FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No.: 12-107133

Employee: Jimmy Fields

Employer: Southwest Airlines (settled)

Insurer: Indemnity Insurance Company of North America (settled)

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, (including supplemental briefs filed in December, 2019[1]) and considered the whole record, we find that the award of the administrative law judge denying compensation in favor of the Second Injury Fund, is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion
The administrative law judge found that employee had not proven permanent total disability occurred as a result of a combination of the last injury (hearing loss) and his preexisting disabilities, such that Second Injury Fund liability was established. We agree, however, we write to supplement the judge's reasoning in certain respects.

The last injury in this case (one of five injury claims which were tried together before the administrative law judge) is an occupational disease based on industrial exposure at the employer's workplace resulting in hearing loss. The administrative law judge wrote one decision combining all the injury claims and issued five identical decisions. The focus of the "combined injury disability" analysis was the four work-related back injury claims. The analysis did not specifically address the hearing loss claim with consideration of preexisting conditions, and whether hearing loss combined to reach permanent total disability under § 287.220.2 RSMo.

The occupational disease claim of hearing loss was filed August 1, 2014. Significant amendments were put into place by the legislature into the statutory provisions affecting Second Injury Fund liability, effective as of January 1, 2014. The analysis of a Second Injury Fund claim which falls under the amended (new) law requires the evaluation of new criteria set forth under § 287.220.3 RSMo to establish a compensable claim against the Second Injury Fund. See *Cosby v. Treasurer*, 579 S.W.3d 202 (Mo. 2019).

Section 287.220.3 RSMo provides, in relevant part, as follows:

> (1) All claims against the second injury fund for injuries occurring after January 1, 2014, and all claims against the second injury fund involving a subsequent compensable injury which is an occupational disease *filed after January 1, 2014*, shall be compensated as provided in this subsection. (*Our emphasis*)

[1] After the parties submitted the case to the Commission, the Missouri Supreme Court issued its opinion in *Cosby v. Treasurer of the State of Missouri,579 S.W. 3d 202 (Mo. June 25, 2019)*. Also the case of *Krysl v.Treasurer of Mo. as Custodian of the Second Injury Fund*, 591 S.W. 3d 13 (Mo. App. E.D. 2019, *transfer denied* Feb. 18, 2020). The parties were given the opportunity to supplement their arguments as a result of that ruling.

> (2) No claims for permanent partial disability occurring after January 1, 2014, shall be filed against the second injury fund. Claims for permanent total disability under section 287.200 against the second injury fund shall be compensable only when the following conditions are met:
>
> (a) a. An employee has a medically documented preexisting disability equaling a minimum of fifty weeks of permanent partial disability compensation according to the medical standards that are used in determining such compensation which is...
>
> b. Such employee thereafter sustains a subsequent compensable work-related injury that, when combined with the preexisting disability, as set forth in items (i), (ii), (iii), or (iv) of subparagraph a. of this paragraph, results in a permanent total disability as defined under this chapter[.]

Section 287.220.3(a) a. (i-iv) sets forth additional qualifying language for preexisting conditions. We do not engage in evaluating whether there are qualifying conditions here because it is not necessary to our analysis. We acknowledge the position stated in the Missouri Court of Appeals, Eastern District in *Krysl. Id.* The Court found that the date of injury in Mr. Krysl's occupational disease claim, as stipulated by the parties, was January 1, 2013; and that the date of injury prevailed in determining which section of the statute applied. (Mr. Krysl filed his occupational disease claim in July 2016.) In so doing, the Court found that "old law" under § 287.220.2 RSMo applied. Similar to the *Krysl* case, Mr. Fields' hearing loss claim was filed on August 1, 2014, but the parties stipulated the date of injury was November 9, 2012.

While we apply the law as set forth by the Eastern District to this matter which falls within that Court's jurisdiction, we respectfully disagree with the interpretation that it is the date of *injury*, rather than the date *filed,* which governs the proper section to apply in an occupational disease case.

We believe such an interpretation requires us to ignore the plain language of the statute at § 287.220.3, which states that a claim "which is an occupational disease filed after January 1, 2014, shall be compensated as provided in this subsection." This is unambiguous and requires no further attempt to divine its meaning. We believe the interpretation taken by the Court, in fact, also requires us to add language to the statute to get to the Court's position. In effect, the Court urges us to insert additional words into § 287.220.3(1) "an occupational disease filed after January 1, 2014, shall be compensated as provided in this subsection, **unless the date of injury of the occupational disease occurs before that date**."(added words in bold) Strict construction of the statute, as required under § 287.800 RSMo forbids us from deviating from the plain words and meaning of the statutory language where their meaning is unambiguous.

