

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

Injury No.: 05-079731

Employee: Sam Ellington

Employer: Southeast Missouri Boll Weevil
Eradication Foundation

Insurer: Commerce and Industry

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 § 287.480 RSMo.¹ Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge 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 November 19, 2010, as supplemented herein.

Preliminaries

The administrative law judge made the following findings: 1) Employee's August 18, 2005, accident that arose out of and in the course of his employment was a substantial factor in causing his new back complaints; 2) Employee did not meet his burden of proving that additional medical care is necessary to cure and relieve him from the effects of his injuries; 3) Employee's primary injuries resulted in 45% permanent partial disability of the left shoulder and 7.5% permanent partial disability of the body as a whole; and 4) Employee is permanently and totally disabled as a result of his primary injuries combining with his preexisting disabilities.

The Second Injury Fund filed an Application for Review with the Commission alleging the administrative law judge erred in not admitting into evidence three separate writings of Dr. Poetz. The Second injury Fund also argues on appeal that the administrative law judge erred in finding that employee's permanent total disability is the result of his primary injuries combining with his preexisting disabilities. The Second Injury Fund maintains that employee is permanently and totally disabled solely due to his primary injuries.

Findings of Fact

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

At the August 4, 2010, hearing the Second Injury Fund attempted to admit an exhibit consisting of two independent medical evaluation reports and a piece of correspondence

¹ Statutory references are to the Revised Statutes of Missouri 2004 unless otherwise indicated.

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prepared by Dr. Poetz (exhibit). Employer objected to the exhibit's admission on the grounds that it is hearsay. Employer argued that Dr. Poetz was not deposed and it was not submitted as a complete medical report. In addition, employer argued that the exhibit included a letter, which offered a medical opinion, but was not accompanied by a contemporaneous medical exam. Employer concluded that without the exhibit being accompanied by any of the aforementioned, it consisted of inadmissible hearsay.

The administrative law judge noted in his award that the exhibit was offered by the Second Injury Fund and that employer objected to the admission of the exhibit into evidence. The administrative law judge concluded that "[t]he objection was sustained based on [the Second Injury Fund's] failure to adhere to the requirements of § 287.210.7, to wit, [the Second Injury Fund] failed to provide opposing parties with notice of its intention to offer the reports."

Conclusions of Law

While we agree with the administrative law judge's ultimate conclusion that employee is permanently and totally disabled as a result of his primary injuries combining with his preexisting disabilities, we issue this supplemental opinion to address the Second Injury Fund's arguments on appeal and to provide a more thorough Second Injury Fund liability analysis.

Evidentiary Issue

The Second Injury Fund argues that the exhibit should have been admitted into evidence because the Second Injury Fund is specifically excluded from the 60-day rule provided in § 287.210.7, RSMo. The Second Injury Fund also argues that because Mr. England's opinions were admitted into evidence, Dr. Poetz's materials should be admitted as well. The Second Injury Fund urges that Mr. England specifically mentions and references Dr. Poetz's opinions in his report and in his deposition testimony. The Second Injury Fund reasons that if Mr. England's opinions were admitted, Dr. Poetz's materials should be admitted as well because Mr. England relied on them.

We find that the administrative law judge's ultimate conclusion to deny admissibility of the exhibit was correct, but for different reasons.

Section 287.210.7, RSMo. provides, in part that "[t]he testimony of a treating or examining physician may be submitted in evidence on the issues in controversy by a complete medical report and shall be admissible without other foundational evidence subject to compliance with the following procedures." Subsection 7 goes on to list a number of requirements a party must complete in order to admit a complete medical report as testimony of a treating or examining physician without other foundational evidence. However, the last sentence of subsection 7 states that "[t]he provisions of this subsection shall not apply to claims against the [S]econd [I]njury [F]und." We find that this last sentence specifically prohibits all parties involved in a claim against the Second Injury Fund, including the Second Injury Fund itself, from admitting into evidence complete medical reports as testimony of a treating or examining physician without other foundational evidence. In other words, we find that subsection 7, as a whole, is inapplicable in cases involving a claim against the Second Injury Fund.

