

FINAL AWARD DENYING COMPENSATION  
(Reversing Award and Decision of Administrative Law Judge  
Second Injury Fund Only)

Injury No.: 02-133498

Employee: Lindell Garrett  
Employer: Wick's Truck Trailers, Inc. (Settled)  
Insurer: Universal Underwriters Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: October 1, 2002  
Place and County of Accident: Greene County, 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. We have reviewed the evidence, read the briefs of the parties and considered the entire record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the associate administrative law judge dated September 2, 2005. The award and decision of Associate Administrative Law Judge David L. Zerrer, issued September 5, 2005, is attached hereto solely for reference.

#### I. Preliminary Matters

The administrative law judge awarded employee permanent total disability benefits from the Second Injury Fund in the weekly amount of \$259.91 beginning October 1, 2002, for 52 and 2/7 weeks, and thereafter, for life, in the weekly amount of \$600.03.

The Second Injury Fund timely filed an Application for Review with the Commission asserting the award to be erroneous because: (1) the substantial and competent evidence did not support a finding that employee had a pre-existing permanent disability existing as of the date of the work related injury which was of such seriousness to constitute a hindrance or obstacle to employment or re-employment; (2) the associate administrative law judge misapplied section 287.220 RSMo in determining the disabilities attributable to the primary injury, the pre-existing conditions, and the ultimate disability attributable to the combination of these disabilities; and (3) if employee is considered to be permanently totally disabled it is due to the primary injury or last injury considered alone.

The Commission finds there is a lack of competent and substantial evidence to base a finding of the presence of an actual and measurable disability at the time the work injury was sustained of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. Due to this failure of proof, the claim against the Second Injury Fund on this point alone must fail. Consequently, the award against the Second Injury Fund issued by the administrative law judge is reversed. This finding is dispositive of the claim and renders moot the remaining two allegations of error in the Application for Review.

#### II. Second Injury Fund Liability: General Principles of Law

Section 287.220 RSMo provides that in a case of permanent total disability the Commission must make three findings respecting disability: (1) there must be a determination of the percentage of disability resulting from the

last injury standing alone; (2) there must be a finding that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or re-employment; and (3) there must be a determination that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

The Commission further notes that in a case of permanent partial disability under section 287.220 RSMo, there also must be a finding that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or re-employment. Without such proof, a claim against the Second Injury Fund must fail, be it for permanent total disability or permanent partial disability.

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). The employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W. 650, 655 (Mo. App. 1995). The nature and extent of the permanent partial pre-existing condition must be proven by a reasonable degree of certainty. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert opinion evidence is necessary to prove the extent of the pre-existing disability. *Plaster v. Dayco Corp.*, 760 S.W.2d 911, 913 (Mo. App. 1988).

In considering Second Injury Fund liability, and paraphrasing the language of the Missouri Court of Appeals, Eastern District, in the case of *Messex v. Sachs Electric Company*, 989 S.W.2d 206, 214 (Mo. App. E.D. 1999), the Commission must decide if there is competent and substantial evidence of a pre-existing disability and if there is a failure of proof, any claim against the fund must fail. As simply stated by the court on pages 214 and 215:

“When a claim is made against the Fund for permanent disability compensation, statutory language and case law make it mandatory that the claimant provide evidence to support a finding, among other elements, that he had a preexisting permanent ‘disability’. Section 287.220.1; *Leutzinger v. Treasurer of Missouri, Custodian of Second Injury Fund*, 895 S.W.2d 591 (Mo.App. E.D.1995) (emphasis added). The disability, whether known or unknown, must exist at the time the work-related injury was sustained *and* be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed. *Id.*; *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D.1995).

... Fund liability is only triggered by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.”

As developed below, the Commission cannot conclude or determine that employee proved the existence of a permanent disability at the time the work related injury was sustained being of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. The Commission emphasizes that an employee's pre-existing condition does not in and of itself constitute a hindrance or obstacle to employment or re-employment, or, a “disabling” condition. A condition which exists at the time of a work related accident which subsequently blossoms or blooms into a disability is not chargeable to the Second Injury Fund if the finally combined disabilities are greater than that which would have resulted from the accidental injury, considered alone and in and of itself. *Wilhite v. Hurd*, 411 S.W.2d 72, 77 (Mo. 1967). Pre-existing conditions are and must be distinguished from pre-existing disabilities.

### III. Facts

#### Testimony of Employee

In summary fashion, employee testified as follows: he was 55 years old as of the date of trial; while a member of the United States military, he served in Vietnam; and during his military service, he experienced unsettling events and happenings performing his duties as a medic.

Upon discharge from service, employee briefly worked in Nebraska, then moved to Missouri where he was employed with Zenith for approximately two weeks and then began employment with Hutco Equipment Company in 1973; he worked for this same company and its successor for the next 26 years, or until 1999. (In approximately

1985, the name was changed to Ozark Utility Trailers.)