Additional Findings of Fact

We adopt the administrative law judge's Findings of Fact to the extent they are not in conflict with our findings here.

We find the permanent partial disability rating referable to hearing loss is 10.25% at the 180 week level for binaural hearing loss, i.e. 18.45 weeks.

Dr. Robert Margolis provided ratings of 6.25% disability to the body as a whole referable to each of the four back injuries, which were filed as separate claims. We do not find his method of equal attribution to each injury to be persuasive. Dr. Russell Cantrell's opinion was that there was no permanent disability referable to the back with regard to the back injuries, with the

exception of the May 17, 2012 injury. In addition, both doctors noted some degenerative changes and spondylosis. We find there was a permanent partial disability to the body as a whole referable to the lumbar spine, including degenerative changes. We find the lumbar disability was a hindrance or obstacle to employment or reemployment. Dr. Margolis' written opinion on permanent total disability was based solely on the physical injuries, age, and work experience. He did not include hearing loss in his analysis as it had not yet been evaluated. Further, he indicated he would defer to vocational rehabilitation evaluation. *Transcript*, page 74.

Employee's primary care physician Dr. David Bean, who treated employee for various injuries, conditions, and pain complaints over the years, advised employee that he should not continue performing the duties of his job and he should apply for disability as early as February 2011. *Transcript*, page 2104. Nothing in the record suggests that Dr. Bean was considering hearing loss as reason employee could not perform his job duties.

Mr. Vincent Stock, the vocational rehabilitation specialist opining for employee identified limitations and injuries resulting from employee's neck, lower back, right shoulder, hands and both feet. Mr. Stock, who is also a psychologist, diagnosed employee with bipolar disorder and generalized anxiety disorder. Mr. Stock opined a 35-40% permanent partial disability, referable to the psychological conditions. His opinion regarding permanent total disability is primarily based on the physical limitations on movement and employee's reports of constant pain. In addition, Mr. Stock mentions a reading and hearing disability.

Conclusions of Law

Permanent total disability under § 287.220.2.

As the judge did not specifically address the hearing loss claim in combination with the alleged preexisting conditions to assess whether a preexisting condition(s) combined with hearing loss for permanent total disability, we do so here.

Section 287.220.2 provides for compensation from the Second Injury Fund for injuries where there has been preexisting disability due to injuries occurring prior to January 1, 2014. Under the old law, employee's burden is to show preexisting condition(s) of such seriousness to cause a hindrance or obstacle[2] to employment or reemployment; and that a subsequent compensable injury (primary) combines with them for a substantially greater degree of disability. Employee must first show the level of disability from the primary/last injury, in this case hearing loss. He has shown that to be 10.25% at the 180 week level.

We find employee has shown preexisting disabilities to the lumbar spine, right shoulder, hands, neck and psychological disabilities. The disabilities are permanent and are hindrances or obstacles to his employment or reemployment.

Employee has not persuaded us that his hearing loss (the primary injury) has combined with his preexisting conditions to result in permanent total disability. The evidence most strongly supports the conclusion that if employee is permanently and totally disabled, it is based on his prior physical injuries, pain, and physical limitations, without consideration of the hearing loss. In addition, the psychological disabilities identified by Mr. Stock may play a role in his overall disability level.

In summary, the evidence on this record does not persuade us that employee is permanently and totally disabled as a result of the combination of the primary injury with his preexisting

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[2] Where permanent total disability is claimed, "the minimum standards under this subsection for a body as whole injury or a major extremity injury shall not apply..." § 287.220.2.

disabilities. It follows, and we so conclude, that employee has failed to meet his burden of proof to satisfy the requirements of § 287.220.2.

For the foregoing reasons, we deny employee's claim against the Second Injury Fund.

Decision
We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Joseph P. Keaveny is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 22nd day of September, 2020.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

Robert W. Cornejo, Chairman

Reid K. Forrester, Member

SEPARATE OPINION FILED
Shalonn K. Curls, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

The majority has voted to affirm the administrative law judge's award which denied employee recovery against the Second Injury Fund. I disagree and would reverse the award, and find employee has proven he is entitled to recovery against the Second Injury Fund for permanent total disability.

