives mainly with his left hand and cannot drive very far. Claimant keeps changing positions due to pain. He "catnaps" during the day because he does not get enough rest at night.
18. Claimant testified he worked for nineteen years with no known restrictions imposed by a doctor except to wear a respirator when outside the control room.
19. Claimant testified that his heart and COPD problems have remained the same since February 2001.

Pre-existing Injuries

20. In 1982 Claimant injured his right shoulder; Dr. Wagner performed two surgeries, and Claimant missed eight to nine months of work.
21. After a lifting incident in 1986, Claimant testified his disc "collapsed or slipped" and he received temporary relief from cortisone injections. Claimant found new ways to lift 100-pound bags to avoid more injections. Leisure activities were limited due to his back. He took breaks when grocery shopping or climbing stairs. Claimant missed two to three days at a time when his back problems increased. ^[1]
22. Claimant's left knee was injured in 1991 when he slipped on a ladder and hung upside down by his knee. Dr. Wagner performed two surgeries and Claimant was off work about nine months. Complaints include: a pulling sensation, pain with weather changes, and inability to walk as long as he could before the injury. Claimant worked without restrictions after he was released by the doctor.
23. Claimant testified he has smoked a pack and a half of cigarettes per day since he was eight years old. The only time he stopped smoking was for seven months after his first heart attack. He developed chronic obstructive pulmonary disease (COPD) in 1997 which caused difficulty breathing. Claimant wore a respirator when he left the control room because of dust. Deep breaths "zapped" him. He attributed fatigue to his heart and emphysema. He relied on his helper to go up and down stairs before February 2001 to avoid becoming out of breath.
24. Prior to February 2001, Claimant testified his right shoulder problems made it increasingly difficult to turn on control room switches.
25. In 1997, Dr. Salem authorized Claimant to receive a license plate for persons with permanent disabilities based on heart problems and severe limitations when walking (Exhibit M).
26. Claimant testified he sustained a heart attack in September 1996. Two more heart attacks followed in 1998 resulting in two angioplasties and two stents. Claimant missed two and a half years from work and testified he was never the same. He took nitroglycerin pills three to four times per month for chest pains. Heart problems required him to slow down, sit, and relax more often.
27. Prior to 2001, Claimant experienced recurrent episodes of gout in his big toes once a year; however, he did not lose much time from work.

Deposition Testimony

Dr. A.G.Lipede

28. **A.G. Lipede, M.D.**, board certified in forensic medicine, examined Claimant in 2004 and 2006 at the request of his attorney.
29. Claimant reported he was forced to retire or had been laid off due to severe restrictions resulting from the February 2001 injury (Exhibit M-1, 3, 5,).^[2] Physical examination on May 17, 2004 revealed a tender right shoulder with an “active winging” scapula and atrophy, tender right thumb joint and crepitus in the right knee (Exhibit M-8).
30. Dr. Lipede concluded Claimant’s right shoulder had worsened given Dr. Haupt’s 30% rating in April 2002 and Dr. Morrow’s 85% rating in May 2002 (Exhibit M-9).
31. On May 17, 2004, Dr. Lipede rated 78% PPD of Claimant’s right shoulder, 25% PPD of the right thumb at the hand, 25% PPD of the right knee, 10% PPD of the low back, and 10% PPD of the body as a whole for gout, 45% of the body for chronic heart problems, 35% of the body for COPD, 50% of the body as a whole for a cardiopulmonary dysfunction, and 25% for depression related to illnesses and inability to engage in daily living and gainful employment (Exhibit L- 22, 26, M-1, 9-10).^[3]
32. On March 28, 2006, Dr. Lipede re-examined Claimant and found his diagnoses the same but a “palpable and observable increase in his limitations and tolerances of work and exercise” since the 2004 examination (M-2).
33. Dr. Lipede found Claimant developed the following limitations between 2004 and 2006: 1) standing due to herniated disk and nerve compression at L5-S1,^[4] 2) walking due to chest pain, shortness of breath from severe COPD and coronary artery occlusive disease, 3) sitting due to the herniated disc at L5-S1, 4) lifting and carrying no more than ten pounds due to both shoulder tears, 5) overhead reaching due to both shoulders, 6) pulling due to shoulders, elbows and wrists, driving short distances due to his back, shoulder, elbows, and wrist, 7) no right hand typing, and 8) glasses are needed for astigmatism (Exhibit M-2).
34. On February 9, 2007 Dr. Lipede testified by deposition that the combined sum of Claimant’s primary right shoulder, pre-existing right shoulder, COPD, coronary artery disease, and knee disabilities is greater than their mathematical sum (Exhibit L-22-23 M-10).
35. Dr. Lipede further testified that Claimant was not employable due to the restrictions imposed by Drs. Nogalski and Haupt. However he acknowledged that neither doctor found Claimant unemployable.
36. Dr. Lipede believed a vocational expert would agree with his conclusion based on Claimant’s restrictions: no lifting above the elbow, no stooping or carrying more than five pounds (Exhibit L-43).

