

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

Injury No.: 00-000720

Employee: Keith Gentry

Employer: Keith Gentry (Settled)

Insurer: Missouri Employers Mutual Insurance Company (Settled)

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 3, 2013. The award and decision of Administrative Law Judge Edwin J. Kohner, issued January 3, 2013, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 28th day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Keith Gentry Injury No.: 00-000720
Dependents: N/A Before the
Employer: Keith Gentry (Settled) **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Missouri Employers' Mutual Insurance Company (Settled) Jefferson City, Missouri
Hearing Date: November 14, 2012 Checked by: EJK/ch

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: January 7, 2000
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The claimant, a siding installer, suffered a low back disc injury and a torn rotator cuff in his left arm while picking up a heavy siding brake.
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: Low back and left shoulder
14. Nature and extent of any permanent disability: 30% permanent partial disability to the low back and 7 ½% permanent partial disability to the left shoulder
15. Compensation paid to-date for temporary disability: \$25,783.68
16. Value necessary medical aid paid to date by employer/insurer: \$31,557.56

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$523.64
- 19. Weekly compensation rate: \$349.09/\$303.01
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Settled

22. Second Injury Fund liability: Yes

| | |
|--|------------|
| 21.625 weeks of permanent partial disability from Second Injury Fund | \$6,552.59 |
|--|------------|

| | |
|--------|------------|
| TOTAL: | \$6,552.59 |
|--------|------------|

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: Edward A. Gilkerson, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

| | | |
|-------------------|--|------------------------------------|
| Employee: | Keith Gentry | Injury No.: 00-000720 |
| Dependents: | N/A | Before the |
| Employer: | Keith Gentry (Settled) | Division of Workers' |
| Additional Party: | Second Injury Fund | Compensation |
| Insurer: | Missouri Employers' Mutual Insurance Company (Settled) | Department of Labor and Industrial |
| | | Relations of Missouri |
| | | Jefferson City, Missouri |
| | | Checked by: EJK/ch |

This workers' compensation case requires a determination of Second Injury Fund liability arising out of a work related injury in which the claimant, a siding installer, suffered a low back disc injury and a torn rotator cuff in his left arm while picking up a heavy siding brake. The sole issue for determination is Second Injury Fund liability. The evidence compels an award for the claimant for additional permanent partial disability benefits from the Second Injury Fund.

At the hearing, the claimant testified in person and offered depositions of Dwight I. Woiteshek, M.D., and James M. England, Jr., three Workers' Compensation settlements, and voluminous medical records. The defense offered depositions of Bob Hammond and the claimant.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

This forty-eight year old claimant, a siding installer, a high school graduate, began a siding business with a business partner. Eventually, his business partner left the company, and the claimant worked mostly on his own during the last five years before his January 2000 work injury. The claimant's physical job duties required him to bend, lift, stoop, climb ladders, stand for most of the day, kneel, and work overhead on a daily basis.

On January 7, 2000, the claimant experienced pain and felt a pop in his back while picking up a heavy siding brake that weighed approximately 100 pounds. On January 30, 2000, the claimant underwent a lumbar spine MRI revealing an L5-S1 disc desiccation with minimal disc bulging. On February 16 and 23, 2000, the claimant received epidural steroid injections. On May 25, 2000, Dr. Piper examined the claimant for back pain. The claimant reported that he was gainfully employed without problems with his back for 18 years prior to his January 2000 work injury. The claimant reported that he no longer rides the tractor or quad or do the things he normally did. Dr. Piper opined that the discogram was normal at the L4-5 level and positive and provocative and concordant at the L5-S1 level. See Exhibit C.

On June 22, 2000, Dr. Gragnani opined that the claimant was at maximum medical improvement and that no specific impairments arose from the January 2000 accident. See Exhibit C. On July 25, 2000, Dr. Piper opined that the claimant's anticipated surgery (fusion of the lumbar spine at the L5-S1 level) was related to a work related event that happened on January, 2000. See Exhibit C. On November 3, 2000, Dr. Abernathie examined the claimant and opined that he did not know that he would be willing to offer the claimant surgery, because he was not convinced that the surgery would help the claimant. Dr. Abernathie could not affirm that there is a lesion in his lower lumbar spine amenable to operative intervention, or that it was consistent with his complaint. Dr. Abernathie found the claimant at maximum medical improvement and found a 15% permanent partial disability of the body as a whole. See Exhibit C.