Employee began his employment as a laborer, he learned how to weld and repair and by 1986 he became the service manager; as service manager he supervised mechanics, originated estimates, opened and closed repair orders, supervised 12 to 20 people, and hired and fired employees. As service manager, employee dealt with customers both in person and by phone; he testified he had to prioritize activities, assign mechanics to certain projects and also at times perform physical labor in order to fulfill his job duties.

Employee left Ozark Utility Trailers in May of 1999, accepting new employment. Peterbilt approached him to start a trailer repair shop from the "ground up" in its behalf. Employee worked approximately 20 months with Peterbilt until the company closed its trailer shop in November of 2000. Employee performed similar type duties at Peterbilt that he had done at Ozark Utility Trailer, with the exception that he built and equipped the shop at Peterbilt, which he did not do at Ozark Utility Trailer.

Employee next was employed at Wick's Trailer Shop, employer, beginning February 2001. He worked for employer until October 1, 2002. Employee again was working as a service manager, where he performed similar duties as he had performed for Ozark Utility as well as Peterbilt; he opened a repair shop, supervised construction of the building, purchasing of equipment and parts, and again, employee interfaced with the public and customers, both in rendering estimates, opening and closing work orders, assigning jobs, hiring and firing employees, etc.

Employee believes he has had post-traumatic stress disorder since returning from Vietnam, with the principal symptom being nightmares. Employee was not diagnosed with post-traumatic stress disorder until approximately 2000, when it was suggested to him that he should go for an evaluation by an acquaintance of his who had been seeking treatment for the same symptoms.

Employee testified that he had no prior diagnosis of post-traumatic stress disorder or problems other than nightmares prior to 2000. He admitted that his nightmares never interfered with his work. He testified that his post-traumatic stress disorder is worse since the 2002 injury. Employee admitted that he did not believe his post-traumatic stress disorder interfered with or jeopardized his jobs. Employee was able to work successfully in supervisory capacities for many years and testified that he was recruited by a competing firm to open up and run its trailer repair shop. Employee admitted he never had any difficulty obtaining employment prior to October 1, 2002; he admitted he never had any difficulty maintaining employment prior to October 1, 2002; he offered no evidence indicating that he had difficulty performing any of his many job duties or that he missed any time from work due to his post-traumatic stress disorder. While working for his three employers between 1973 and 2002, employee interacted and interfaced with co-workers and customers throughout each and every work day and had very little if any difficulties.

In his 29 year employment history employee testified to approximately four incidents/altercations with co-employees and none with any customers. As to his current complaints employee testified his post-traumatic stress disorder is triggered when he has a nightmare; during the short-term he is fine with working with co-employees, but he does not like crowds and he does not trust many people; he does not presently believe he could return to his supervisory roll as he believes it is now difficult to deal with people; and employee did make himself available for work and searched for work after he separated from employment from the employer on October 1, 2002, but his search for work was not fruitful and he ended up collecting unemployment compensation benefits for approximately 38 to 42 weeks.

Employee testified that being discharged and separated from employment by employer came as a surprise to him. Employee was of the impression that his employment was going well and he was doing a "good job".

#### Testimony of Wilber Swearingin

Mr. Wilber Swearingin, a vocational expert, testified in behalf of the employee. His testimony was based on an interview with employee and a review of medical records. The vocational opinion of Mr. Swearingin was that employee is permanently and totally disabled as the result of the combination of his pre-existing post-traumatic stress disorder and the work related injury to employee's right shoulder sustained October 1, 2002.

Mr. Swearingin based his opinion in part from his review of medical records indicating to him that employee had problems with anger, concentration and sleeping, and those factors caused difficulty with his employment prior to the injury sustained October 1, 2002. Mr. Swearingin also testified that he was of the opinion employee had problems with co-workers and customers prior to the injury of October 1, 2002, which was attributable to his post-traumatic stress disorder.

On cross-examination, Mr. Swearingin admitted that employee's post-traumatic stress disorder had worsened since the injury of October 1, 2002; that the employee is presently considered to be 100% disabled by the Veterans Administration (VA) based upon his post-traumatic stress disorder alone; however, prior to October 1, 2002, the Veterans Administration considered his disability to be at 30%; and Mr. Swearingin indicated that the VA system of disability is not similar to the Missouri Workers' Compensation statutes concerning disability as the VA percentages are based on loss of earnings in civilian occupations and how the disability impacts earning potential.

Mr. Swearingin did not contact any of employee's employers between 1973 and 2002 to obtain any information as to how he fared during his employment. Mr. Swearingin on cross-examination agreed that prior to the injury of October 1, 2002, employee worked in jobs in a supervisory capacity often times supervising anywhere between 12 to 20 employees; Mr. Swearingin admitted he had no information regarding any problems employee had with dealing with customers during his 29 years of work; the four altercations occurred with co-workers; and Mr. Swearingin could not identify any difficulty employee had performing his job duties due to his post-traumatic stress disorder; or employee being able to accomplish his goals and fulfill his job duties. Mr. Swearingin also admitted that employee was successful in starting out in a lower level position and moving upwards to shop manager which is a management supervisory position.