Mr. James England

37. **James England**, a rehabilitation counselor, examined Claimant at his attorney’s request on August 15, 2005. Mr. England reviewed work restrictions set for Claimant by Drs. Morrow, Haupt and Lipede. He concluded Claimant was unable to compete for or sustain employment “considering [his] combination of medical problems” (Exhibit O-12).
38. Claimant informed Mr. England the control room job became “better and better” over time due to decrease in physical activity (Exhibit N-23).
Mr. England concluded:

“If [Claimant] had the ability to do even sedentary work, he would have stayed where he was working **based on what he indicated to me and how he described the job**” (Exhibit N-18). **If [Claimant] could sustain sedentary work, he should be able to go back ... and just continue doing what he was doing** (Exhibit N-23-24). (Emphasis added)
39. Claimant informed Mr. England that he would still be working if he could function at a sedentary to light level on a consistent basis (Exhibit O-12).
40. Mr. England found Claimant’s combined medical problems included difficulty sitting, using his right arm, sleep deprivation, staying awake in a seated position, breathing, heart problems, and fatigue. For these reasons, he found Claimant lacked the stamina to pay attention to the details of a sedentary position (Exhibit O-2-12).
41. Mr. England testified by deposition that Claimant’s inability to work was due to the February 2001 work injury combined with the pre-existing disabilities. He further opined employers would be reluctant to hire Claimant in his sixties with heart, upper extremity, and breathing problems. He also concluded Claimant’s physical difficulties would make employers leery of hiring him (Exhibit N-19).

42. Mr. England opined that Claimant's high school level reading and sixth grade math scores were sufficient to perform a variety of jobs ^[5] (Exhibit N-17). However, re-training was not recommended as Claimant was unable to sustain sedentary employment for forty hours per week. Mr. England found Claimant willing to work if he had been able to (Exhibit 24).
43. Mr. England found Claimant had no transferable skills outside of chemical operation.