On January 16, 2001, Dr. Kennedy examined the claimant and found no evidence of nerve root compression to suggest radiculopathy. Dr. Kennedy opined that given the fact that he does not have any significant degenerative changes in the disc, the results of the discogram are spurious and do not predict likely successful response to surgery. Dr. Kennedy opined that a fusion would fail to improve symptoms since they are poorly localized. Dr. Kennedy opined that there was not any particular reason to restrict the claimant's activities. Dr. Kennedy opined that the claimant may choose to not perform heavy lifting, but he did not see any correlative physical abnormalities that would explain this. Dr. Kennedy diagnosed a lumbar strain, recommended no operative intervention or specific activity restrictions, and found the claimant to be at maximum medical improvement.

On February 27, 2001, Dr. Piper examined the claimant, reviewed a discogram, and found an abnormal L5-S1 discogram with extravasation of dye in the epidural space. Dr. Piper noted that the L4-L5 was normal appearing. See Exhibit C. Dr. Piper noted that initially, after a positive discogram, he planned to do a one level ALIF at the level L5-S1 in August or September 2000. See Exhibit C. On April 16, 2004, Dr. Piper reviewed a discography and noted that level L4-L5 and L5-S1 were abnormal, that Level L5-S1 was grossly abnormal with a right radial tear, and that L4-L5 had a radial tear. Dr. Piper noted that he would schedule him for a 2 level ALIF. See Exhibit C.

On February 27, 2007, Dr. Kuklo examined the claimant and diagnosed degenerative disc disease with L5 radiculopathy. Dr. Kuklo noted that the discogram is positive for concordant pain at the L4-L5 and the L5-S1 level. See Exhibit C. On March 14, 2007, the claimant underwent a bilateral pedicle screw instrumentation at the L4-S1 level, transforaminal lumbar interbody fusion at the L4-L5 level and the L5-S1 level with interbody spacer and bony grafting, and a posterior spinal fusion with bone morphogenic protein and local bone L4 through S1. See Exhibit C. On July 31, 2007, at Dr. Kuklo's re-examination, the claimant reported that his left leg pain was gone, back pain was decreased, and that he experienced no more shooting pains. See Exhibit C. On March 17, 2008, Dr. Kuklo discharged the claimant and placed him at maximum medical improvement. See Exhibit C. On May 1, 2008, Dr. Kuklo examined the claimant and cleared the claimant to do whatever activities he desired. Although Dr. Kuklo provided no specific restrictions, he opined that the claimant should avoid a lot of bending, lifting, and twisting, but otherwise should be as active as he can. See Exhibit C.

On August 28, 2008, the claimant underwent a rotator cuff and impingement surgery on the left shoulder. See Exhibit C.

The claimant testified that he now has to lie down during the day to relieve his back pain and that he spends 65-70% of the day lying down to relieve back pain. Until the primary work injury, he worked at a physical job without any other co-workers or helpers. The claimant testified that his job required him to bend, lift, climb, and stand or walk throughout the day. The claimant testified that before the work injury, he would hunt, fish, ride four wheelers, jog, play softball, and lift weights. The claimant testified that he has been unable to do these activities since his primary work injury. The claimant testified that before the primary work injury, he worked a physical job on a daily basis putting up siding alone.

The claimant testified that after his work injury, his wife, Sandy Gentry, started a company called S & G Measures that measured windows. He testified that the business also did siding. See claimant deposition, page 8. The claimant testified that his wife worked as a nurse during the time S & G Measures operated. The claimant testified at the hearing that he did not run ads or put signs up looking for crews to do the siding and window jobs. The claimant testified that only on one occasion he worked for S & G Measures to measure a window. However, in his 2004 deposition testimony, he testified that he would go pick up the paper work, even though the company was in Sandy's name. See claimant deposition, page 11. The claimant testified in his 2004 deposition that "we would call and set up a guy to do the work. We would run an ad and put signs up looking for crews. They would call; we'd give them the job to do. When they got done they would contact us, and we would go get our pay". See claimant deposition, page 11. The claimant testified in his 2004 deposition that he would go in and pick up measures from United Home Craft. The claimant testified that he, not Sandy, would call and schedule the appointments, have other people go and measure them, unless that person that day had to have the window measured, then he would go and measure them. See claimant deposition, page 12. The claimant testified that his wife set up a bank account for S & G Measures, that he eventually had his name placed on the bank account, that money acquired from the jobs done through S & G Measures was placed into this bank account, and that the money from the account would go into paying their house payment or bills.