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In this case, the Second Injury Fund offered into evidence, without any other foundational evidence, two independent medical evaluations and a piece of correspondence prepared by Dr. Poetz. Employer objected to the admission of the reports and the correspondence on the grounds that they were hearsay.

The reports and correspondence included Dr. Poetz's medical opinions. The Second Injury Fund offered the reports and correspondence to prove that employee's nature and extent of permanent partial disability is the same as that opined by Dr. Poetz in said reports and correspondence. We find that the Second Injury Fund's use of Dr. Poetz's reports and correspondence violated the hearsay rule. The Second Injury Fund attempted to offer Dr. Poetz's opinions as proof of the matter asserted, the nature and extent of employee's permanent partial disability. For the foregoing reasons, we find that the exhibit is hearsay, the Second Injury Fund failed to prove, or even argue, that the exhibit was admissible under any exception to the hearsay rule and, therefore, the exhibit is inadmissible.

We also disagree with the Second Injury Fund's argument that Dr. Poetz's opinions are part of the record as introduced, without objection, through Mr. England's report and testimony. Mr. England is a vocational expert and provided his expert opinion with regard to employee's employability. Dr. Poetz's medical opinions are not automatically admitted simply because a vocational expert reviewed and took them into account in formulating his opinion. Mr. England's opinion is admitted into evidence because employee provided the proper foundational evidence (Mr. England was deposed and the employer and the Second Injury Fund were provided with an opportunity to cross-examine him). The Second Injury Fund is not allowed to piggyback on the foundational evidence properly laid for Mr. England's opinions to bring in Dr. Poetz's opinions. There was no foundational evidence provided for Dr. Poetz's opinions and, therefore, the exhibit is denied.

Second Injury Fund Analysis

Section 287.220 RSMo. creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." Before determining Second Injury Fund liability, the employer's liability must first be considered in isolation. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Kizior*, the Court set out a step-by-step test for determining Second Injury Fund liability:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer's liability is considered in isolation – 'the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability'; (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered

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alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

Kizior, 5 S.W.3d at 200.

1. Primary Injury

Dr. Cantrell saw employee for an independent medical evaluation in 2007. Dr. Cantrell opined that employee had reached maximum medical improvement and recommended permanent restrictions that he avoid repetitive over the shoulder work with his left upper extremity and limit lifting to 50 pounds from waist to shoulder utilizing both upper extremities. Dr. Cantrell concluded that employee sustained 10% permanent partial disability of the left upper extremity at the level of the shoulder as a result of the August 2005 injury.

Dr. Volarich saw employee for an independent medical evaluation on October 28, 2008. Dr. Volarich diagnosed employee as having suffered a left shoulder AC separation, failed AC joint repair, left frozen shoulder syndrome, left chest rib fracture, and an aggravation of lumbar syndrome as related to the injury of August 18, 2005. Dr. Volarich suggested that employee should be limited from using his left arm for anything more than attempts to perform activities of daily living. Dr. Volarich opined that employee sustained 65% permanent partial disability of the left shoulder and 15% permanent partial disability of the body as a whole referable to the lumbar spine as a result of the August 2005 injury.

Dr. Volarich found an aggravation of the lumbar spine based upon employee telling him that he had worsening back pain and more frequent complaints following the August 2005 accident.

Based upon the weight of the evidence, we agree with the administrative law judge and find that the primary injuries resulted in employee sustaining 45% permanent partial disability of his left shoulder and 7.5% permanent partial disability of the body as a whole referable to the aggravation of his lumbar symptoms.

2. Preexisting Disabilities

Dr. Cantrell found no disabling condition as it relates to the spine either prior to the August 2005 injury or following the injury of August 2005.

Dr. Volarich, on the other hand, opined that there was 25% permanent partial disability of the body as a whole regarding the lumbar complaints due to degenerative disc disease prior to the August 2005 injury. Dr. Volarich agreed that the preexisting degenerative lumbar spine condition was progressive in nature.