While the administrative law judge, (and to some extent the majority) place focus on the lack of specificity in the disability ratings for each back injury, I believe there is enough evidence from which we can determine there were preexisting disabilities at the time of the last/primary injury in the form of hearing loss with a date of injury as November 9, 2012. Further, I believe employee has proven his permanent total disability resulted from a combination of preexisting disabilities with his primary injury.

Before a determination of permanent total disability against the Second Injury Fund is warranted, the disability from the last injury must first be identified. The hearing loss was rated at 10.25% at the 180 week level for bilateral hearing loss, by stipulation of the employer/insurer and employee. I would adopt this level of disability on the primary/last injury. Credible medical opinion has established that employee had hearing loss in both ears and that he needed hearing aids. He still has trouble hearing, despite obtaining the hearing aids.

I disagree with the administrative law judge's reliance on *Plaster v. Dayco Corp.*, 760 S.W. 2d 911 (Mo. App. 1988), and his analysis that, "when a pre-existing disability is present, the claimant is required to prove the extent of the pre-existing disability so that such percentage can be evaluated against the disability percentage existing after the compensable injury." While *Plaster* was similar to this matter in that it involved a re-injury of the low back, in contrast to the case before us, the issue was the level of permanent *partial* disability to be attributed to each injury. However, in finding permanent *total* disability, the focus of inquiry starts with the level of disability of the last/primary injury.

In this case, the hearing loss, the primary injury, is the first step of inquiry. "Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). The hearing loss is not permanently and totally disabling in itself.

Employee has established the disability rating for hearing loss that is attributed to the employer liability. If that injury combines with preexisting disabilities (287.200.2 RSMo) to result in permanent total disability, the Second Injury Fund is responsible for permanent total disability benefits, after the date of maximum medical improvement of the last injury.

"The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer

reasonably would be expected to hire the injured worker, given his present physical condition." *Treasurer v. Cook*, 323 S.W.3d 105, 110 (Mo. App. 2010).

The vocational rehabilitation specialist, Mr. Vincent Stock, a psychologist, credibly opined that employee was not employable in the open market and was therefore permanently totally disabled. He noted significant limitations due to pain, and injuries to his feet, hands and neck in addition to his lower back. He noted a hearing disability and a reading disability. Employee's past employment was mostly physical labor-oriented. He does not have past experience or training in office work or something that would be less physically taxing. That along with his age, education level, and physical limitations, (including a ten pound lifting restriction), when combined with his diminished hearing, and psychological conditions, make him unemployable in the open market at even sedentary work. Mr. Stock, opined that employee's psychological disorders, preexisting and current depression and anxiety, warranted an additional 35-40% disability rating. Employee credibly testified that he did not believe he could even do a greeter job at a warehouse store, given his hearing limitations.

Dr. Robert Margolis, opined that all the back injuries together established a disability rating of 25%. Even Dr. Cantrell, the expert consulted by the Second Injury Fund, acknowledged a 5% permanent partial disability to the body as a whole attributed to degenerative changes in employee's lumbar spine and he identified disability resulting from one of the back injuries. While I do not adopt the ratings of either doctor, the record does establish that employee had some level of preexisting permanent partial disability referable to the low back at the time of the primary injury. It is not necessary to establish the level of disability for each preexisting condition, employee must merely show that the preexisting disabilities combined with the primary injury to result in permanent total disability.

Aside from the back injuries, employee provided additional evidence of preexisting conditions which had been previously rated in other claims: a prior shoulder injury was rated at 24% disability at the right shoulder; a 15% disability of the left upper extremity at the wrist; a 20% disability to the body as a whole due to a cervical fracture. Some level of permanent disability to the right thigh is identified, although the degree is widely disputed. Dr. Margolis opined that a loading factor should be added and that he considered him totally and completely disabled from all forms of employment. He found all the injuries to be a hindrance or obstacle to employment or reemployment. Mr. Stock also offered credible opinion that employee is totally disabled from all forms of employment as a combination of the physical, psychological, hearing and reading disabilities, in combination with his age and education.

Employee has suffered a number of physical injuries over the years which have increasingly limited his functioning. Add to this his psychological disabilities and hearing impairment, and it is clear to me that the experts' opinions that employee is permanently and totally disabled, as a result of all these disabilities combined are well supported.

I would reverse the administrative law judge's award denying compensation against the Second Injury Fund. Because the Commission majority has decided otherwise, I respectfully dissent.

S. Kiki Curls

Shalonn K. Curls, Member

AWARD

Employee:	Jimmy Fields	Injury No.: 12-107133
Dependents:	N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations Of Missouri
Employer:	Southwest Airlines (settled)	
Additional Party	Treasurer as Custodian of the Second Injury Fund	
Insurer:	Indemnity Insurance Company of North America (settled)	Jefferson City, Missouri
Hearing Date:	December 6, 2018	Checked by: JPK

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: 11/9/2012
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: Working on ramp, tarmac, and baggage area from May 1995 to November 9, 2012
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Hearing
14. Nature and extent of any permanent disability: 10.25% hearing loss at the 180 week level
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? 0

17. Value necessary medical aid not furnished by employer/insurer? 0

18. Employee's average weekly wages: Unknown

19. Weekly compensation rate: $692.53 TTD/ $433.58 PPD

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:		None
22. Second Injury Fund liability		None
	TOTAL:	NONE
23. Future requirements awarded:		N/A

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Robert D. Arb

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Jimmy Fields	Injury No.: 12-107133
Dependents:	N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations Of Missouri
Employer:	Southwest Airlines (settled)	
Additional Party	Treasurer as Custodian of the Second Injury Fund	
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PRELIMINARIES

This case involves five separate Claims for Compensation alleged by employee, the first four of which are injuries to the lower back.. The first injury is an accident injury to the lower back, suffered by employee, identified by Injury Number 11-064748, on 8/17/2011. The second injury is an accident injury to the lower back, suffered by employee, identified by Injury Number 12-040765, on 5/17/2012. The third is an accident injury to the lower back, suffered by employee, identified by Injury Number 12-048145, on 6/29/2012. The fourth injury is an accident injury to the lower back, suffered by employee, identified by Injury Number 12-088323. The fifth injury is an occupational disease, for loss of hearing, suffered by employee, identified by Injury Number 12-I07133. Claimant seeks permanent total disability in the fourth and/or fifth case. These cases may be referred to hereinafter as the first, second, third, fourth, and fifth cases, respectively and chronologically.

The testimony and exhibits in this record constitute the evidence in each Claim. Separate awards are issued on each Claim.

On 12/6/2018, the parties appeared for a hearing. Jimmy Fields ("Employee") appeared in person and with Attorney Robert D. Arb. Assistant Attorney General Rachael Houser represented the Second Injury Fund ("SIF"). The Employer, Southwest Airlines, and its Insurer, Indemnity Insurance Company of North America, previously settled with claimant and did not participate in the hearing.

STIPULATIONS

1) The Employer was operating subject to Missouri's Workers' Compensation Law at all times, heretofore.
2) Claimant was employed at all times relevant herein.
3) The Employer received proper notice of each Claim.
4) Claimant filed the Claim within the proper time allowed by law.
5) The City of St. Louis is the proper venue.

6) In the first case, the average weekly wage at the date of the injury was sufficient to qualify for rates of $687.53 for temporary total disability (TTD), and $425.19 for permanent partial disability (PPD).
7) In the second case, the average weekly wage at the date of the injury was sufficient to qualify for rates of $737.08 for TTD and $425.19 for PPD.
8) In the third case, the average weekly wage at the date of the injury was sufficient to qualify for a rate of $425.19 for PPD.
9) In the fourth case, the average weekly wage at the date of the injury was sufficient to qualify for the rates of $692.53 for TTD and $425.19 for PPD.
10) In the fifth case, the average weekly wage at the date of the injury was sufficient to qualify for rates of $692.53 for TTD and $433.58 for PPD.
11) In the first case, Employer paid $8,144.07 in medical expenses and $982.23 in TTD.
12) In the second case, Employer paid $27,645.81 in medical expenses and $14,611.76 in TTD.
13) In the third case, Employer paid zero in medical expenses and zero in TTD.
14) In the fourth case, Employer paid zero in medical expenses and zero in TTD.
15) In the fifth case, Employer paid zero in medical expenses and zero in TTD.

EXHIBITS

Claimant introduced, and had admitted into evidence, the following Exhibits:

1) Dr. Robert Margolis's curriculum vitae
2) Dr. Robert Margolis's report dated June 16, 2015
3) Indexed medical records
4) Vincent Stock's curriculum vitae
5) Vincent Stock's report of vocational rehabilitation evaluation dated August 10, 2015
6) Vincent Stock's report of psychological evaluation dated April 17, 2018
7) Dr. Sheldon Davis' hearing evaluation report of October 23, 2014
8) Dr. Anthony Mikulec's hearing evaluation report of September 9, 2016
9) Certified copy of Division records of Workers' Compensation Claim for Injury No. 09-019206
10) Certified copy of Division records of Workers' Compensation Claims for Injury Nos. 10-110287, 11-064748, 12-040765, 12-048145, 12-088323 and 12-107133
11) Deposition of Dr. Robert Margolis of October 20, 2016
12) Deposition of Vincent Stock of June 20, 2018
13) Description of injury for each Injury Number
14) Note regarding 6/28/11 counseling visit with psychologist Mike Diller
15) Employer's wage statement

SIF introduced, and had admitted into evidence, the following Exhibit

I) Orthopedic Sports Medicine & Spine Care Institute report dated February 3, 2015

ISSUES

1) In the first case, liability of the Second Injury Fund for permanent partial disability.
2) In the second case, liability of the Second Injury Fund for permanent partial disability.
3) In the third case, liability of the Second Injury Fund for permanent partial disability.
4) In the fourth case, liability of the Second Injury Fund for permanent partial disability or permanent total disability.
5) In the fifth case, liability of the Second Injury Fund for permanent partial disability or permanent total disability.

FINDINGS OF FACT

Employee was born on 9/27/1950. He is married and has one child and two grandchildren. In 1969, employee graduated from Kennett Missouri High School. He has trouble reading. In 1974, he was diagnosed with severe dyslexia and struggled in high school. He took special education classes for six to eight years. His wife handles the family finances, as he cannot use a personal computer, type, or spell.

From June 1969, to early 1970, employee worked at Sterling Aluminum operating a lathe machine. He underwent basic training for the National Guard from March through July of 1970. From 1970 to 1979, he worked on the assembly line and as a machine operator for Emerson Electric in Kennett, Missouri. During this time he was diagnosed with bilateral carpal tunnel syndrome. He underwent surgery on his left wrist, but never underwent surgery on the right wrist. In 1980, Employee attended a six-month bricklaying course, but found little work as a bricklayer in or around Kennett, Missouri. Employee testified that he then went to work for UARCO in Kennett, Missouri for 14 years in the warehouse and eventually operated a printing press. He testified that he did not have any supervisory responsibilities at Emerson or UARCO and did not have to do much paperwork. The equipment that employee operated at Emerson and UARCO were not computerized. He left UARCO and obtained a job at Southwest Airlines in 1995, when he learned that UARCO was beginning to reduce its operations.

Employee is currently unemployed. He started working at Southwest Airlines in 1995 and worked there until 11/9/2012. He was hired as a ramp agent. His duties consisted of handling baggage and freight up to 100 pounds each. He did not use a computer at work and did not supervise other workers.

Employee worked at the T-Point of the baggage line while at Southwest Airlines because that job required little reading. This job involved a lot of pushing, pulling, twisting, bending, and lifting. A conveyer belt came down from the ticket counter to the T-Point, when baggage jammed on the conveyor belt, he would shut off the belt, crawl up the belt and rearrange baggage to break the jam. Employee testified that he would personally handle 150 to 200 pieces of luggage, or freight, per plane, nine planes per day. On occasion, he would have to climb inside the planes. There was not enough height to stand, so he would be bent over, or kneeling, when handling the baggage.

Employee's pre-existing injuries and conditions include:

1) Right shoulder injury incurred on 3/4/2009. Injury No. 09-019206. Stipulation for Compromise Settlement (Exhibit 9) 24% of the right shoulder.

2) Fracture of the C-7 vertebrae on 6/30/2008. Injury was not compensable, but employee experienced neck pain the entire time that he worked at Southwest Airlines.

3) Depression and anxiety diagnosed in 2008. Employee is currently taking Lexapro. Employee is currently experiencing symptoms of these conditions.

4) Bilateral carpal tunnel syndrome diagnosed in 1979. Employee underwent surgery on the left wrist, but the right wrist was never treated.

First Case – Injury No. 11-064748

Employee testified that, on 8/17/2011, he was lifting a piece of luggage when he felt pain in his low back. His symptoms included pain and tingling in his left leg. He treated conservatively, however, he continued to experience his low back and left leg symptoms up through 5/17/2012. At a hearing conducted on 11/16/2017, employee was awarded 3.5% BAW referable to the low back. (Exhibit 10B)

Second Case – Injury No. 12-040765

Employee testified that, on 5/17/2012, he was lifting a 95-pound golf bag and container from the T-Point when he felt increased pain in his low back. He testified that his low back worsened, from what he experienced, from his previous low back injury on 8/17/2011. His symptoms also included pain and tingling in his right leg going down to his right knee. He treated conservatively, however, he continues to experience these symptoms. At a hearing conducted on 11/16/2017, employee was awarded 3.5% BAW referable to the low back. (Exhibit 10C)

Third Case – Injury No. 12-048145

Employee testified that, on 6/29/2012, he was pulling luggage at the T-Point to put them onto a cart when he felt a great increase in his low back pain. He testified that his low back pain worsened, from what he experienced, from his previous low back injuries on 8/17/2011 and 5/17/2012. His symptoms also included pain and numbness in his right leg going down to his right knee. Employer kept him off work until 11/9/2012. His treatment included physical therapy and low back injections. However, he continues to experience these symptoms. At a hearing conducted on 11/16/2017, employee was awarded 3.5% BAW referable to the low back. (Exhibit 10D)

Fourth Case – Injury No. 12-088323

Employee returned to work for one day following the third injury. On 11/9/2012, after working for only 2 hours, employee felt a pop in his back while unloading a plane. Initially, employer provided treatment, but then discontinued it. Employee obtained treatment from his primary care physician (Dr. Bean), his pain management specialist (Dr. Gunapooti), and from a back specialist (Dr. Gorecki). Employee testified that as a result of his 11/9/2012 injury, his low back pain, from his previous low back injuries on 8/17/2011, 5/17/2012 and 6/29/2012, has worsened. At a hearing conducted on 11/16/2017, employee was awarded 4.5% BAW referable to the low back (Exhibit 10E)

Fifth Case – Injury No. 12-107133

Employee testified that he worked in a noisy environment while at Southwest Airlines from the start of his employment in 1995, until his last day of work on 11/9/2012. The noise at the T-Point was caused by the sound of the conveyor belt, the sounds of the baggage hitting the side of the T-Point carousel, and the sounds of various equipment running next to the T-Point, such as belt loaders, baggage tugs, and pushback tractors. Employer did not require employees to wear hearing protection while working at T-Point. Employee was evaluated by ENT Specialist Dr. Sheldon Davis, who suggested that employee obtain hearing aids. Employer sent employee to Dr. Anthony Mikulec for hearing testing. Dr. Mikulec confirmed that employee had hearing loss in both ears and suggested that he obtain hearing aids. Employee has obtained hearing aids, but still has trouble hearing. On 12/5/2017, employee entered into a Stipulation for Compromise Settlement for the approximate disability of 10.25% at the 180 week level for hearing loss. (Exhibit 10F)

Opinion Evidence

Dr. Margolis

Claimant offered the deposition testimony of Robert Margolis, M.D. of 10/20/2016 (Exhibit 11). Dr. Margolis is board certified in internal medicine, neurology, and vascular neurology. He prepared a Workers' Compensation disability rating report regarding employee dated 6/16/2015. (Exhibit 2) In this report, Dr. Margolis noted that an MRI of the lumbar spine, dated 6/8/2012, revealed "mild degenerative disc disease and spondylosis throughout the lumbar spine and a Tarlov cyst at S2. At L2-3 there is a left paracentral disc bulge. At L3-4 there is facet hypertrophy, ligamentum flavum hypertrophy and a disc bulge. L4-5 facet hypertrophy, ligamentum flavum hypertrophy, and diffuse disc bulge. There is moderate bilateral neural foraminal stenosis, greater on the right. At L5-S1, there is facet hypertrophy and minimal posterior disc bulge and mild left neural foraminal stenosis."

Dr. Margolis observations were:

1) It appears that employee has had multiple lumbar strain/sprains superimposed upon some degenerative changes. The patient could not apportion out the change in his symptomatology.

2) He felt employee has a permanent partial disability of 25 percent of his person as a whole. Apportionment "would have to be equal over the injuries."

In Dr. Margolis' deposition testimony, he testified regarding the one rating for all four back injuries: (Exhibit 11 p. 37 – 38)

Q. And even though Mr. Fields could not necessarily apportion it out for you, you felt that it would be equally apportioned between those injuries?

A. Yeah, I had no choice but to do that because he could not apportion it for me.

Dr. Margolis testified later in the deposition: (Exhibit 11 p. 42)

Q. And I know you said earlier that because he couldn't apportion his current back condition to how it worsened with each injury, you had to apportion it yourself at 6.25 percent per injury.

A. Correct.

Q. Is that just a guess?

A. Yes, I mean, I have nothing else to base it on because he could not tell me how the difference was, so the only way to do it fairly was to divide it equally.

3) Employee, on 12/1/2010, suffered meralgia paresthetica to the right lower extremity resulting in permanent partial disability of 25 percent of the right lower extremity at the hip.
4) Employee had prior shoulder surgery resulting in a 24 percent settlement of the right shoulder.
5) Employee has a permanent partial disability of 15 percent of the left upper extremity at the level of the wrist for the left carpal tunnel release.
6) Employee has a 20 percent pre-existing disability BAW for the C7 fracture.
7) A loading factor should be added.
8) Dr. Margolis' opinion is that "based on this patient's age, disabilities as well as work experience, that the average employer would not hire him in the normal course of doing business and therefore I consider him totally and completely disabled from all forms of employment. I would, however, defer to a vocational rehabilitationist."

Dr. Cantrell

The Second Injury Fund offered the independent medical evaluation of Dr. Russell C. Cantrell (Exhibit I). Employee was examined on 2/3/2015, and the report was issued on 2/3/2015. After reviewing employee's extensive medical records, Dr. Cantrell concluded:

Within a reasonable degree of medical certainty, that employee did not sustain any specific injury to his lumbar spine as a result of his alleged injury from 12/1/2010, and it is further his opinion that the symptomatology in his right anterolateral thigh is consistent with the residual of surgical

treatment for meralgia paresthetica. As such, Dr. Cantrell found that employee has not sustained any permanent partial disability to the person as a whole or of the right lower extremity at the level of the hip as a result of his alleged injury of 12/1/2010.

Within a reasonable degree of medical certainty, that although a lumbar strain may have occurred as a result of the 8/17/2011 (first case) injury, he found employee had recovered and there was no indication that any permanent partial disability of the person as a whole was sustained as a result of that injury.

Regarding the 5/17/2012 (second case) diagnosis, Dr. Cantrell opined that employee sustained a lumbar strain superimposed on degenerative disc disease. It is Dr. Cantrell's opinion that employee has a 3 percent permanent partial disability of the person as a whole regarding that lumbar strain diagnosis.

Approximately two weeks prior to his alleged injury on 6/29/2012 (third case), employee saw Dr. Mirkin for complaints that he attributed to a residual 5/17/2012 injury to his low back. There is no indication that the pain complaints in his lower back had resolved leading up to the 6/29/2012 injury. It was Dr. Cantrell's opinion, within a reasonable degree of medical certainty, that there is no indication that additional injury was sustained to his low back as a result of the alleged injury of 6/29/2012. Therefore, it is Dr. Cantrell's opinion that no additional permanent partial disability of the person as a whole was sustained as a result of the 6/29/2012 work injury.

It is Dr. Cantrell's understanding that employee has alleged a repetitive trauma claim to his lower back as a result of his occupational activities. It is his opinion, within a reasonable degree of medical certainty, that there is no indication that he has experienced symptoms associated with repetitive trauma as a result of his work activities. Further, within a reasonable degree of medical certainty, that he has not sustained any permanent partial disability of the person as a whole attributable to the 11/9/2012 injury. It is Dr. Cantrell's opinion that employee has a 5 percent permanent partial disability or the person as a whole unrelated to any of his work injuries, but which is attributed to multi-level degenerative changes in his lumbar spine.

Vocational Opinions

Vincent F. Stock, M.A.

Claimant offered the deposition testimony of Vincent F. Stock, M.A. (Exhibit 12). He was deposed on 6/20/2018. Mr. Stock is a licensed psychologist and has worked as vocational rehabilitation counselor. Mr. Stock examined employee on 4/15/2015, and issued a vocational rehabilitation report dated 8/10/2015 (Exhibit 5). He, again, examined employee on 4/10/2018, and issued a psychological evaluation dated 4/17/2018 (Exhibit 6).

In his vocational rehabilitation report, Mr. Stock noted that employee's primary care physician has given employee a ten-pound lifting limit. Employee has not worked since 11/12/2012, due to his disabilities. He found employee's limitations due to pain to be significant. Mr. Stock stated, in his report, "He has injuries to his neck, lower back, both hands, both feet all due to the nature and demands of his work as a ramp agent. He has a hearing disability. He has a reading disability. He provided a leadership role. He lives in constant pain.

His daily activities and particularly his sleep are affected by his physical limitations on a daily basis. I do not believe that he could work in a full-time position, even a sedentary position. I do not believe that he has any transferable skills to any other type of employment. He is permanently and totally disabled based on all of his documented injuries."

In his psychological evaluation, Mr. Stock opined, to a reasonable degree of psychological certainty, that employee "has a diagnosis of Bipolar Disorder and Related Disorder Due to Another Medical Condition with Mixed Features and Generalized Anxiety Disorder." Employee has been on medications to help his depression and sleeping difficulties since 2009. He has attempted counseling without success. Despite a non-surgical patient profile, his current mental difficulties are directly related to his physical limitations and pain from his work experience until he quit on 11/9/2012.

He does not feel that employee's psychological impairment alone has resulted in permanent and total disability. Mr. Stock does not believe that employee can compete for employment, or sustain it, based on a combination of his physical injuries. He stated, "There is evidence that there is an additional 40 percent disability based on his pre-existing and current depression and anxiety."

RULINGS OF LAW

First, Second, Third, and Fourth Work Injuries

Section 287.220 RSMo. creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.* Missouri courts have used the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

> [T]he proper focus of the inquiry is not on the extent to which a condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that ; (1) existed at the time the last injury was sustained; (2) was of such seriousnesss as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund,* 272 S.W.3d 267,272 (Mo.App. E.D.20080 (Citations omitted)

When a pre-existing disability is present, the claimant is required to prove the extent of the pre-existing disability so that such percentage can be evaluated against the disability percentage existing after the compensable injury. *Plaster v. Dayco Corp.,* 760 S.W.2d 911 (Mo. App. 1988).

Dr. Margolis, a board certified internal medicine, neurology, and vascular neurology specialist, was one of two physicians to provide an evaluation of employee's condition. He was claimant's expert. His deposition was the only expert medical deposition in evidence. In his deposition, he was unable to apportion, absent an admitted guess, how much each accident caused the disabilities that the employee now claims. He purported to excuse this omission by employee's inability to do so.

The claimant, in a Workers' Compensation case, bears the burden of proving that an accident occurred and that it resulted in injury. *Dolen v. Bandera's Café & Bar,* 800 S.W.2d 163,164 (Mo.App.1990). A claimant must not only show causation between the accident and the injury but also that a disability resulted and the extent of such disability. *Smith v. National Lead Co.,* 228 S.W.2d 407,412[4] (Mo.App.1950).

Under the circumstances, only expert medical testimony would be sufficient to satisfy the burden. *Griggs v. A.B. Chance Co.,* 503 S.W.2d 697, 704-705 (Mo.App.1973). It was claimant's responsibility to provide testimony of the extent of each of the pre-existing injuries if he expected to recover permanent partial disability and/or permanent total disability for the additional injury and occupational disease by reason of the 11/9/2012 low back strain and the 11/9/2012 hearing loss. This he failed to do. Claimant's own expert testified employee was unable to apportion the extent of disability to him. Additionally, claimant's expert testified that he had nothing to base his apportionment on for the degree of injuries, among the four low back injuries (11-064748, 12-040765, 12-048145, 12-088323), and that it was merely a guess.

I find claimant has not met his burden of proof by his own failure to apportion the degree of disability among the four low back injuries *Goleman v. MCI Transporters,* 844 S.W.2d 463 and by the admitted guess by his expert to apportion the degree of disability. Therefore, this Court must deny claimant's Claim against the Second Injury Fund for permanent partial disability.

Fourth and Fifth Cases

RSMo. 287.020.6 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. Any employment means any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet the statutory definition. *Kowalski v. M-G Metals and Sales, Inc.* 631 S.W.2d 919, 922 (Mo. App. 1982).

In determining whether a claimant is permanently and totally disabled is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. *Radar v. Werner Enterprises, Inc.* 360 S.W.3d 285 (MO.App.2012).

It is the employee's burden to prove the nature and extent of disability attributed to the compensable injury, even though both injuries were work related and sustained while employed by the same company where separate Claims were pending for each injury. *Goleman* supra. While employee's vocational opinion is probative and unrebutted, it is undercut by employee's medical expert's opinion.

Again, I find claimant has not met his burden of proof by his own failure to apportion the degree of disability among four low back injuries and by the admitted guess by his expert to apportion the degree of disability. Therefore, this Court must deny claimant's Claim against the Second Injury Fund for permanent total disability.

CONCLUSION

Claimant's failure to meet his burden of proof by his own failure to apportion the degree of disability necessitates a finding of no liability for claimant's Claim against the Second Injury Fund.

I certify that on 2-25-19 I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

By _____

Made by: _____ 2/20/19
Joseph P. Keaveny
Administrative Law Judge
Division of Workers' Compensation

DIVISION OF WORKERS' COMPENSATION
DEPARTMENT OF LABOR INDUSTRIAL RELATIONS