The claimant testified as his own boss, he was able to make accommodations for his injuries and limitations. The claimant testified that his customers complained about the speed in which he did his work and that he was slow. The claimant testified that he worked at his own pace and would have helpers from time to time.

The claimant testified that he does not sleep very well, lives alone, has a boring life, and takes ibuprofen for pain although he had prescriptions for stronger medication. The claimant testified that he can sit 10-15 minutes comfortably, stand about a half an hour, and walk for 15-20 minutes and drive about 45 minutes. The claimant testified that he does not lift, carry, climb steps, or climb ladders. The claimant testified that he continues to have pain in his back and legs. The claimant settled his Workers' Compensation claim with the insurer on the basis of a 30% permanent partial disability of the low back and a 7 ½% permanent partial disability of the left shoulder. See Exhibit F.

Pre-existing Disabilities

In 1984, the claimant fractured his left ring finger while playing soccer but continued to work full duty following this injury. The claimant testified that he cannot bend his finger as a result. In 1987, the claimant injured his left shoulder when lifting a walk board and was diagnosed with internal derangement and impingement. He received injections and physical therapy. The claimant testified that he had problems performing overhead work following this injury but returned to full duty work. In 1991, the claimant injured his right ankle while losing his balance on a ladder and was diagnosed with internal derangement and old fracture of the 3rd right metatarsal. He was placed in an air cast for 3 weeks, placed into another cast for 6 weeks, and then underwent physical therapy. He testified that his ankle still swells due to this injury. However, the claimant returned to work full duty following this injury. The claimant settled his workers' compensation claim on the basis of a 12 ½ % permanent partial disability of the right ankle and testified that he continued to have problems with his ankle, including pain and swelling. See Exhibit E. The claimant testified that his pre-existing injuries to his left finger and hand, left shoulder and right ankle caused him to seek medical attention and miss work, and that these injuries impacted and affected his ability to work.

Wayne T. Stillings, M.D.

Dr. Stillings, a psychiatrist, examined the claimant on June 5, 2000 and opined that the claimant had no definable psychiatric illness and no psychiatric illness causally related to the January 7, 2000 work injury. See Exhibit C. Dr. Stillings opined that from a psychiatric standpoint, the claimant is able to work without restrictions. See Exhibit C.

Raymond F. Cohen, D.O.

On July 29, 2000, Dr. Cohen, a neurologist, examined the claimant and diagnosed the following related to the primary work injury: annular tear confirmed on discogram at the L5-S1 level, severe lumbosacral myofascial pain disorder, and left shoulder impingement syndrome. Dr. Cohen noted that the claimant injured his right ankle at work in 1994. The claimant reported he eventually improved regarding that matter. Dr. Cohen opined that there was no combination with the primary work-related injury and the pre-existing right ankle, because he apparently recovered from the right ankle condition. See Exhibit C.

Dr. David T. Volarich, D.O.

On September 20, 2005, Dr. Volarich examined the claimant and made the following diagnosis referable to the January 7, 2000 work injury: lumbar radicular syndrome secondary to internal disc derangement with annular tear at the L5-S1 level causing right leg radiculopathy and mild aggravation of left shoulder impingement syndrome. Dr. Volarich opined that with reference to his L4-5 annular tear, he would defer to the opinion of the treating surgeon at the time of surgery to determine whether or not the L4-5 level tear occurred as a direct result of the L5-S1 lesion. Dr. Volarich opined that it was difficult to determine how the L4-5 tear occurred, because it was not present on the first discogram. See Exhibit C.

Dwight Woiteshek, M.D.

On November 9, 2010, and August 30, 2011, Dr. Woiteshek, an orthopedic surgeon, examined the claimant and provided the following diagnosis as a result of the injury of January 2, 2000: traumatic annular tears at the L4-5 level and at the L5-S1 level and rotator cuff tear and impingement of the left shoulder. Dr. Woiteshek testified that for the 2000 injury alone, Dr. Woiteshek would place the following restrictions: advised to avoid remaining in a fixed position for any more than 20 to 30 minutes, change positions frequently to maximize comfort and rest in a recumbent fashion when needed. See Dr. Woiteshek deposition, page 19. Dr. Woiteshek clearly testified that he would place the restriction of avoid remaining in a fixed position for any more than 20 to 30 minutes and change positions frequently to maximize comfort and rest in recumbent fashion when needed solely on the work injury in 2000. See Dr. Woiteshek deposition, page 20. Dr. Woiteshek deferred to a vocational expert to see if the claimant was unable to work based on the restrictions that Dr. Woiteshek provided for the last injury alone. See Dr. Woiteshek deposition, page 20.