Medical Evidence

44. John Wagner, M.D repaired Claimant's right rotator cuff on May 3, 1982 and a second right shoulder surgery on July 27, 1982 (Exhibit D, K). ^[6] On February 28, 1983, Dr. Wagner set permanent restrictions of no overhead work and no lifting over 25 pounds (Exhibit D).
45. Dr. Wagner performed left knee surgery on December 13, 1991. On May 4, 1992, Dr. Wagner released Claimant from medical care with a rating of 15% PPD of the left knee (Exhibits D).
46. An MR/CT scan on November 12, 1992 revealed a disc bulge at L5-S1 (Exhibit M- 6). Similar findings were made on the 1996 myelogram and 1999 MRI of the lumbar spine.
47. In 1996, Dr. Salem performed Claimant's first angioplasty on the left side. A second stent was placed in January 1998. Dr. Salem noted chronic obstructive pulmonary disease (COPD) (Exhibit N-10).
48. In 1998, Neil A. Ettinger, M.D., examined Claimant and diagnosed coronary disease. Claimant reported he smoked up to three packs of cigarettes per day for 47 years. At the time of the examination, Claimant smoked one and a half packs per day.
49. On March 23, 2001, Michael Nogalski, M.D., repaired Claimant's right rotator cuff and deltoid.
50. On June 28, 2001, Claimant reported increased pain after he crumpled a piece of paper. Other complaints included shaking when performing exercises, difficulty shaving or holding a cup (Exhibit A).
51. An MRI on July 26, 2001 revealed a large rotator cuff tear (Exhibit B-1). Herbert. Haupt, M.D examined Claimant's right shoulder on August 15, 2001. After a brief course of treatment, Dr. Haupt repaired the tear on September 7, 2001, (Exhibit B-3).
52. Claimant reported right shoulder pain while operating a computer. An MRI on October 25, 2001 revealed a full thickness rotator cuff tear which Dr. Haupt repaired on October 26, 2001(Exhibit B-6).
53. Claimant re-injured his right shoulder on January 4, 2002 while leaving physical therapy. An MRI on March 7, 2002 revealed a rotator cuff tear. Dr. Haupt did not recommend more surgery due to an avascular condition of Claimant's shoulder (K-12). No surgery was performed.
54. Dr. Haupt released Claimant to full duty on March 7, 2002. After continuing complaints, Dr. Haupt injected the shoulder, scheduled more physical therapy, and a functional capacity evaluation (FCE). The therapist reported symptom magnification and significant limitations with overhead lifting (Exhibit B-14, K).
55. On April 22, 2002, Dr. Haupt found Claimant had reached maximum medical improvement (MMI) from multiple failed rotator cuff repairs. Based on FCE results, Claimant was released from care with the following permanent restrictions: lifting floor to knuckle: 30 pounds occasionally, 15 pounds frequently, knuckle to shoulder: 7 pounds occasionally, 2 pounds frequently, shoulder to eye level: 7 pounds occasionally, 2 pounds frequently, carrying limit bilaterally: 17 pounds occasionally, 8 pounds frequently, pushing: 29 pounds, pulling: 44 pounds, and no work above chest level with the right arm (Exhibit B14).
56. Dr. Haupt rated 25% PPD of the right shoulder for the February 2001 injury and 5% for pre-existing injury to the same body part (Exhibit B).
57. On May 28, 2002, J.H. Morrow Jr., M.D., examined Claimant for SIF purposes at his attorney's request. Dr. Morrow discussed Claimant's prior right shoulder injury, gastric ulcers, and three heart attacks. Prior to February 2001; Claimant reported he could bowl, play softball, lift, had normal range of motion, and was virtually pain free (Exhibit K-6-7).
58. Examination of the right shoulder revealed tenderness, limited range of movement, and increased pain with movement (Exhibit K 8-9).

59. Dr. Morrow rated Claimant's right shoulder 85% PPD, with 20% pre-existing (Exhibit K-10). No other ratings were provided.
60. Dr. Morrow recommended Claimant avoid: right arm use above the waist, forceful grasping, twisting, pushing, pulling, vibrating machines, vertical climbing, working at high levels, and limit mouse use to 30 minutes with elbow and forearm on a level surface, left hand use only for work, no vertical climbing, and avoid working at high levels.
61. Dr. Morrow deferred to a vocational opinion regarding Claimant's ability to work (Exhibit K-10-11).
62. Dr. Morrow concluded the disability to Claimant's right shoulder combined with "any prior rating" to provide greater overall disability than the simple sum (Exhibit K-11).^[7]
63. On July 10, 2002, a right angioplasty and stenting were performed on Claimant's coronary system after tests revealed 70% narrowing of the mid portion (Exhibit E).
64. On January 30, 2003, Bakr I. Salem, M.D., cleared Claimant for additional surgery to his right shoulder due to "significant limitations" (Exhibit E).^[8]
65. On February 5, 2003, Dr. Haupt treated Claimant for a full thickness rotator cuff tear to his left shoulder which he sustained while cutting grass at home in June 2002 (Exhibit B-4).
66. On May 14, 2003, Dr. Strecker performed a CMC arthroplasty with an orthosphere of Claimant's left thumb (Exhibit B-6, G).
67. On June 8, 2004, Neil A. Ettinger, M.D., examined Claimant with increasing complaints of shortness of breath and diagnosed COPD with interval decline since 1998. Dr. Ettinger attributed obesity and de-conditioning to Claimant's excessive shortness of breath (Exhibit F).
68. On January 10, 2005, Dr. Salem cleared Claimant from a cardiac standpoint, for another surgery to his left hand (Exhibit E).^[9]
69. On January 6, 2006, Claimant complained of increased breathing problems, chest burning, and leg pain, and tingling when examined by Dr. Ettinger (Exhibit F). Claimant also reported smoking a pack of cigarettes per day. Dr. Ettinger opined that obesity and de-conditioning continue to contribute to Claimant's excessive shortness of breath (Exhibit F).

FINDINGS OF FACT and RULINGS OF LAW

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

I. Claimant has the burden of proof.

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury fund Liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). Claimant [must] establish that he has sustained an injury by accident arising out of and in the course of his employment, and the accident resulted in the alleged injuries. *Choate v. Lily Tulip, Inc.*, 809 S. W. 2d 102, 105 (Mo. App. 1991). (*Overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W. 3d 220, 223 (Mo. banc 2003)). Claimant must prove the nature and extent of disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995). (*Overruled on other grounds by Hampton*, 121 S.W. 2d at 223).

II. Claimant reached maximum medical improvement on April 22, 2002.

The parties did not stipulate to the date Claimant reached MMI. Dr. Haupt found Claimant reached MMI April 22, 2002. Dr. Salem cleared Claimant for right shoulder surgery in 2003, but no medical records are in evidence.^[10] Therefore, I find Claimant reached MMI on April 22, 2002.

III. Claimant sustained permanent partial disability from the last injury alone.

In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000). [P]re-existing disabilities are irrelevant until the employer's liability for the last injury is determined. *Id.* If the last injury in and of itself rendered Claimant permanently and totally disabled, then the fund has no liability... *Id.*, *Landman v. Ice Cream Specialties, Inc.* 107 S.W.3d

240, 248 (Mo.banc 2003) (*Overruled on other grounds by Hampton*, 121 S.W. 2d at 223).

Section 287.220.1 RSMo (2000), pertaining to SIF liability, provides that in a case of permanent partial or permanent total disability benefits, Claimant must prove the following:

- 1) There must be a determination that the employee has permanent disability resulting from the last injury alone which is compensable. *Hughey*, 34 S.W.3d at 847, and
- 2) There was a pre-existing permanent disability that was serious enough to constitute a hindrance or obstacle to employment or re-employment which combines with the disability from the compensable work related injury to create a greater overall disability to the employee's body as a whole than the simple sum of the disability from the work injury and the pre-existing disability considered separately. *Luetzinger v. Treasurer of Missouri, Custodian of Second Injury Fund*, 895 S.W. 2d 591 (Mo. App. 1995).

To establish entitlement to permanent total disability benefits, Claimant must prove a third factor:

- 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. *Boring v. Treasurer*, 947 S.W. 2d 483 (Mo. App. 1997) (*Overruled on other grounds by Hampton*, 121 S.W. 2d at 223).

Claimant has met his burden on step one. The parties did not stipulate to a percentage of disability related to the primary work injury. Right shoulder ratings include: Dr. Haupt - 25%, Dr. Morrow - 65%, and Dr. Lipede - 78% ^[11]. Claimant settled his primary case for 60% PPD of the right shoulder (Exhibit P). However, the SIF is not bound to the terms of the settlement. *Totten v. Treasurer of State* 116 S.W.3d 624, 628 (Mo. App. 2003). Three surgeries were performed on four rotator cuff tears. Dr. Haupt opined the fourth tear would not benefit from surgery. The FCE noted significant limitations with overhead lifting. Dr. Haupt increased the lifting restrictions set by Dr. Wagner in 1983 and added pushing and pulling limits. Dr. Morrow limited right hand work to chest level and limited work to left hand use only.

Claimant testified that after February 2001, he could no longer woodwork as long; wash the outside of his house, hunt, or bowl and it takes longer to perform tasks. At night the arm falls asleep; requiring him to "sling" it out of bed in the morning.

Based upon medical records and Claimant's testimony, I find Claimant sustained 47.5% PPD referable to his right shoulder from the February 2001 injury.

IV. Claimant's pre-existing injuries create a hindrance or obstacle to employment or re-employment.

The next step is to determine whether or not, at the time of the primary injury, Claimant had any pre-existing PPD sufficient to constitute a hindrance or obstacle to employment or re-employment. Claimant has met his burden on step two.

"To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, the [fact finder] should focus on the potential that the pre-existing injury may combine with a future work related injuries to result in a greater degree of disability than would have resulted if there was no such prior condition." *E.W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo.App.2002), (*overruled on other grounds, Hampton*, 121 S.W.3d at 223).

Dr. Lipede rated the following PPD percentages for pre-existing conditions: 25% of the right knee, 10% of the low back, 10% of the body for gout, 45% of the body for heart problems, 35% of the body for COPD, and 50% of the body for cardiopulmonary dysfunction.

Claimant testified to the following pre-existing conditions prior to February 2001: two right shoulder surgeries, left knee surgery, three heart attacks requiring two stents, low back pain, gout, coronary artery disease, and COPD.

Before February 2001, Claimant testified credibly that he used his left side to lift and carry hundred pound bags. He occasionally missed up to three days with back pain. ^[12] Claimant decreased walking after the knee injury and continues to experience pain with weather changes. He further testified he missed two and a half years from work during recovery for three heart attacks. He could not take deep breaths and easily became "zapped" of strength due to COPD. He used a respirator at work when he was outside the control room. Claimant's helper walked the stairs for Claimant as needed. In general, it became harder to perform his job duties and required more effort. Claimant was issued a permanent disabled license plate in 1997 for his heart and limited ability to walk.

Based on medical evidence, and Claimant's testimony, I find Claimant had the following pre-existing conditions on February 12, 2001: right shoulder, left knee, heart, lungs, and low back. I find Claimant's pre-existing disabilities serious enough to constitute a hindrance or obstacle to employment or to obtaining reemployment. I further find the pre-existing conditions combine with the primary right shoulder injury to create greater overall disability than the simple sum of the work injury and the earlier injuries considered separately.

V. Claimant has not proven that he is permanently totally disabled due to a combination of the pre-existing conditions and February 2001 right shoulder injury.

The final determination is whether Claimant is permanently and totally disabled due to a combination of his primary shoulder injury and his pre-existing medical conditions. ^[13]

Section 287.020.7 Mo. Rev. Stat. (2000) defines total disability as the inability to return to any employment and not merely... [the] inability to return to the employment in which employee was engaged at the time of the accident." The words "inability to return to any employment" mean that "the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo. App. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition. *Id* at 922, *Vogel v. Hall Implement Co.*, 551 S.W.2d 922, 926 (Mo.App. 1977) (*Overruled on other grounds by Hampton*, 121 S.W. 2d at 223). Courts do not consider working very limited hours at rudimentary tasks to be reasonable or normal employment. *Grgic v. P & G Const.*, 904 S.W.2d 464, 466 (Mo. App. 1995).

The primary determination for permanent-total disability is whether the claimant is able to compete in the open labor market given [his] physical condition and situation. *Messex v. Sachs Elec. Co.* 989 S.W.2d 206, 210 (Mo. App. 1999) (*overruled on other grounds by Hampton*, 121 S.W.3d at 223). The test for permanent total disability is whether, given the claimant's situation and condition, he is competent to compete in the open labor market. The central question is whether in the ordinary course of business, an employer would reasonably be expected to hire the claimant in his present physical condition, reasonably expecting him to perform the work for which he is hired. *Grgic*, 904 S.W.2d at 466, *Messex*, 989 S.W.2d at 210 (*overruled on other grounds by Hampton*, 121 S.W.3d at 223).

I find Claimant has not met that burden. Drs. Haupt and Morrow set work restrictions in 2002 but did not find Claimant unable to compete in the open labor market in 2002. Dr. Lipede's opinion is not persuasive. Dr. Lipede found Claimant unable to work after multiple surgeries following the work injury and unrelated to it. Procedures include: surgery to the left shoulder and thumb, and right-sided angioplasty and stenting between 2002 and 2005. Dr. Lipede based his opinion on restrictions set by Dr. Nogalski and Dr. Haupt. However, Dr. Haupt did not find Claimant unable to work and Dr. Nogalski did not set restrictions. Nor is Dr. Lipede a vocational expert.

Mr. England's opinion lacked foundation. He interviewed Claimant once, more than three years after Claimant was released and after multiple surgeries which were unrelated to the February 2001 injury. Mr. England's opinion is not credible because it was based on Claimant's statement that he would have continued working a sedentary to light job if he were able to do so consistently.

After February 2001, Claimant continued to receive medical care for pre-existing conditions. Although Claimant demonstrated limited right shoulder movement during the hearing, Mr. England's opinion did not address the impact of deteriorating pre-existing conditions on Claimant's ability to work. Mr. England gave the following deposition testimony:

Question (Attorney): So [Claimant's] disabilities as they existed prior to February of 2001, along with this – considered along with this February 2001 work injury, have made him unemployable in your opinion?

Answer (Mr. England): I believe so. ^[14]

However, Claimant's own doctors noted a decline in his health after February 2001. Claimant received an angioplasty and stenting in July 2002. Dr. Ettinger noted a decline in COPD interval in 2004 and again in 2006. He attributed Claimant's increased shortness of breath to obesity and de-conditioning in 2004 and 2006. Dr. Lipede noted an increase in Claimant's limitations and work tolerances between 2004 and 2006. The SIF is not liable for deterioration of these pre-existing conditions. *Wilhite v. Hurd*, 411 S.W.2d 72 (Mo. 1967).

Also, Mr. England's opinion does not address the impact of subsequent conditions after February 2001 on Claimant's ability to work. Dr. Salem approved Claimant for additional right shoulder surgery in 2003 due to severe limitations ^[15]. A CMC arthroplasty of Claimant's left thumb was performed in 2003. Dr. Salem cleared Claimant for left hand surgery in ^[16]

2005.

Mr. England's opinion is also based on Claimant's ability to work as of August 2005, not April 2002, when he reached MMI. Shortly after returning to work, Claimant injured his left shoulder at home. Claimant relied on his left side in the past when working. It is not clear how much the left shoulder injury impacted Claimant's ability to work or Mr. England's opinion. Mr. England based his opinion on Claimant's problems with right and left shoulder pain, fatigue, heart, breathing problems, and difficulty sleeping. However, left shoulder, thumb, and hand problems developed after February 2001, and heart and breathing problems worsened during the same time period.

Mr. England's report lacks any reference to a forced retirement, layoff, or refusal to allow Claimant to return work within the restrictions, as referenced in medical reports. Claimant's testimony is not credible regarding his ability to work and Employers' willingness to return him to work. Claimant testified he returned to work, performed the work, but decided to retire and say "to heck with it." He also provided the following contradictory testimony about his ability to work in 2002 and why he left work:

a) On cross-examination, Claimant testified that Employer did not fire him or let him go; he made a decision to retire.

b) On redirect, Claimant testified Employer would not allow him to return to the control room and had no job within the restrictions. Claimant denied returning to his job due to the stress of two departments working in one area, extreme tiredness, and difficulty with breathing. He testified that he had the age and years of service, so he figured "to heck with it."

c) On re-cross, **Claimant decided it was better for his health for him to "Get out of there."** The job was still there but Claimant did not think he could perform the job anymore due to his health. Claimant then testified **Employer did not accommodate his restrictions and he was not able to do the same job** he performed prior to February 2001. (Emphasis added).

d) Claimant testified that **he believed he could have obtained another position with the company but he did not want to.** (Emphasis added) Claimant has not sought employment anywhere since he retired.

e) On redirect Claimant **testified he left Employer because he did not believe he could perform the job due to a combination of conditions** (Emphasis added).

Claimant's testimony is not credible that Employer would not permit him to return to work. He did not seek another position with Employer although he was sure he could obtain one within the restrictions. Nor did he seek employment with another employer. I find Claimant worked until he decided to say "to heck with it" and retire.

Claimant believed he could not work due to multiple health problems. However, that is not the standard for receiving PTD benefits. I do not find Claimant was unable to compete in the open labor market due to a combination of his pre-existing conditions and the February 12, 2001 work injury. I find Claimant was able to continue to work within the restrictions set by Dr. Haupt. I find it was reasonable for Employer to expect Claimant to continue performing the work he was hired to do within the work restrictions. The heaviest item Claimant carried was a clipboard. Helpers performed duties involving steps. He had not performed overhead work since 1983. Dr. Haupt did not restrict sitting, walking, standing, or writing. Also, Claimant did not connect the deterioration of any pre-existing conditions to the February 2001 work injury. Claimant has many health issues; however, the SIF is not liable for deterioration of pre-existing or subsequent conditions.

I find Claimant had a serious injury and chose to retire; which he was entitled to do. Based on deterioration of pre-existing conditions, development of subsequent conditions, lack of expert foundation, medical records, and Claimant's inconsistent testimony, I find Claimant did not prove he was unable to compete in the open labor market due to a combination of the February 12, 2001 right shoulder injury and pre-existing conditions. Therefore, I do not find Claimant PTD as a result of the primary and pre-existing conditions; and the SIF is not liable for PTD benefits.

VI. Claimant is entitled to permanent partial disability from the Second Injury Fund.

Once a determination is made that a claimant is not PTD, the inquiry turns to what degree, if any, is an individual permanently partially disabled for purposes of SIF liability. *Leutzinger v. Treasurer of the State of Missouri*, 895 S.W.2d 591, 593 (Mo. App. 1995). Section 287.220.1 RSMo., provides the SIF is triggered in all cases of PPD where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the preexisting disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and the preexisting conditions must produce additional disability greater than the last injury standing alone.