#### Testimony of Dr. Martin Faitak

Dr. Martin Faitak, a psychologist, testified by deposition in behalf of the employee. Dr. Faitak is a psychologist working under contract at the VA in Fayetteville, Arkansas. Dr. Faitak saw employee on two occasions at the request of the VA, in December 2001, and in May 2003.

Based upon his review of records and his interview with employee, Dr. Faitak was of the opinion that employee has post-traumatic stress disorder attributable to his Vietnam military service.

When Dr. Faitak first interviewed employee in December 2001, he found employee to have coped "pretty good" with his post-traumatic stress syndrome in his occupational settings. Dr. Faitak found employee to have been able to maintain employment without having an excessive number of jobs, that he hadn't lost any jobs due to anger or difficulty getting along with others, and so he "felt that his occupational adjustment at that time was pretty good". Dr. Faitak noted that when he next saw employee, in May 2003, employee was worse with respect to his post-traumatic stress syndrome symptoms.

Dr. Faitak testified that when he first interviewed employee in December 2001, employee did not relate any history of experiencing difficulty performing his job duties or tasks or experiencing problems with interpersonal relationships at work.

#### Witness, David G. Paff, M.D.

Dr. David Paff testified in behalf of employee. Dr. Paff evaluated employee on August 18, 2003.

Dr. Paff opined that due to the accident occurring October 1, 2002, employee sustained a 25% permanent partial disability of the right shoulder. Dr. Paff further stated that employee had a 20% permanent partial disability to the body as a whole for pre-existing post-traumatic stress disorder. When Dr. Paff combined the disability attributable to the primary injury, with the pre-existing disability attributable to the post-traumatic stress disorder, Dr. Paff was of the opinion there was a 10% body as a whole enhancement.

However, on further questioning, it is clear that Dr. Paff did not independently review employee's condition of post-traumatic stress disorder; and he admitted that he used the opinion of another expert by reading a report. Dr. Paff took no history from employee regarding his post-traumatic stress disorder as his opinion was based on a review

of another expert's medical records.

#### IV. Findings of Fact and Conclusions of Law.

It is clear that employee had a pre-existing condition, post-traumatic stress disorder. Employee may also suffer from sleep apnea. The issue though is the seriousness of any of his pre-existing conditions, and whether or not they constituted a hindrance or obstacle to employment or re-employment, hence, a disabling condition. Employee has the burden of proof in establishing this pre-existing disabling condition.

In an attempt to prove his post-traumatic stress disorder or sleep apnea was a hindrance or obstacle to his employment prior to the primary injury, employee principally relied on the testimony of his vocational expert, Mr. Swearingin. Mr. Swearingin testified on direct examination that employee's prior post-traumatic stress disorder was a hindrance or obstacle to employment at the time of the primary injury. However, the Commission does not find the conclusions of Mr. Swearingin credible, persuasive or convincing, as a review of all of the evidence indicates there is little, if any, evidence to support his opinion.

In the opinion of the Commission, the most important evidence concerning this issue is the evidence from the employee himself. Despite having returned from Vietnam in the early 70's, employee did not have any treatment for, or even have a diagnosis of post-traumatic stress disorder until sometime in the year 2000. During his tenure of employment with three separate employers over a 29-year period, 1973 through 2002, employee had few if any altercations with his co-employees, and none with any customer. There was practically no evidence that employee had any other problems or exhibited any other symptoms from his post-traumatic stress disorder during any of his employments. Employee himself testified he did not believe his post-traumatic stress disorder was interfering with, or jeopardizing any of his jobs. Employee worked successfully in supervisory capacities for many years and was recruited by a competing firm to open up and run its trailer repair shop from the "ground up". Employee's testimony is directly in contrast to the vocational picture depicted by Mr. Swearingin, and his ultimate conclusions.

Employee testified he never had any difficulty obtaining employment prior to October 1, 2002, and he never had difficulty maintaining employment prior to October 1, 2002. Employee offered no evidence himself showing that he had difficulty performing any of his job duties or that he missed any time from work due to his post-traumatic stress disorder. Employee's testimony is devoid of any evidence that he himself believed he was ever hindered from employment or there was any condition that created an obstacle to his employment and certainly not due to his post-traumatic stress disorder prior to the compensable injury.