Dr. Woiteshek testified that he was not aware of any prior back problems. See Dr. Woiteshek deposition, page 20. Dr. Woiteshek did not have Claimant's treating records for the left shoulder injury before 2000. See Dr. Woiteshek deposition, pages 25-26. Dr. Woiteshek testified that he found the Claimant permanently and totally disabled without factoring the prior left shoulder injury. See Dr. Woiteshek deposition, page 26.

With regard to pre-existing disabilities, Dr. Woiteshek opined that the claimant had three pre-existing permanent partial disabilities:

- (1) 30 percent of the left ring finger due to a fracture of the left ring finger due to discomfort, stiffness, and weakness in the ring finger.
- (2) 25% of the right foot level due to a fracture of the third metatarsal of the right foot with discomfort, stiffness, and weakness in the right foot area.
- (3) 20% of the left shoulder due to impingement from a 1987 injury. See Dr. Woiteshek deposition, pages 13, 14.

After examining the claimant and reviewing medical records, Dr. Woiteshek distinguished the two injuries to the left shoulder, "the shoulder injury that he had in 2000 was a rotator cuff tear, where the injury in 1987 was basically an impingement type of injury." See Dr. Woiteshek deposition, page 15. He opined that the pre-existing disabilities synergistically combined with the primary work-related injury that he sustained on January 7, 2000 to create a substantial greater overall disability than the independent sum of the disabilities. See Dr. Woiteshek deposition, page 14. Dr. Woiteshek opined within a reasonable degree of medical certainty that the claimant was no longer employable in the open labor market...due to a combination of his work-related injuries on January 7, 2000 and his pre-existing disabilities. See Dr. Woiteshek deposition, page 18.

James M. England, Jr.

Mr. England, a licensed vocational rehabilitation counselor, reviewed the claimant's medical records, performed testing, and personally evaluated the claimant on February 8, 2011,

eleven years after the January 2000 work-related injury. Mr. England's testing included a word recognition test in which the claimant scored at the fourth grade level. He was able to do sixth grade level math. On the reading comprehension test, he scored at sixth grade, ninth month level. See England deposition, pages 13-14.

Mr. England testified that the claimant's work was classified as medium to heavy type work. See England deposition, page 20. Mr. England testified that based on Dr. Kuklo's restrictions, the treating doctor, the claimant would still be able to do probably cost estimates, sales of materials and certainly some un-skilled entry-level service kind of things like security work or cashiering, retail work at a Wal-Mart or something like that would all be within those findings. See England deposition, page 22. Mr. England opined that part of his problem with his employability is that the claimant appeared depressed. See England deposition, page 24. Mr. England opined that if the claimant has a restriction for changing positions frequently and even assume a recumbent position, then the claimant would be employable. See England deposition, pages 23-24. Mr. England opined that the claimant was able to do a medium to heavy work activity on a day to day basis before the primary work injury. See England deposition, pages 26-27.

Mr. England opined that "someone who has the combination of physical problems that he seems to be experiencing would not, in my opinion, be able to sustain even a sedentary level of work activity on a consistent day to day basis. Absent significant improvement in his overall physical function, I believe that he is likely to remain totally disabled from a vocational standpoint." See England report, pages 15-16. Mr. England noted that the claimant's 1984 injury to his left ring finger caused him to have less grip strength in that hand. The claimant had problems with his left shoulder since the 1987 injury doing overhead work or lifting a lot of weight. The claimant reported to Mr. England that after the 1991 right ankle injury his ankle never healed properly and continues to pop and ache and that it often swells. See England report p. 12. Mr. England opined,

I didn't feel that he would be able to successfully compete for or sustain work in the long run... Further, I think more importantly, if you look at the problems that he's having physically, I don't think he could sustain even a sedentary level on a consistent day to day work basis. And I thought absent significant improvement in his overall physical functioning that he would likely remain totally disabled from a vocational standpoint. ... In other words, this man has trouble with his left upper extremity; he has difficulty moving it out away from his body, moving it up overhead, lifting very much with the arm. He also has trouble with his back that makes it difficult for him to stand long, sit long, be in any one position very long. ... I don't think with the problems that he's got that – and he's only functioning at about a mid grade school level academically, that he's going to be able to go out and successfully compete for or last in a work setting. ... It's a combination of the problems that he has. ... Well, he's got problems with the shoulder; he's got problems with the back. I think those are the two primary things, although he comes across as obviously also very depressed. See England deposition, pages 16, 17.