I previously found Claimant sustained 47.5% PPD of the right shoulder from the February 2001 work injury. ^[17] Dr. Wagner rated 20% PPD of Claimant's right shoulder in 1983. Dr. Lipede rated 78% PPD of the right shoulder in 2002, 10% PPD of the back, 10% PPD of the body for gout, 45% of the body for heart problems, 35% of the body for COPD, 50% of the body for cardiopulmonary dysfunction, and 25% of the body for depression.

The [fact finder] is free to deviate from the exact disability percentages that medical experts estimate when there is additional testimony of Claimant's ability to function. *Jost v. Big Boys Steel Erection, Inc.* 946 S.W.2d 777, 779 (Mo. App. 1997) (overruled on other grounds by *Hampton*, 121 S.W.3d at 223).

Based upon Claimant's testimony of complaints regarding pre-existing conditions which is supported by medical records, and the opinions of Drs. Wagner, Nogalski, Haupt, Lipede, and Morrow, I find Claimant's preexisting conditions to his right shoulder, left knee, heart, and lungs create a hindrance or obstacle to Claimant's employment or re-employment.

I find both the February 2001 injury and the pre-existing conditions reach the threshold to trigger SIF liability. I find Claimant to have the following PPD regarding pre-existing conditions: 20% of the right shoulder, 25% of the left knee, 25% of the body for heart problems, and 12.5% of the body for COPD.

I do not find the following pre-existing conditions trigger SIF liability: Claimant's right knee, low back, gout, cardiopulmonary dysfunction, or alleged depression. The left shoulder, left thumb, and left long finger conditions, occurred after February 12, 2001, therefore do not trigger SIF liability. SIF is also not responsible deterioration of the pre-existing heart and COPD conditions after February 12, 2001. *Wilhite v. Hurd*, 411 S.W.2d 72 (Mo. 1967) (overruled on other grounds by *Hampton*, 121 S.W.3d at 223) (other citations omitted).

I find that when Claimant's last injury to his right shoulder, totaling 47.5% of the shoulder, combined with his preexisting right shoulder, left knee, heart problems, and COPD, it created a substantially greater disability than the simple sum, resulting in a synergistic affect. Applying a 10% load factor, Claimant is entitled to receive 34.66 weeks of PPD compensation from the SIF or \$10,892.25 (34.66 weeks x \$314.26).

CONCLUSION

Claimant sustained an injury on February 12, 2001, which arose out of and in the course of his employment. Employer and Insurer have reached a compromise settlement with Claimant referable to the right shoulder. Claimant is awarded 34.66 weeks of additional PPD from the SIF totaling \$10,892.25. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

[1] An MRI dated November 13, 1992 revealed a central disc bulge at L5-S1 (Exhibit 12).

[2] According to Dr. Lipede's report Employer would not permit Claimant to return to work. However, the evidence does not support this conclusion.

[3] Dr. Lipede did not distinguish between the disability from the 1982 and 2001 right shoulder injuries. Dr. Lipede provided a right knee rating but did not provide a left knee rating. The record contains no evidence of Claimant sustaining a right knee injury.

[4] The record does not contain evidence of nerve compression.

[5] Based on Claimant's test scores on The Wide Range Achievement Test- Revision 3.

[6] The record is not clear whether the second surgery was to manipulate a frozen shoulder, repair a re-torn rotator cuff or was exploratory in nature. It is clear that a second surgery was performed on the right shoulder in July 1982.

[7] It is not clear what 'prior ratings' or body parts Dr. Morrow referred to. No other ratings are mentioned in the report.

[8] It is not clear what caused the severe limitations.

[9] It is not clear from the medical records when the first surgery occurred and what it was for; or if the second surgery was performed.

[10] For more information, see numbered paragraph 64 supra and Exhibit E.

[11] Dr. Lipede is the only physician that did not address pre-existing disability to Claimant's right shoulder. Therefore, it is not clear whether the 78% includes any prior disability.

[12] An MRI shows a bulge at L5-S1.

[13] Section 287.220.1 Mo. Rev. Stat (2000).

[14] Exhibit M-19 (lines 9-13)

[15] The record is not clear why right shoulder surgery was considered, whether it was performed, or the reason it was needed. The record is silent as to why Claimant sought clearance for additional right shoulder surgery after Dr. Haupt released him and recommended against more surgery.

[16] The record contains no explanation for the need for hand surgery in 2005. However, Dr. Salem approved Claimant for right shoulder and left hand surgeries in 2003 and 2005.

[17] Supra, pg. 13