The Commission is constrained to find any evidence to substantiate the conclusions reached by Mr. Swearingin. Mr. Swearingin did not obtain any feedback from any of the three employers with whom employee was employed for the preceding 29 years. Mr. Swearingin admitted employee had an excellent work history; at Ozark Trailers he worked his way up from an apprentice into management and supervision; Mr. Swearingin admitted that in all three employments, employee developed a customer base, maintained a customer base, created estimates, ordered parts, assigned work, hired and fired employees, etc. Employee routinely supervised 12 to 20 people. Employee was in a position where he interfaced with customers and a number of people throughout the day including those he supervised. Employee was in charge of assigning work to several co-employees and making sure the work assignments were fulfilled in a timely and correct fashion. Mr. Swearingin had no information that employee ever missed time from work prior to October 1, 2002, due to post-traumatic stress disorder or for any other condition. Mr. Swearingin was also aware that employee was actually recruited in 1999 by Peterbilt to start from "the ground up" and operate a new trailer repair shop. There is no evidence to base a conclusion that employee's pre-existing condition was ever an obstacle to employment.

Mr. Swearingin admitted that in employee's supervisory capacity, he would have to make sure that certain tasks were accomplished each day either by him or by the employees he supervised and Mr. Swearingin agreed that he had no evidence that employee had problems of setting and accomplishing goals or fulfilling goals prior to the injury of October 1, 2002.

On further cross-examination, Mr. Swearingin had to retract a portion of his opinion when on direct he indicated that employee had a history of confrontational problems or arguments with customers, when in fact, Mr. Swearingin admitted it was not true. Mr. Swearingin was able to only indicate four times in a 29-year period of

employment where employee had any sort of confrontation with a co-employee. Four confrontations within a 29 year history of employment does not persuade or convince the Commission that employee's condition of post-traumatic stress disorder was a measurable disability that was a hindrance or obstacle to employment. Mr. Swearingin's credibility is further undermined by his attempt to speculate as to reasons for employee's separation from employment on October 1, 2002.

Furthermore, the Commission is convinced from the expert testimony of Dr. Faitak, and from the employee himself, that employee's post-traumatic stress syndrome, a condition which existed at the time of the accident occurring October 1, 2002, had subsequently blossomed into a disability, which did not exist as of the date of the accident. The Second Injury Fund is not responsible for progression of pre-existing conditions that develop after the work injury. *Wilhite v. Hurd*, 411 S.W.2d 72 (Mo. 1967).

The opinions of Dr. Paff, concerning liability of the fund, are also not reliable, convincing or worthy of belief. Admittedly, Dr. Paff did not discuss or even receive any history from the employee concerning his pre-existing condition of post-traumatic stress disorder. Dr. Paff did not independently review this condition, and Dr. Paff utilized the opinion of another medical expert as to employee's alleged pre-existing disability.

A testifying expert cannot be a mere conduit for another non-testifying expert. *Brufat v. Mister Guy, Inc.*, 933 S.W.2d 829 (Mo. App. W.D. 1996). The Commission lends no credence to the opinions of Dr. Paff as to the issue of a pre-existing disability.

The Second Injury Fund liability is only triggered by a finding of the presence of an actual and measurable disability at the time the work injury is sustained. See *Messex, supra*. In the instant case, there is a lack of substantial, competent and reliable evidence to support a finding that employee had a pre-existing permanent disability which was a measurable disability at the time the work injury was sustained and of such seriousness as to constitute a hindrance or obstacle to employment or re-employment.

The credible evidence consistently supports a finding that employee did not have any problems, limitations, or occupational complaints up to and at the time of the primary injury occurring October 1, 2002. Due to this lack of proof of any measurable pre-existing disability at the time of the primary injury, the Second Injury Fund cannot be liable for benefits.

#### V. Conclusion

The instant record is devoid of substantial and competent evidence providing a basis to support a finding and determination that employee had a disability prior to the work injury sustained October 1, 2002. Due to this lack of proof, the instant claim against the Second Injury Fund must fail.

The Commission concludes that the Second Injury Fund has no liability on account of this injury. Due to this conclusion, all other issues are rendered moot.

The award and decision of Associate Administrative Law Judge David L. Zerrer, issued September 5, 2005, is attached hereto solely for reference.

Given at Jefferson City, State of Missouri, this 22<sup>nd</sup> day of May 2006.

#### LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

#### DISSENTING OPINION FILED

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John J. Hickey, Member

Attest:

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Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon 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 concluding that employee is entitled to permanent total disability benefits from the Second Injury Fund is supported by competent and substantial evidence and should be affirmed.

I respectfully dissent from the decision of the majority of the Commission reversing the award of permanent total disability benefits against the Second Injury Fund.

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John J. Hickey, Member

**AWARD**

|                   |                                    |                                    |
|-------------------|------------------------------------|------------------------------------|
| Employee:         | Lindell Garrett                    | Injury No. 02-133498               |
| Dependents:       |                                    | Before the                         |
| Employer:         | Wick's Truck Trailers, Inc.        | <b>DIVISION OF WORKERS'</b>        |
| Additional Party: | Treasurer of the State of Missouri | <b>COMPENSATION</b>                |
| Insurer:          | Universal Underwriters             | Department of Labor and Industrial |
| Hearing Date:     | April 20, 2005                     | Relations of Missouri              |
|                   |                                    | Jefferson City, Missouri           |
|                   |                                    | Checked by: DLZ                    |

**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: October 1, 2002
5. State location where accident occurred or occupational disease was contracted: Greene 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  
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 was handling tool box when felt pain in shoulder

12. Did accident or occupational disease cause death? No Date of death? N/a
13. Part(s) of body injured by accident or occupational disease: Right upper extremity
14. Nature and extent of any permanent disability: 22.5% at the 232 week level
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? \$5,195.70
  
17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$900.05
19. Weekly compensation rate: \$600.03/\$340.12
20. Method wages computation: Stipulation

### **COMPENSATION PAYABLE**

21. Amount of compensation payable:
  
  
22. Second Injury Fund liability: Yes  No  Open

Permanent total disability benefits from Second Injury Fund:

\$259.91 weekly differential payable by SIF for 52-2/7 weeks beginning October 1, 2002, thereafter, \$600.03 weekly for Claimant's lifetime

TOTAL: \$259.91 FOR 52-2/7 WEEKS, THEREAFTER \$600.03 FOR LIFE

23. Future requirements awarded: None

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: Randy C. Alberhaskey

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

Employee: Lindell Garrett

Injury No: 02-133498

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Dependents:

Employer: Wick's Truck Trailers, Inc.

Additional Party Treasurer of the State of Missouri

Insurer: Universal Underwriters

Checked by: DLZ

On the 20<sup>th</sup> day of May, 2005, the parties appeared before the undersigned Associate Administrative Law Judge for a final hearing. The Claimant appeared in person and by his attorney, Randy C. Alberhasky. The Employer previously settled the primary claim with the Claimant by Compromise Lump Sum Settlement Agreement, and therefore, did not appear. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, appeared by Assistant Attorney General, Cara Harris.

The parties entered into a stipulation as to certain facts which are not at issue in this claim as follows, to wit: On or about the 1<sup>st</sup> day of October, 2002, Wick's Truck Trailers, Inc., was an employer operating subject to the Missouri Workers' Compensation Law; the Employer's liability was fully insured by Universal Underwriters Insurance Co.; on the alleged injury date of October 1, 2002, Lindell Garrett was an employee of the Employer; the Claimant was working subject to the Missouri Workers' Compensation law; the parties agree that on or about October 1, 2002, Claimant sustained an accident/occupational disease which arose out of the course of and scope of employment; the employment occurred in Greene County, Missouri, and Greene County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of his injury as required by Section 287.420; the Claimant's claim was filed within the time prescribed by Section 287.430; at the time of the claimed accident/occupational disease, Claimant's average weekly wage was \$900.05, sufficient to allow the following compensation rates: \$600.03 for permanent total disability and \$340.12 for permanent partial disability; no temporary total disability benefits were paid; the Employer has paid all medical expenses incurred prior to the date of the primary claim settlement; the Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award.

## **ISSUES**

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

## **DISCUSSION**

A legal file was created which included the Claim for Compensation, the Amended Claim for Compensation, the Answer of the Second Injury Fund to the original claim for compensation, the Answer of the Second Injury Fund to the amended claim for compensation, the Stipulation for Compromise Settlement.

The Claimant offered the following exhibits, which were admitted into evidence:

- A. Medical records of MRI of Springfield
- B. Medical records of Phelps Chiropractic Clinic
- C. Medical records of Diagnostic Clinic
- D. Deposition of Dr. Martin Faitak

- E. Medical records of Ozark Area Orthopedics
- F. Medical records of the Department of Veterans Affairs
- G. Medical report of Dr. David Paff
- H. Curriculum Vitae of Dr. David Paff
- I. Vocational report of Wilbur Swearingin
- J. Curriculum Vitae of Wilbur Swearingin
- K. Claim for Compensation dated May 10, 2003
- L. Letter of Claimant's attorney dated June 2, 2003, addressed to the Second Injury Fund
- M. Stipulation for Compromise Settlement between Claimant and Employer, approved by the Division June 1, 2004
- N. Vocational profile prepared by Wilbur Swearingin indicating sedentary jobs with reaching frequently and hearing frequently
- O. Vocational profile prepared by Wilbur Swearingin indicating sedentary jobs with reaching frequently and hearing occasionally
- P. Vocational profile prepared by Wilbur Swearingin indicating sedentary jobs with reaching occasionally and hearing frequently.

Dr. David Paff testified on behalf of Claimant. Dr. Paff testified that he performed an independent medical evaluation on the Claimant on August 18, 2003. Dr. Paff testified that he reviewed certain medical records and the deposition of

Dr. Faitak as part of his evaluation. Dr. Paff identified Claimant's Exhibit G as his written report issued pursuant to his evaluation of the Claimant. Dr. Paff testified that he took a history from the Claimant with regard to previous work history, previous medical history, and the events of the day of Claimant's injury. Dr. Paff reported that Claimant complained that he could not lift a bottle of milk, that his right shoulder fatigues easily, and that sometimes Claimant cannot use his right hand and arm to eat a full meal because of the pain in Claimant's shoulder.