Mr. England opined that the claimant is totally disabled from a vocational standpoint, by taking into consideration his age, education, work experience, the medical records, and the information at the interview. He indicated that he had some difficulty performing his work. See England deposition, page 27. He testified that the claimant's pre-existing permanent partial disabilities were primarily his hands and his shoulder. See England deposition, page 28.

Bob Hammond

Mr. Hammond performed a vocational rehabilitation records review and testified that based on the treating doctors' restrictions, the claimant is employable in the open labor market based on the treating doctors' restrictions. See Hammond deposition, page 11. Mr. Hammond opined that the claimant was released to work at various levels before 2010 that would have provided for transferability of skills to such positions as a materials manager for hardware and lumber, an order clerk for truss building and pre-fabricated wall panels, and at the light level a sales clerk for hardware, lumber, and as a construction sales manager. See Hammond report.

Mr. Hammond testified that restricting the claimant to be in a recumbent position would eliminate all positions. See Hammond deposition, page 14. Mr. Hammond testified that if the claimant needed to lay down that often (60 to 70 percent) during the day, and Dr. Woiteshek found that the need to lie down during the day was due to the 2000 injury, then the 2000 injury alone would render the claimant unemployable in the open labor market. See Hammond deposition, page 15. Mr. Hammond opined that based upon the restriction placed on the claimant by Dr. Woiteshek to rest in a recumbent fashion as needed, the claimant would be restricted from employment in the open labor market. Mr. Hammond opined, "Dr. Woiteshek has placed Mr. Gentry needing a recumbent position; this would place his loss of ability to work on the 2000 injury alone." See Hammond deposition, Attachment p. 6.

Mr. Hammond testified that the claimant had a low math score on the test done by Mr. England. See Hammond deposition, pages 7-8. However, Mr. Hammond testified that the claimant owned his own business wherein he was responsible for performing bid activities, doing measurements and area considerations, and doing material and cost control. See Hammond deposition, page 8. Mr. Hammond testified that if you look at the dictionary of occupational titles, with the time the claimant spent doing siding installation and those types of things, the claimant would have acquired a higher level of math than at the level the claimant tested. See Hammond deposition, page 8.

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability pre-existing the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).

2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).
6. In cases arising after August 27, 1993, the extent of both the pre-existing permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzing, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the 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. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1, RSMo 1994, contains four distinct steps in calculating the compensation due an employee, and from what source:

1. The employer's liability is considered in isolation- "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability."

2. Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered;
3. The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and
4. The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in [a]ll cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined...."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

The test for permanent, total disability is the worker's ability 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. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 48 (Mo.App. W.D. 2007).

The claimant in this case claims that he is unemployable in the open labor market and that the Second Injury Fund bears liability for permanent total disability benefits. He based his claim on forensic medical evidence from Dr. Woiteshek, an orthopedic surgeon, that examined him a decade after the 2000 accident, and James England, a vocational rehabilitation counselor. However, those findings have serious concerns. Although Dr. Woiteshek examined the claimant a decade after the accident and opined that the claimant was permanently and totally disabled, he

is the only physician to so opine and his conclusions are contrary to the overwhelming weight of the other evidence. Dr. Woiteshek's finding that the claimant's subsequent back condition at the L4-L5 level resulted from the January 2000 accident is not supported by the weight of the credible evidence in the record, which are summarized below.

On January 30, 2000, the claimant underwent an MRI revealing an L5-S1 disc desiccation with minimal disc bulging. No abnormalities were noted at the L4-5 level. On May 25, 2000, five months after the work-related injury, the claimant underwent a discogram revealing positive and provocative findings at the L5-S1 level, but *normal* findings at the L4-5 level. On July 25, 2000, Dr. Piper recommended a one-level fusion of the lumbar spine at the L5-L1 level. Dr. Piper opined that the L5-S1 level was related to the January 2000 work-related event. Dr. Piper never opined that the L4-5 level was abnormal or that it was related to the work injury. Over a year after the work-related injury in February, 2001, Dr. Piper reviewed a discogram noting an abnormal L5-S1 level. However, Dr. Piper opined that the L4-5 level appeared *normal*.