Dr. Volarich pointed out that employee had radicular leg pain dating back to the first auto parts job he worked and developed pain down into his foot at the second auto parts job he worked. He also noted that employee's history revealed that he removed himself from the auto mechanic/parts profession because of his lumbar condition. Employee took the job with employer because it was easier on his back. Dr. Volarich found that all of these factors support his diagnosis of preexisting degenerative disc disease.

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We find that Dr. Volarich's opinion with regard to preexisting disabilities is more credible than Dr. Cantrell's. Therefore, in accordance with Dr. Volarich's opinion, we find that at the time of the August 2005 injury, employee suffered 25% preexisting permanent partial disability of the body as a whole referable to his degenerative disc disease.

3. Combination

Dr. Volarich opined that employee is "permanently and totally disabled and unable to return to the open labor market due to the 8/18/05 injury to the left shoulder and low back in combination with his preexisting lumbar syndrome." Dr. Volarich also included in his report that in the absence of the prior lumbar radicular complaints, employee "would have been able to return to some sort of one-handed work duty with a normal dominant right upper extremity."

Mr. England, the only vocational rehabilitation expert to evaluate employee, opined that in consideration of the "combination of restrictions related to both his back and upper extremity problems as described by Dr. Volarich, I do not believe [employee] would be able to sustain any type of work activity on a consistent basis."

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

The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

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

The testimony of employee, Dr. Volarich, and Mr. England, along with the supporting medical records and reports, are all consistent in showing that employee suffered from preexisting degenerative lumbar disc disease that posed a hindrance and obstacle to his employment or reemployment, and when combined with his primary injuries, result in his permanent and total disability.

We agree with Dr. Volarich's opinion that employee would have been able to return to work absent the preexisting lumbar condition and, therefore, find that the Second Injury Fund's argument that employee is permanently and totally disabled solely due to the primary injuries fails.

For the foregoing reasons, we find, as did the administrative law judge, that employee is permanently and totally disabled as a result of his primary injuries combining with his preexisting disabilities.

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Award

As previously stated, we find employer liable for permanent partial benefits associated with the primary injuries, which amount to 134.4 weeks compensation, or \$49,066.75 (= \$365.08 PPD rate x 134.4 weeks).

We find that employee reached maximum medical improvement on June 15, 2006 (the date employee was released from treatment by Dr. Moseley). Therefore, going forward from June 16, 2006, the Second Injury Fund is liable for the difference between the PTD benefits and the PPD benefits (\$533.15 PTD rate - \$365.08 PPD rate) for 134.4 weeks. Thereafter the Second Injury Fund shall be liable for employee's PTD benefit of \$533.15 for the remainder of employee's life, or until modified by law.

The Commission affirms the award and decision of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Matthew W. Murphy, issued November 19, 2010, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 14th day of October 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

VACANT
Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Sam Ellington Injury No. 05-079731
Dependents: N/A
Employer: SE Missouri Boll Weevil Eradication Foundation
Additional Party: N/A
Insurer: Commerce and Industry
Appearances: Mr. James Turnbow on behalf of the employee
Mr. William Love on behalf of the employer
Mr. Gregg Johnson on behalf of the Second Injury Fund
Hearing Date: August 4, 2010 Checked by: MM/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? August 18, 2005.
5. State location where accident occurred or occupational disease contracted: Dunklin County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident happened or occupational disease was contracted: Employee was operating a four wheeled all terrain vehicle when he hit a ditch, flew over the handle bars and injured his shoulder and back.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left shoulder and lower back.
14. Nature and extent of any permanent disability: 45% of the left shoulder at the 232 week level and 7.5% of the body as a whole (lumbar spine).
15. Compensation paid to date for temporary total disability: \$25,591.20.
16. Value necessary medical aid paid to date by employer-insurer: \$33,021.91.
17. Value necessary medical aid not furnished by employer-insurer: \$0.00.
18. Employee's average weekly wage: \$799.73.
19. Weekly compensation rate: The rate of compensation for temporary total disability and permanent total disability is \$533.15. The rate for permanent partial disability is \$365.08.
20. Method wages computation: Stipulation.
21. Amount of compensation payable: Employee is awarded $(45\% * 232 + 7.5\% * 400 =)$ 134.4 weeks of PPD against Employer. Employer is ordered to pay \$49,066.75 in PPD benefits.
22. Second Injury Fund liability: Permanent total disability benefits pursuant to RSMo. §287.200 (2000). Beginning on June 16, 2006, the Second Injury Fund is liable for weekly benefits in the amount of $(\$533.15 - \$365.08 =)$ \$168.07 for 134.4 weeks and weekly benefits in the amount of \$533.15 thereafter.
23. Future requirements awarded: Employee's claim for future medical benefits is denied. Employee's claim for permanent total disability benefits is sustained against the Second Injury Fund.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the employee 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 employee: James Turnbow.

FINDINGS OF FACT AND RULINGS OF LAW

On August 4, 2010, the employee, Sam Ellington, appeared in person and by his attorney, James Turnbow, for a hearing for a final award. The employer was represented at the hearing by its attorney, William C. Love. The Second Injury Fund was represented at the hearing by its attorney, Gregg Johnson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. **Covered Employer** - Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Law, and liability was fully funded by: Commerce and Industry.
2. **Covered Employee** - On or about the date of the alleged accident, the employee was an employee of SE Missouri Boll Weevil Eradication Foundation and was working under the Missouri Workers' Compensation Law.
3. **Accident** - On or about Thursday, August 18, 2005, the employee sustained an accident arising out of and in the course of his employment.
4. **Notice** - Employer had notice of employee's accident.
5. **Statute of Limitations** - Employee's claim was filed within the time allowed by law.
6. **Average Weekly Wage and Rate** - Employee's average weekly wage rate is \$799.73. The rate of compensation for temporary total disability and permanent total disability is \$533.15. The rate for permanent partial disability was \$365.08.
7. **Medical Aid Furnished** - Employer/Insurer has paid medical aid in the amount of \$33,021.91.
8. **Temporary Total Disability Paid** - Employer/Insurer has paid \$25,591.20 as temporary total disability benefits for 48 weeks of disability for the period from 8/23/2005 through 7/24/2006.
9. **Previously Incurred Medical** - There is no claim for previously incurred medical.
10. **Mileage or other medical (287.140 RSMo)** - There is no claim for mileage or other medical expenses under 287.140 RSMo.
11. **Additional TTD or TPD** - There is no claim for additional TTD or TPD benefits.

ISSUES

1. **Medical Causation** - There is a dispute as to whether the employee's injury was medically causally related to the accident. Employer disputes causation as it relates to the back, stipulates to causation with regard to the left shoulder.
2. **Additional or Future Medical** - Employee is claiming future medical aid.
3. **Permanent Total Disability** - Employee is claiming permanent total disability benefits.
4. **Permanent Partial Disability** - Employee is claiming permanent partial disability benefits.
5. **Second Injury Fund Liability**

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

Identifier	Description
A	Deposition of Dr. Volarich
B	Deposition of James England

Employer-Insurer's Exhibits

Identifier	Description
1	Deposition of Dr. Cantrell

Second Injury Fund Exhibits

Identifier	Description
I	Reports and Correspondence from Dr. Poetz ¹

Joint Exhibits

Identifier	Description
J1	Medical volume
J2	Medical volume

SUMMARY OF EVIDENCE

Sam Ellington, hereinafter referred to as "Employee", was born April 5, 1942 and lives in Cardwell, Missouri. He is right hand dominant. He has been married for 44 years and has adult children. He is a High School graduate and completed an auto-diesel mechanic educational program at Bailey Technical School in St. Louis, Missouri. He has no difficulties with reading, writing, or doing math. Furthermore, he had subsequent transmission specialists training through Ford Motor Company. He served in the military and was honorably discharged. He has had varied jobs over his life including work for a surveyor, oil drilling business and airplane maintenance. However, a substantial portion of his working life has been spent doing farm work, automobile transmission work, auto parts maintenance and the employment fo, SE Missouri Boll Weevil Eradication Foundation, hereinafter referred to as "Employer".

¹ Second Injury Fund offered Exhibit I. Employer and Employee objected to the admission of the exhibit based on SIF's failure to adhere to the requirements of RSMo. §287.210.7 for the admission of a complete medical report. The objections were sustained. The exhibit was made a part of the record as an offer of proof but the contents of the exhibit were not considered in arriving at the decisions found herein.

With respect to farming, he helped his father and brother with the family farm doing hay work and watermelon farming. By the time he started the Boll Weevil job the farm had been reduced to only 10 acres and watermelon only. When the farm was productive, he supervised up to two employees. The farm activities were reduced to the 10 acres in 1983.

In 1983 he began working at Parnell Ford and Lincoln/Mercury in Paragould, Arkansas. He would overhaul transmissions and repair them. He rebuilt them on a bench. It was during this employment he began to develop back pain.

At first the pain was limited to his low back and gradually increased to involving his left leg. As he continued to work doing transmission repairs, the back pain gradually worsened to where he had to obtain help with the lifting. Because of the back pain he would miss about one week every three months. Because of his back pain he had to lie down and get off his feet to relieve the pain and also had to take hot showers and use a heating pad. It got worse while he was working at Ford and became unbearable. The standing caused him more difficulties than anything else. His leg would go numb and he would get a burning sensation. In the late 1980's he sought treatment at the Veterans Hospital for his low back pain. His back pain has been progressive. Because of the pain, he left Parnell Lincoln/Mercury in 1989 and worked on the farm and did mechanic work out of his home between 1989 and 1998. His back pain gradually worsened. He stopped loading hay in 1995 or 1996 because of back pain.

In 1998 he began working at Auto Zone Auto Parts in Paragould, Arkansas as a parts salesman. He specifically sought out the Auto Zone job because it was lighter work than the farming work or mechanic work he had been doing. As part of his job he had to wait on customers, put up freight as it came in and operate the computer/cash register to look up parts or to complete sales. While working at Auto Zone Auto Parts, his back and legs bothered him. He was on his feet 10 hours a day, five days per week. He also did part time farming with the 10 acres of watermelon. He moved from Auto Zone Auto Parts to Advanced Auto Parts in Paragould, Arkansas where his back and leg problems worsened. His feet also began to bother him. His legs were getting weak and going numb. He made the best accommodation he could while doing the auto parts job, but felt standing all day was too hard on his back and legs. He related the worsening problem he was having with his legs and feet to his back pain.

He then sought out employment with Employer. He had to successfully complete an agricultural knowledge test in order to obtain the job. He would have to work off a four wheeler, but he made it extra comfortable with extra cushioning which made it easier on his back. The work with Employer was considerably lighter. He set his own hours. The traps weighed only three or four pounds. Because of the placement of the traps above ground, he rarely had to bend over. There were occasions where he might have to get on or off his ATV, but generally the ATV was used on flat ground. Hardly any lifting was involved. The job also included the operation of a computer in order to track the traps. He specifically took this job because of the back problems that he was having because it was lighter work and easier on his back and legs.

On August 18, 2005, he was operating the ATV crossing a road where apparently the road department had been working. They had filled in a flat place in the road, but apparently had not packed it down so the ATV encountered soft ground. It flipped the ATV over and Employee

landed on his left shoulder. He was approximately three and one half miles from home at the time of the injury. He had a friend take him to his house and his wife took him to St. Bernard's hospital in Jonesboro, Arkansas.

They treated and released him that day and his greatest complaints were with respect to his left side ribs and his left shoulder. The initial evaluation and treatment records at St. Barnard's Hospital in Jonesboro, Arkansas specifically note that Employee had no back tenderness at the time of his initial evaluation. His specific complaints at the time of his admission were left shoulder and chest pain, worse with deep breathing and movement. While the differential diagnosis included multiple conditions, the ultimate diagnosis made at St. Bernard's Hospital was the dislocation of the left shoulder. The left shoulder was x-rayed and ultimately Employee was discharged with a shoulder separation and dislocation and cracked ribs on the left side.

When Employee first saw Dr. Claiborne Moseley on August 23, 2005, the history only notes Employee's complaints regarding "he cracked some ribs and separated his left AC joint." Dr. Moseley performs a physical exam noting the AC separate of the left shoulder and also notes that the ribs were tenderer than anything else. There were no back complaints. The plan at that point was left shoulder reconstruction, which he performed August 30, 2005.

When Employee followed up with Dr. Claiborne Moseley, surgery was recommended and on August 30, 2005 a left acromioclavicular repair procedure was performed by Dr. Moseley. Following the surgery and physical therapy, Employee continued to have difficulties with his shoulder and in November 2005, a hardware removal procedure was performed with manipulation of the shoulder under anesthesia. Further physical therapy and care was provided by Dr. Moseley with still reported problems with respect to the left shoulder. Employee subjectively reported that he was getting better. Employee last saw Dr. Moseley on June 15, 2006. At that time, Dr. Moseley notes that Employee reports that the shoulder is still bothering him quite a bit as well as the left hand. Employee reports that he "still can't get his shoulder to work very well. He can't sleep on that side. It bothers him when he wears his seat belt across the shoulder. He cannot reach up over head to get anything off a shelf, but he can work fairly well if he goes straight up in front of him, as opposed to coming out to the side at all. He cannot pick up a can of pain and move it out to the side at all even though he has attempted that." Dr. Moseley concluded that he is disappointed that the shoulder doesn't work better than it does, and indicates it was unlikely to get better. He then assesses the permanent partial impairment under the AMA Guide to the Physician in the Evaluation of Permanent Impairment at 16% of the upper extremity, or 10% to the body as a whole. Employee indicates that his shoulder is essentially in the same condition as when he was last seen by Dr. Moseley.

Employee then saw his family physician, Dr. Abdullah Arshad, with respect to his continued left shoulder pain. Dr. Arshad suggested he see an orthopedic surgeon at his visit of December 20, 2006. When Employee saw Dr. Arshad again on March 12, 2007, he reported back pain going down his leg and a CT scan was ordered by Dr. Arshad which revealed degenerative changes but no disk protrusions or bulging. Dr. Arshad recommended he receive additional treatment with respect to the shoulder. There is no history relating the back complaint to any incident in the doctor's records.

Employee first saw Dr. Cantrell in May 2007. At that time, Dr. Cantrell believed that an Arthrogram and CT scan was necessary along with an EMG study of the left upper extremity before Employee could be evaluated. He imposed temporary restrictions limiting Employee's use of the left upper extremity of 20 pounds from floor to waist and less than 10 pounds of the left upper extremity from waist to shoulder. Employee then returned to Dr. Cantrell in December 2007 where the additional studies were performed. Dr. Cantrell had a nerve conduction study performed which was normal and a CT Arthrogram was done which demonstrated continued defects in Employee's left shoulder. Dr. Cantrell opined that Employee had reached MMI and recommended permanent restrictions that he avoid repetitive over the shoulder work with his left upper extremity and limit lifting to 50 pounds from waist to the shoulder utilizing both upper extremities. There were no other specific restrictions imposed. Dr. Cantrell then opined that Employee had sustained a disability of 10% to the left upper extremity at the level of the shoulder secondary to the accident.

Thereafter, Employee was referred by his family physician, Dr. Arshad, to Edmund Landry for purposes of further shoulder evaluation. Dr. Landry performed x-rays, an MRI and ultimately concluded that Employee continued to have shoulder impingement difficulties, shoulder bursitis and tendonitis and recommended a consult with Dr. Galatz regarding possible surgical intervention. Dr. Galatz saw Employee in April, 2008 and indicated that there was little to offer with respect to surgery that would provide any long term relief. Employee chose not to proceed with any further operative care or treatment.

With respect to his back pain, Employee testified that he thought it might have been worse following the ATV accident, although he related such to his doctors and the doctors did identify any the lower back issues. Furthermore, Employee admitted that he didn't notice any difference in his back pain or complaints the month or two following the accident when he compared it to the back problems he was having before the accident. Furthermore, he agreed that his back pain had been getting worse prior to the ATV accident and continued at the same pace to worsen following the ATV accident.

Employee is not currently employed. However, he has been receiving Social Security retirement benefits since turning age 62 in 2004. He was receiving Social Security retirement benefits at the time he was working for the Boll Weevil eradication program. At the time of his deposition, on May 26, 2009, he had only been taking Darvocet twice a week. Furthermore, Employee is able to drive around the farm every day as most farmers do looking at others fields and crops. He can sit for a couple of hours before he has to get up. He would walk back and forth to the shop on his farm approximately 150 yards away two to three times a day to visit with his sons who were doing transmission work for a while at the farm. At the time of the hearing, he was on over-the-counter medication as he has an aversion to prescription medications. Employee continues to wake up if he rolls over on his shoulder. However, he rises at 5:00 a.m. each day, which has been his habit for years. He will occasionally do laundry. He indicates that his shoulder hurts all the time and essentially his shoulder condition is the same as when he last saw Dr. Moseley. He has no problems with his right arm and is right arm dominant. He is able to drive his pickup around with his right arm. Employee admits that with all the nurses and doctors he has seen for this accident, he has been honest in his responses to them with respect to his complaints and was also honest with Dr. Volarich, Dr. Cantrell and Dr. Moseley. At the time of

his deposition in May, 2009, he was able to walk to the creek but he cannot do it now because of back and shoulder pain.

Employee also saw Dr. Volarich who performed an assessment on August 28, 2008. Dr. Volarich diagnosed Employee having suffered the left shoulder AC separation, failed AC joint repair, left frozen shoulder syndrome, left chest rib fracture, and an aggravation of lumbar syndrome as related to the injury of August 18, 2005. With respect to the left shoulder, he suggested limitations of not using the left arm for anything more than attempts to perform activities of daily living and recommended that he not try to handle any weights more than one pound or two pounds with the arm dependent tucked in by his side for protection. Dr. Volarich further opined that Employee sustained disability of 65% to the left shoulder, 15% to the body as a whole due the lumbar spine and no disability to the left rib cage injury as “those symptoms resolved” related to the August 18, 2005 ATV accident. He further opined that there was 25% disability to the body as a whole regarding the lumbar complaints due to degenerative disk disease prior to the ATV accident. He then also opined that Employee was “permanently and totally disabled and unable to return to the open labor market due to the 8/18/05 injury to the left shoulder and low back in combination with his pre-existing lumbar syndrome.” In his report he states that in the absence of the prior lumbar radicular complaints that Employee “would have been able to return to some sort of one-handed work duty with a normal dominant right upper extremity.” On cross-examination, Dr. Volarich agreed that Employee’s degenerative lumbar spine condition was progressive in nature. He also indicated that in the absence of the August 28, 2005, degenerative changes would have continued at the same rate as they have in the past. Dr. Volarich finds an aggravation of the lumbar injury based solely upon the history that he records that Employee told him he had worsening back pain and more frequent complaints following the accident. Dr. Volarich does agree that such degenerative back symptoms “do wax and wane.”

At the time of his final report of December 5, 2007, Dr. Cantrell specifically evaluated the low back portions by his supplemental letter of April 1, 2010 where he outlined the complaints with respect to the back and reviews additional medical records that had been provided to him. Employee reported to Dr. Cantrell, when he saw him on May 22, 2007, and advised him that “symptoms in his lower back have also largely resolved such that he does not have any complaints at this time. His primary complaints remain those of left shoulder pain and limited range of motion.” Dr. Cantrell found no disabling condition as it relates to the spine either prior to August 2005 or following the injury of August 2005. With respect to the injuries from the August 2005 injury, he would recommend that Employee “avoid repetitive over shoulder work with his left upper extremity”, that there is no restriction on lifting from floor to waist and that there would continue to be a “lifting restriction of 50 pounds from waist to shoulder level utilizing both upper extremities”, he also would find no limitations with respect to the use of the dominant right upper extremity.

The Second Injury Fund offered reports from Dr. Poetz dated November 8, 2006, July 9, 2008, and July 2, 2008. Employer and Insurer objected to the admission of such records into evidence. That objection was sustained based on the SIF’s failure to adhere to the requirements of **§287.210.7**, to wit, SIF failed to provide opposing parties with notice of its intention to offer the reports.

FINDINGS OF FACT AND RULINGS OF LAW:

Issue 1. Medical Causation

There is a dispute as to whether the Employee's claimed back injury was medically causally related to the accident.

“An injury shall be deemed to arise out of and in the course of the employment only if: (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury;...” **§287.020.3(2)**²

The law that existed at the time of this injury only required a showing that the employment was a “substantial factor in causing the injury.” Having read the medical evidence, considered the opinions of the experts and considered the live testimony of Employee, I find that Employee’s employment and accident of August 18, 2005 that occurred in the course and scope of that employment was a substantial factor in Employee’s new back complaints.

Issue 2. Additional or Future Medical

Employee is claiming future medical aid.

“In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. ...” **§287.140.1**

Employee’s treating physician did not indicate that any additional medical care was necessary to cure and relieve Employee from the effects of his injuries. Employer’s expert did not indicate that any additional medical care was necessary to cure and relieve Employee from the effects of his injury. Dr. Volarich’s report places Employee at maximum medical improvement and does not include any recommendation of additional care to cure and relieve Employee from the effects of his injuries. In contrast, at deposition, Dr. Volarich testified that Employee may need occasional over-the-counter medication to control pain. He also testified that Employee had been taking Tylenol and occasionally taking prescription medication in the past.

I find that Employee has not met his burden on the issue of the necessity of any additional medical care to cure and relieve him from the effects of his injury. Employee’s request for an award of additional or future medical benefits is denied.

² Unless stated otherwise, all statutory references are to RSMo. (2000).

Issue 4. Permanent Partial Disability

Employee is claiming permanent partial disability benefits. Having reviewed the medical records, the reports and depositions of experts, and observed Employee, I find that he has suffered permanent partial disability to his left shoulder and back that is attributable to Employer. I find that Employee has suffered a significant left shoulder injury. Dr. Volarich opined that Employee suffered a 65% PPD of the left shoulder. Dr. Cantrell opined that Employee suffered a 10% PPD of the left shoulder. Employee's treating physician stated, "I've told Mr. Ellington that I am very disappointed that his shoulder does not work better than it does and I'm not at all certain that it will get any better at all than what he has now." This is unusual language from a treating physician. Employee clearly and consistently favored to the point of non-use of his left shoulder during the entire period for which I was able to observe him. For these reasons, I find that Employee has suffered a 45% PPD of his left shoulder at the 232 week level as a result of his work related injury. Based on the evidence and presentation of Employee, I find that he suffered 7.5% PPD to the body as a whole due to the aggravation of his lumbar symptoms resulting from his work related injury.

Issue 3 and 5. Permanent Total Disability and Liability of the Second Injury Fund

Employee is claiming permanent total disability benefits. Dr. Volarich credibly testified that Employee was permanently and totally disabled due to a combination of his pre-existing disability and the injuries suffered as a result of his work related accident. This opinion is supported by the expert testimony of Mr. James England. Dr. Cantrell does not address Employee's employability due to a combination of his previous and primary injuries.

For the reasons stated herein, I find that Employee is permanently and totally disabled due to a combination of his pre-existing and primary injuries/disabilities.

Based on the note of Dr. Moseley dated June 15, 2006, I find that Employee was at MMI as of that date. The Employee is awarded permanent total disability benefits against the Second Injury Fund beginning on June 16, 2006 and for the remainder of his life pursuant to **§287.200**. The Second Injury Fund shall receive a credit of \$365.08 per week for the 134.4 weeks of permanent partial disability that has previously been awarded, *supra*, against Employer.

ATTORNEY'S FEE

James Turnbow, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Matthew W. Murphy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

Date: _____