Dr. Paff testified that in his opinion, the medical records reviewed generally supported Claimant's history given to Dr. Paff. Dr. Paff further testified that he issued a rating of permanent partial disability to Claimant's right shoulder of 25%. Dr. Paff concurred with Dr. Miller's recommendation for surgery in order to bring Claimant's muscle up to his shoulder and re-attach the muscle to the rotator cuff.

Dr. Paff placed permanent restrictions on Claimant of no repetitive overhead use of the right arm above the shoulder. Dr. Paff further testified concerning his review of records from the Veterans Administration and the deposition of Dr. Faitak, who has treated Claimant for Post Traumatic Stress Disorder (PTSD). Dr. Paff's report assigns a 20% disability to the body as a whole for Claimant's PTSD. Dr. Paff opined that Claimant's permanent disability is enhanced by 10% of the body as a whole because of the combination of Claimant's PTSD and his right shoulder injury.

On cross-examination Dr. Paff admitted that some of Claimant's treatment for PTSD was after the date of injury, October 1, 2002, but that Claimant had five treatments prior to his injury of October 1, 2002. Dr. Paff admitted that Claimant's PTSD condition worsened after September 11, 2001, and he further admitted that his opinions concerning Claimant's mental condition were based on review of medical records more than Claimant's reported history.

Dr. Paff further testified that he did not render a medical opinion that the Claimant could not work. He further opined that Claimant's PTSD was exacerbated by the events of the Oklahoma City Federal Building bombing and the September 11, 2001, attack in New York City. Dr. Paff further opined that Claimant suffered permanent disability for

his PTSD of 20% to 30% but did not testify as to an exact percentage of disability of the Claimant's PTSD condition. Dr. Paff opined that Claimant was at maximum medical improvement as of his last visit with Dr. Miller, unless he receives additional treatment in the form of surgery as discussed in the medical records.

Wilber Swearingin, Vocational Rehabilitation Consultant, testified on behalf of Claimant. Mr. Swearingin testified that he performed a vocational evaluation on the Claimant September 1, 2004. Mr. Swearingin testified that he reviewed medical records as well as depositions in drawing conclusions concerning Claimant's ability to be employed on the open labor market. Mr. Swearingin testified that the Claimant suffered from exertional and non-exertional impairments. Mr. Swearingin further testified that prior to October 1, 2002, Claimant did not have any physical restrictions with the possible exception of some hearing loss at high frequencies due to Claimant's military experience. Mr. Swearingin identified Claimant's Exhibit I as a report authored by him which sets out the records reviewed, the interview history conducted with the Claimant, and the results of various tests administered as part of the vocational evaluation. Mr. Swearingin opined that the test results indicated that Claimant had the academic skills to do many jobs and that his occupational preferences fell within the areas of jobs in skilled trades and service skilled occupations.

Mr. Swearingin testified that the permanent physical restrictions placed on Claimant affected his ability to do manual jobs but that the physical restrictions would have less impact on supervisory type jobs. Claimant's ten-pound lifting restriction would prevent him from performing his old job tasks of trailer repairs. Mr. Swearingin further testified that Claimant's psychological condition precluded him from performing supervisory type jobs because Claimant cannot interact with other persons in the workplace due to his mental disorder. Mr. Swearingin identified Claimant's Exhibit O which changed some of the parameter qualifications on job classification which resulted in Claimant having the aptitude to perform as many as 95 different jobs in light of his physical restrictions but when factoring in the PTSD condition, Mr. Swearingin opined that Claimant would not be able to perform any of these jobs.

Mr. Swearingin testified that Claimant's PTSD was severely disabling in terms of Claimant being employable on the open labor market. Mr. Swearingin further testified that the PTSD condition affects Claimant's ability to learn skilled job tasks, according to the testimony of Dr. Faitak, whose deposition was reviewed by Mr. Swearingin.

Mr. Swearingin testified that, in his opinion, Claimant was not employable in the open labor market due to the combination of Claimant's physical restrictions as a result of his shoulder injury of October 1, 2002, and his PTSD condition. Mr. Swearingin testified that it appeared that Claimant was terminated involuntarily from his employment as a result of his failure to control his interactions with other persons, as related to him by Claimant in the history portion of the evaluation. Mr. Swearingin testified that, in his opinion, Claimant's PTSD was severely disabling because Claimant suffered from depression as part of the PTSD condition. Mr. Swearingin further opined that Claimant's shoulder injury alone would not have precluded Claimant from employment; however, the combination of the shoulder injury and the mental condition created a level of disability that rendered the Claimant permanently and totally disabled.

On cross-examination Mr. Swearingin admitted that Claimant's hearing loss and his PTSD condition were the only significant impediments to Claimant's work and that Claimant's diabetes was not a significant factor to employability for the Claimant.

Mr. Swearingin also admitted that Claimant's PTSD symptoms became worse after September 11, 2001 and that Claimant's condition has worsened since his last injury of October 1, 2002. Mr. Swearingin also admitted that there is no direct information for the cause of Claimant's termination on October 1, 2002. He further admitted that

Claimant's increase in disability from the mental condition occurred after September 11, 2001, and that there are no records that cite specific changes in Claimant's condition caused by the injury of October 1, 2002.

Lindell Garrett testified on his own behalf. Mr. Garrett testified that he was 55 years of age at the date of the hearing, that he is married for the third time, and that he graduated from high school. Mr. Garrett testified concerning his work history, the accuracy of which is supported by the medical records and evaluations. Claimant related the details of several confrontational incidents which occurred between him and other persons with whom he worked in his capacity as service manager, in particular, an event that occurred at work about one month prior to Claimant's termination between the Claimant and the parts man. After this last incident, Claimant was told to "leave the parts man alone," and Claimant testified that he had no other words or problems with the parts man up to the day that Claimant was terminated.

Claimant testified concerning his active military duty in Viet Nam and the fact that he was treated for PTSD from time to time by the Veterans Administration. Claimant testified that his disability rating with the Veterans Administration changed after the events of September 11, 2001, to a 100% disability rating.

Claimant testified concerning the events of October 1, 2002. Claimant testified that the day was a normal day with the exception that the vice-president of operations of the Employer was on site that day to help install the new general manager. At the end of the workday, Claimant was called into the office and told that things were not going as well as management wanted them to go and that Claimant should take his personal belongings and leave the premises. Claimant testified that when he inquired as to why he was terminated, he was told, "We don't have to give you a reason."

Claimant left the termination meeting and began to pack up his personal belongings and his personal tools. A drill bit box slid off some other boxes, Claimant reached out to grab the falling box with his right arm and immediately began feeling pain in his right shoulder. Claimant testified that he has not worked since October 1, 2002.

Claimant testified that the Employer sent him to a doctor where he was diagnosed with tendonitis. Employer eventually referred Claimant to Dr. Miller for treatment.

Dr. Miller prescribed physical therapy for a period of two months. Claimant testified that he did not sleep well at night. He further testified that he suffered dreams about what he saw and did in Viet Nam and that after September 11, 2001, the nightmares became worse. Claimant testified that he mistrusted any customer who appeared to be of middle-eastern descent and that loud noises startled him. Claimant began carrying a gun in his car after September 11, 2001, and Claimant suffered a change in his ability to concentrate and stay on track after September 11, 2001.

Claimant testified that he no longer liked being around people after his experience in Viet Nam and that he has two previous failed marriages. Claimant testified that he was not able to be close to his first two wives. Claimant testified that he first learned about treatment for his depression and PTSD when a friend suggested that he check with the Veterans Administration about Claimant's exposure to Agent Orange while in Viet Nam. During the year 2000, Claimant contacted the Veterans Administration who tested Claimant and diagnosed him with PTSD. Claimant testified that since that time, he has been treated for the effects of PTSD.

Claimant testified that currently his right shoulder has pain and that he cannot lift using his right shoulder. Claimant further testified that he could lift small items up to his waist before he suffers from pain and loss of strength in his right shoulder. Claimant further testified that his range of motion is decreased in that it is hard to reach behind his back and that sometimes he has to take his meals with his left hand and let his right arm dangle beside him while he eats.

Claimant testified that he continues to suffer from nightmares, especially after watching violence on television or a movie. Claimant further testified that he is not comfortable being around people in groups or crowds. Claimant feels that he cannot go back to work because he cannot deal with the things that people do when they are around him.

On cross-examination Claimant admitted that he is somewhat computer literate. Claimant further admitted that his PTSD symptoms have become worse since September 11, 2001, and that they have continued to worsen since October 1, 2002. Claimant admitted that his hearing loss was not a problem at work except that he had to ask people to repeat things on occasion and that the pain in his shoulder sometimes effects his attitude. Claimant further admitted that he worked steadily prior to October 1, 2002, and that Claimant did not feel his job was in jeopardy prior to his termination.

Dr. Marin T. Faitak, Ph.D., testified on behalf of the Claimant by deposition. Dr. Faitak testified that he saw Claimant on two occasions for evaluation. Dr. Faitak opined that Claimant's condition had worsened between his first evaluation in late 2001 and the next evaluation in May 2003. Dr. Faitak testified concerning the history related to him by Claimant and further to the conclusions that the doctor reached after both evaluations. Dr. Faitak testified that Claimant suffered from PTSD primarily caused by the experiences and events, which Claimant observed in Viet Nam during Claimant's military service time. Dr. Faitak further testified about PTSD symptoms normally exhibited, such as mistrust of people, being uncomfortable around crowds and groups of people, problems with anger management, problems with interpersonal relationships, and depression. Dr. Faitak also testified that in his opinion the events of the attacks of September 11, 2001, exacerbated Claimant's PTSD condition and that Claimant's increased nightmares and inability to cope with everyday life were indicative of his PTSD condition. Dr. Faitak further opined that Claimant's PTSD condition after September 11, 2001, would affect his ability obtain or maintain employment because of Claimant's difficulty in working with and getting along with people. Dr. Faitak also testified that Claimant's PTSD condition would necessitate that Claimant tend to look for jobs where he was able to work alone and not interact with other people.

The Second Injury Fund presented no evidence at the hearing.

## **FINDINGS OF FACTS AND RULINGS OF LAW**

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

For Second Injury Fund liability to attach to this claim, the Claimant must prove that he suffers from a condition which constitutes a hindrance or obstacle to employment or re-employment. In order for the Second Injury Fund to be liable for benefits to this Claimant, the Division must find that the Claimant has a pre-existing condition that is substantial enough to constitute an obstacle to employment. The statute recites that such a substantial condition can be presumed if it amounts to 12.5% disability to the body as a whole or 15% of an extremity.

The initial inquiry must be to determine the amount of disability, if any, caused by the primary injury. If Claimant is permanently totally disabled from the effects of the last injury alone, no liability for the Second Injury Fund for permanent total disability will attach. The threshold question, then, is what is the disability to the Claimant from the primary injury. Dr. Paff testified that Claimant's permanent disability from the last injury is 25% of the shoulder at the 232-week level. The Claimant settled his last injury claim with the Employer for 22.5% of the shoulder at the 232-level. After a review of all the evidence presented at the hearing, both oral and written, I find that Claimant's permanent disability for the last injury is 22.5% of the shoulder at the 232-week level. I further find that Claimant is not permanently totally disabled from the last injury alone.

There is evidence adduced at the hearing concerning the level of Claimant's disability from his PTSD condition. Mr. Swearingin testified that Claimant's mental condition, from a vocational aspect, was "severely disabling." If the Claimant was not employable in the open labor market at the time of his last injury, and was therefore permanently totally disabled as a result of his condition immediately prior to the last injury, than the Second Injury Fund cannot be held liable for permanent total disability benefits as a result of the combination of the previously existing conditions and the effects of the last injury. There is evidence that Claimant was terminated from his last employment for reasons which could be directly connected to the effects of his PTSD condition. No evidence was adduced to establish a specific cause for Claimant's termination on October 1, 2002, the date of his last injury. After a review of all the evidence presented at the hearing, both oral and written, and based on the record as a whole, I find that Claimant was not permanently totally disabled from his pre-existing medical, physical, or mental conditions alone prior to the last injury to Claimant's shoulder.

Mr. Swearingin testified that, in his opinion, Claimant was permanently totally disabled as a result of the combination of Claimant's last injury to his shoulder and Claimant's PTSD condition that pre-existed the last injury. Mr. Swearingin opined that Claimant might qualify for certain jobs in the open labor market with the restrictions imposed by the shoulder injury; however, Claimant's PTSD condition would prevent him from being employable in any of those jobs. The result is that Claimant is considered unemployable, not by either condition alone, but the fact that Claimant's shoulder restrictions place him in job categories classified as supervisory and his PTSD condition prevents him from performing jobs classified as supervisory. After a review of all the evidence presented at the hearing, both oral and written, and based on the record as a whole, I find that Claimant is permanently and totally disabled as a result of the combination of his pre-existing mental/physical conditions and the effects of his last injury to the right shoulder. The Treasurer is hereby ordered to pay to Claimant the sum of \$600.03 per week from the date Claimant reached maximum medical improvement, which I find to be May 16, 2003. The Second Injury Fund is hereby awarded a credit of \$340.12 per week for 52-2/7 weeks for permanent partial disability paid to Claimant by the Employer pursuant to settlement approved by the Division. The Second Injury Fund is therefore ordered to pay to Claimant the sum of \$259.91 per week for a differential payment for the period of 52-2/7 weeks beginning May 16, 2003. Thereafter, the Second Injury Fund shall pay to Claimant the sum of \$600.03 per week as ordered herein.

Claimant's attorney has requested approval of an attorney fee of 25% of the amount of this award. Claimant's attorney is hereby awarded an attorney fee of 25% of the amount of this award. Claimant's attorney is hereby granted a lien on the proceeds of this award unless and until the attorney shall have been paid in full.

Dated: September 2, 2005

Made by: /s/ David L. Zerrer

David L. Zerrer  
Associate Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secret  
Patricia "Pat" Secret  
Director  
Division of Workers' Compensation