The tear at the L4-L5 level did not appear until 2004, four years after the January 2000 work-related injury. Dr. Piper indicated in April, 2004, that the level L5-S1 was grossly abnormal with a right radial tear and the L4-L5 level appears to have a radial tear. Then, Dr. Piper recommended a 2 level fusion. Dr. Piper, the treating orthopedic surgeon, never opined that the L4-5 annular tear was related to the primary work injury.

While Dr. Woiteshek found the L4-L5 annular tear to be related to the work injury, no treating physician so concluded. Rather, Dr. Piper only related the L5-S1 level to the January 2000 work-related injury, but never found the L4-5 annular tear to be related to the work injury. In addition, no physician diagnosed an annular tear at the 4-5 level until 2004, four years after the January 2000 work-related injury. In addition, Dr. Volarich did not conclude that the L4-L5 annular tear was related to the primary work injury. Instead, Dr. Volarich opined that it was difficult to determine how the L4-L5 tear occurred since it was not present on the first discogram. Instead, Dr. Volarich deferred to the treating surgeon as to whether the L4-5 tear was related to the January 2000 work-related injury. The absence of such a finding from the treating orthopedic surgeon speaks volumes.

The combination of the medical records with the lack of opinion from Dr. Piper, and Dr. Volarich's opinion supports a finding that the L4-L5 tear occurred years after the January 2000 work-related injury and was not related to the January 2000 work-related injury. As a result, because Dr. Woiteshek included the subsequent L4-5 annular tear in his permanent and total disability opinion, Dr. Woiteshek's opinion is against the weight of the evidence compiled contemporaneously with the work-related injury and seems to be inconsistent with that evidence. Both vocational experts agreed that when taking into consideration the treating doctors' restrictions, the claimant would be employable.

The claimant also relied on Mr. England's conclusion that the claimant's unemployability was related to the January 2000 work-related accident. However, Mr. England based his opinion of permanent and total disability on the claimant's depression. Mr. England opined that part of the claimant's problem with employability is that the claimant appeared depressed. However, no psychiatrist or psychologist provided a rating of permanent partial disability for any depression or psychiatric condition. No psychiatrist or psychologist opined that the claimant had a permanent

psychiatric condition, either before or after the January 2000 work-related injury. On the contrary, the only mental health provider, Dr. Stillings, a psychiatrist, examined the claimant and opined that the claimant had no psychiatric illness causally related to the January 2000 work-related injury. Dr. Stillings found that from a psychiatric standpoint, the claimant was able to work without restrictions. Therefore, Mr. England erroneously based his finding of permanent and total disability on a condition that was inconsistent with the uncontradicted forensic evidence in the record. As a result, Mr. England's opinion of permanent and total disability does not support his claim for permanent total disability.

Because the claimant's subsequent back injury consisting of an L4-L5 tear occurred years after the January 2000 work-related injury and was not related to the January 2000 work-related injury the Second Injury Fund bears no liability for the claimant's post-accident worsening of his low back condition. The Second Injury Fund is not liable for any post-accident worsening of an employee's preexisting disabilities which is not caused or aggravated by the last work related injury, or for any conditions which arise after the last work related injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo. App. 1996); Frazier v. Treasurer of Missouri, 869 S.W.2d 152, 155 (Mo. App. 1994). Based on the weight of the credible evidence, the claim for permanent total disability is denied.

However, the evidence clearly supports a finding that the Second Injury Fund bears liability to the claimant for additional permanent partial disability benefits. Based on the entire record, the claimant suffered a compensable work related injury in 2000 resulting in a 30% permanent partial disability to the low back (120 weeks). At the time the last injury was sustained, the claimant had a 20% pre-existing permanent partial disability to the left shoulder (46.4 weeks) and a 30% pre-existing permanent partial disability to his left little finger (6.6 weeks). The permanent partial disability from the last injury combines with the pre-existing permanent partial disability to create an overall disability that exceeds the simple sum of the permanent partial disabilities by 12 ½%.

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. The claimant testified credibly about significant ongoing complaints associated with these injuries. The claimant changed how he performs many activities both at home and at work due to the combination of the problems. The claimant testified that as a result of the combination of the problems, he had limited ability to lift items.

Therefore, the Second Injury Fund bears liability for 21.625 weeks of permanent partial disability benefits.

CONCLUSION

Based on the entire record, the Second Injury Fund is liable to the claimant for 21.625 weeks of additional permanent partial disability benefits. The attorney for the claimant is entitled to an attorney fee of 25% of this award.

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation