

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

Injury No.: 03-140766

Employee: Bentley Gilbert
Employer: Brundage Bone Concrete Pumping, Inc. (Settled)
Insurer: Builders Assoc. Self Insurance (Settled)
Additional Parties: 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. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision affirming the award and decision of the administrative law judge by supplemental opinion. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with our supplemental findings and comments set forth below.

Introduction

The parties stipulated the following issues for resolution by the administrative law judge: (1) whether the Second Injury Fund has any liability; (2) whether employee is entitled to permanent total disability benefits from the Second Injury Fund; and (3) when employee reached maximum medical improvement.

The administrative law judge rendered the following findings and conclusions: (1) the Second Injury Fund is liable for, and employee is entitled to, permanent total disability benefits; and (2) employee reached maximum medical improvement on December 23, 2004.

Employee filed a timely Application for Review with the Commission alleging that the administrative law judge erred in honoring the parties' stipulation setting the weekly compensation rate for permanent total disability benefits at \$340.12.

Discussion

At the outset of the hearing on December 12, 2011, the administrative law judge recited the disputed issues and stipulations for the record. Among other things, the administrative law judge recited that the parties were stipulating that the appropriate weekly compensation rate for permanent total disability benefits is \$340.12. At the end of reciting all of the stipulations and issues, the administrative law judge asked the parties whether there was any other issue or stipulation of which she should be aware. Both parties indicated there were no other issues or stipulations. Thereafter, the parties did not advance any evidence as to the issue of compensation rate, apart from a "Stipulation for Compromise of Lump Sum Settlement" entered between employee and employer. See *Transcript*, page 54. The "rate of weekly compensation" listed in this document is \$340.12. *Id.*

Employee: Bentley Gilbert

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The briefs submitted by the parties, as well as the award by the administrative law judge, reflect that, after the hearing, employee submitted a proposed award that recited \$649.32 as the weekly compensation rate for permanent total disability benefits. Noting the discrepancy between this rate and the stipulation of the parties, the administrative law judge agreed to reopen the record and invited the parties to submit a substitute stipulation regarding the compensation rate on or before January 11, 2012. The parties failed to do so.

In a communication submitted January 13, 2012, employee asked the administrative law judge to take administrative notice of the Report of Injury from the legal file of the Division of Workers' Compensation (Division), or alternatively mark it as an exhibit, and accept it as evidence that employee's average weekly wage was \$771.00. In her award, the administrative law judge denied employee's request. The administrative law judge noted that, even if she were to accept the Report of Injury as evidence that employee's average weekly wage was \$771.00, this wage would not entitle employee to a weekly compensation rate of \$649.32 for permanent total disability benefits, as alleged in the proposed award. The administrative law judge ultimately concluded that, given the lack of any credible evidence on the issue, she would accept the parties' original stipulation that the weekly compensation rate for permanent total disability benefits is \$340.12. See *Award*, page 3, n.1.

The Division's legal file contains docket entries indicating that on February 7, 2012, employee filed a Motion to Correct the Award, and that the administrative law judge denied the Motion the same day.

In his Application for Review, employee asks us to take notice of a purported Report of Injury filed by employer, and amend the award to reflect a rate of compensation consistent with an average weekly wage of \$771.00,¹ or alternatively reopen the record to take additional evidence from the parties on the issue of the appropriate weekly compensation rate for permanent total disability benefits. The Second Injury Fund objects to both of these requests.

To the extent employee is asking that we consider evidence that was not offered and received into evidence at the hearing, we must deny that request because employee has failed to satisfy the requirements of 8 CSR 20-3.030(2), our rule pertaining to the submission of additional evidence. In pertinent part, the rule states as follows:

After an application for review has been filed with the commission, any interested party may file a motion to submit additional evidence to the commission. The hearing of additional evidence by the commission shall not be granted except upon the ground of newly discovered evidence which with reasonable diligence could not have been produced at the hearing before the administrative law judge. The motion to submit additional evidence shall set out specifically and in detail--

¹ In his brief, employee advances two different "correct" weekly compensation rates for permanent total disability benefits: \$540.03 (on page 1) and \$514.03 (on page 2).

Employee: Bentley Gilbert

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1. The nature and substance of the newly discovered evidence;

...

4. Full and accurate statement of the reason the testimony or exhibits reasonably could not have been discovered or produced at the hearing before the administrative law judge; ...

As we have recounted, the hearing in this matter took place on December 12, 2011. Employee fails to identify any newly discovered evidence pertinent to the question of compensation rate that, with the exercise of reasonable diligence, could not have been produced at the hearing. Employee identifies a purported copy of a Report of Injury filed by employer, attached as Exhibit C to his Application for Review, as evidence of his average weekly wage. But employee does not identify the date that this document was discovered.² Nor has employee provided any explanation of the reason why this Report of Injury could not have been marked and offered at the hearing. Accordingly, we deny employee's request to submit additional evidence.

Employee alternatively requests that we take notice of the Report of Injury and amend the award to modify the weekly rate of compensation for permanent total disability benefits. Incidentally, we note that, for unknown reasons, there is no Report of Injury contained within the legal file that was forwarded to us by the Division in connection with this case. But even if there were, we believe we would be required to deny employee's request. There is some authority suggesting that a Report of Injury, not admitted into evidence but nevertheless contained within the Division's legal file, may, in certain circumstances, be considered as evidence as to the substantive issues in a workers' compensation proceeding, e.g., *Sublett v. Columbia*, 652 S.W.2d 189, 193 (Mo. App. 1983), but employee has failed to provide us with authority demonstrating that we would be permitted to rely upon such evidence to contravene a stipulation by the parties. Meanwhile, there is ample authority that parties' stipulations at a hearing before an administrative law judge are controlling and conclusive. *Boyer v. Nat'l Express Co.*, 49 S.W.3d 700, 705 (Mo. App. 2001).

Employee cites *International Dehydrated Foods, Inc. v. Boatright Trucking, Inc.*, 824 S.W.2d 517, 520 (Mo. App. 1992) for the proposition that we should interpret the stipulation regarding compensation rate in view of the result the parties were trying to accomplish. We gather that employee is now alleging that the parties did not intend to stipulate a compensation rate of \$340.12 at the hearing and that we can give effect to the parties' actual intent by modifying the compensation rate, notwithstanding the Second Injury Fund's objections.

The problem with employee's argument is that employee advances no evidence of a mistake. After a careful review of the transcript, we find no indication that the parties made any mistake in stipulating that the weekly rate of compensation for permanent total disability benefits is \$340.12. If there were a mistake, it would seem the parties

² We are unable even to determine when the exhibit was allegedly created, as it bears no readily legible date, and employee does not provide any such information in his brief or Application for Review.

AWARD

Employee: Bentley Gilbert

Injury No. 03-140766

Dependents: N/A

Employer: Brundage Bone Concrete Pumping, Inc. (settled)

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Treasurer of the State of Missouri
as custodian of The Second Injury Fund

Insurer: Builders Assoc. Self Insurance (settled)

Hearing Date: December 12, 2011

Reviewed by: VRM/db

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: March 3, 2003.
5. State location where accident occurred or occupational disease was contracted: Christian County, Missouri.
6. Was above employee in employ of above employer at the time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was performing maintenance on a raised conveyor belt when a coworker turned on the conveyor belt, causing injury to Claimant's low back.
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/whole body.

14. Nature and extent of any permanent disability: Settled as to Employer/Insurer; PTD as to the Second Injury Fund.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$12,539.59.
17. Value necessary medical aid not furnished by employer/insurer? Not applicable.
18. Employee's average weekly wages: Sufficient to yield the maximum disability rate.
19. Weekly compensation rate: \$340.12 PTD/\$340.12 PPD.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Employer previously settled its risk of liability.
22. Second Injury Fund liability: Permanent Total Disability.
23. Future requirements awarded:

Beginning August 30, 2007, and continuing for Claimant's lifetime, the Second Injury Fund shall pay Claimant the weekly sum of \$340.12, subject to review and modification as provided by law.

The compensation awarded to Claimant shall be subject to a lien in the amount of 25 percent of all payments to Claimant in favor of the following attorney for necessary legal services rendered to Claimant: Jay Cummings.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Bentley Gilbert

Injury No. 03-140766

Dependents: N/A

Employer: Brundage Bone Concrete Pumping, Inc. (settled)

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Treasurer of the State of Missouri
as custodian of The Second Injury Fund

Insurer: Builders Assoc. Self Insurance (settled)

Hearing Date: December 12, 2011

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INTRODUCTION

The undersigned Administrative Law Judge conducted a final hearing between Bentley Gilbert (Claimant) and the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund (Second Injury Fund) on December 12, 2011. Claimant appeared in person and with his attorney, Jay Cummings. Assistant Attorney General Susan Colburn appeared for the Second Injury Fund. Brundage Bone Concrete Pumping, Inc., (Employer) and Builders Assoc. Self Insurance (Insurer) previously settled with Claimant.

STIPULATIONS

On March 3, 2003, Claimant sustained an accidental injury arising out of and within the course of his employment with Employer, while he was working in Christian County, Missouri on a construction site in Nixa, Missouri. Venue and jurisdiction is appropriate in Springfield, Missouri, where the hearing occurred. Employer, a fully insured entity, was subject to the Missouri Workers' Compensation Law. Claimant was an employee of Employer covered by the Workers' Compensation Law. Employer received proper notice. The claim was filed timely. Employer and Insurer previously settled their liability with Claimant, as set forth in Exhibit A. Employer paid \$12,539.59 in medical benefits and no temporary total disability. Claimant's average weekly wage was sufficient to yield the permanent partial and permanent total disability rate of \$340.12.¹

¹ The parties stipulated that the PPD and PTD rates were identical at \$340.12. Claimant's post-hearing proposed Award recited the PTD rate as \$649.32. Given this discrepancy, the Administrative Law Judge agreed to reopen the record to allow the parties to submit a substitute stipulation **on or before January 11, 2012**, which was the 30th date following the hearing. No stipulation was received by that date. In a letter submitted by facsimile on January 13, 2012, Claimant requested that the Division mark the report of injury as Exhibit D, and take judicial notice that the average weekly wage was \$771.00. Even absent any objection by the Fund, this request is not timely. It is denied. Moreover, such evidence only serves to further obfuscate the issue as an average weekly wage of \$771.00 would not make the PTD rate \$649.32. Given the lack of other credible evidence, I accept the original stipulation. The PTD rate is \$340.12.

ISSUES

The parties agreed that the following were the sole issues for determination:

1. What is the extent of the Second Injury Fund's liability, if any?
2. What is Claimant's date of maximum medical improvement?

EXHIBITS

Claimant offered the following exhibits which were admitted:

- Exhibit A Stipulation of Compromise Settlement with Employer
- Exhibit B Deposition of Dr. Shane Bennoch, with attached exhibits
- Exhibit C Medical Timeline

The Second Injury Fund offered the following exhibit which was admitted:

- Exhibit I Deposition of Claimant dated March 2, 2009

FINDINGS OF FACT

Claimant testified credibly. He is 50 years old, having been born on June 5, 1961. He is widowed and lives by himself in Arkansas. Claimant tends to a small yard with flowers. He no longer holds a job.

Claimant performed poorly in school, but obtained his high school diploma. He completed a six-month training course in welding. He also has some military experience. At one time he was able to pass a DOT physical and obtain a CDL license. That license is not current. He has worked in maintenance, welding, construction, and truck driving. He never has been fired from a job.

Claimant has been described as borderline intellectual functioning, although he performs basic math and reads sufficiently to order off a menu and read the newspaper to some degree. He handles his own finances. He has can use a keyboard for short periods of time, but does not and cannot use the computer on a regular basis. Claimant can drive for short periods of time. Claimant's complaints of pain and numbness in his legs increase with activity. While Claimant had back pain after a prior fusion surgery, the last accident left him with what Claimant described as "massive" pain (Ex. I, p. 59).

Primary Injury of March 3, 2003

On January 8, 2003, Dr. Wade Ceola had just released Claimant to return to work following a back fusion surgery. Claimant reported doing well as the surgery had helped alleviate his pain. Claimant did go back to work, but on March 3, 2003, Claimant sustained yet another back injury. As he was attempting to repair a conveyor belt, a coworker started the conveyor belt causing Claimant to fall. Five months later, the pain was too much to work with. Claimant quit work on August 27, 2003.

On September 22, 2003, Claimant reported to Dr. Cornelison that his pain had increased to a "10" on a 10-point scale. He could not work. He could not bend. He had burning, numbness and tingling in his extremities. Conservative treatment for more than a year did not result in any significant improvement. Finally, the only option left was additional surgery.

Dr. Wade Ceola performed surgery on February 27, 2004, to redo a L4 lateral arthrodesis. Dr. Ceola also performed a L4-5 posterior lumbar interbody fusion, neurolysis with reexploration of the previous fusion site, an L4 complete laminectomy for nerve root decompression, removal of hardware, insertion of segmental instrumentation from L4-S1 with a Miami Moss system, and placement of an interbody cage at L4-5. When Claimant thereafter continued to have pain, he received a spinal/dorsal cord stimulator. Despite the implant of the spinal cord stimulator on December 23, 2004, and significant amounts of narcotic medication, Claimant has not returned to work.

Preexisting Condition

Claimant identified the following preexisting conditions during his testimony:

1. Heat Stroke

Years prior to the primary work accident, Claimant suffered a heat stroke, which now makes him more susceptible to heat related illness. He has had at least two subsequent instances sufficiently serious to require urgent care. Claimant has since adjusted his work load so that he worked early in the morning or stayed inside during hot weather.

2. Hypertension

Claimant was diagnosed with high blood pressure about the same time as his first back surgery. Claimant began taking medication in 2002 for that condition. He said the medication has controlled his high blood pressure.

3. Sleep Apnea

In 1997, Claimant was diagnosed with sleep apnea, which he believes makes him fatigued during the day. He has refused to use the prescribed "air machine," which Claimant described as a nuisance he could not sleep with. He takes no medication for this condition. Claimant did not tell Dr. Bennoch of any difficulties he had performing his job functions because of the sleep apnea leading up to the last injury (Ex. B, p. 19).

4. Hearing Loss

In the 1990s, Claimant was diagnosed with difficulty hearing certain pitches and sounds. He testified that the hearing loss never caused a problem on the job.

5. Carpal Tunnel Syndrome

Claimant was diagnosed with carpal tunnel syndrome in the left wrist in 1999, and carpal tunnel syndrome in the right wrist in 2000. He had carpal tunnel releases which helped

alleviate numbness. Claimant said he continued to experience some pain in both hands, with the right worse than the left. He continued to perform his work full duty.

6. Low Back

As noted above, Claimant suffered a prior low back condition necessitating surgery. In July 2002, Dr. Wade Ceola had performed a L5-S1 lateral arthrodesis, L5-S1 posterior lumbar interbody fusion along with bilateral L5-S1 nerve root decompressions and discectomy and internal fixation with a Miami Moss screw rod system. When Claimant returned to work in January 2003, it was to a different position, albeit full time. He was able to work only because he was taking morphine to control his pain. Claimant takes even more morphine now (after the 2003 injury) than what he took in the past. The preexisting back injury was a disability that posed a hindrance or obstacle to employment.

7. Neck

Claimant sustained a neck injury in 1999. Surgery was performed by Dr. Bert Park. He has had restricted movement and pain since that time, but continued to work through the discomfort. Claimant experiences pain when he looks down, but not up. He has had trouble driving because of the neck injury. He took medication to alleviate symptoms after his surgery. The preexisting neck injury, with the restricted movement and pain, was a disability that posed a hindrance or obstacle to employment or reemployment.

Current Complaints

Claimant has a steady pain in his back all of the time. Claimant had pain into the lower right extremity. He is unable to stand for more than an hour. Because he lives by himself, he must perform his own household chores. He microwaves food, performs laundry, and does some basic cleaning. Claimant explained that he often has to get on his knees to perform some chores because it hurts his back too much to bend over. He also can turn up his stimulator to block pain when he has to bend over for short periods of time, such as doing dishes. When Claimant mows or performs anything physical, he has to pace himself and perform the task in increments. He is able to mow and plant flowers if he paces himself. As noted above, in addition to his spinal stimulator, Claimant takes morphine on a regular basis for control of his pain. Claimant believes the pain medication makes him anxious.

Expert Evidence

Dr. Shane Bennoch performed an independent medical examination on June 29, 2006. He testified by deposition taken November 15, 2010. Dr. Bennoch found that the March 23, 2003 accident was the prevailing factor resulting in traumatic injury to the lumbar spine and ongoing disability. In the lumbar spine, Dr. Bennoch reported that Claimant's range of motion was significantly less than normal. Dr. Bennoch was unable to test Claimant's flexion because the movement was too painful. Dr. Bennoch rated the low back as 35 percent to the body as a whole attributable to the last accident.

In addition to the back pain, Dr. Bennoch found that Claimant suffered a subsequent neck injury in April or May 2003, which was a contributing factor in Claimant's increase in neck pain. He rated this as 10 percent to the whole body attributable to the cervical spine.

Dr. Bennoch also found that Claimant suffered a 15 percent permanent partial disability to the whole body attributable to depression resulting directly from the last work accident.

Dr. Bennoch identified and rated the following preexisting conditions:

1. 30 percent to the whole body relative to the cervical spine due to cervical disc disease and surgery;
2. 30 percent to the whole body attributable to the lumbar spine due to chronic pain followed by Claimant's first surgery with nerve root decompression, lateral arthrodesis, and internal fixation at the L5-S1 interspace;
3. 5 percent permanent partial disability due to sleep apnea;
4. 5 percent permanent partial disability due to hypertension, which takes into account Claimant's need for medication;
5. 15 percent permanent partial disability to the whole body due to learning disabilities and borderline intellectual functioning. Dr. Bennoch admitted he did not have a medical record diagnosing Claimant as having a learning disability, but noted that Claimant's reading was "very slow." (Ex. B, p. 21).

Dr. Bennoch also identified gastroesophageal reflux disease as preexisting, but he did not provide a rating for it. Further, Dr. Bennoch did not include a rating for the preexisting heat stroke or the preexisting bilateral carpal tunnel syndrome in his report.²

Dr. Bennoch opined that Claimant was permanently and totally disabled due to a combination of disabilities from the primary injury and those disabilities he identified as preexisting March 3, 2003. He found Claimant to be permanently and totally disabled as of the date he left his job at Brundage-Bone Company in August 2003. He indicated that Claimant continued to be permanently and totally disabled despite the subsequent surgery by Dr. Ceola, as well as the various modalities used to address pain.

I accept as credible and persuasive Dr. Bennoch's opinion that Claimant is permanently and totally disabled, and that such degree of disability is caused by a combination of disabilities from the primary injury and those preexisting the last injury, as identified by Dr. Bennoch. I do not accept Dr. Bennoch's opinion as to the date of maximum medical improvement.

² Over the Second Injury Fund's continuing objection, Dr. Bennoch testified to the degree of impairment a hypothetical person would have following a good result from bilateral carpal tunnel release surgeries. On cross-examination by the Fund, Dr. Bennoch conceded that Claimant had no disability to his wrists. Dr. Bennoch further testified that he had no information as to how any alleged prior heat stroke may have affected Claimant leading up to the last injury.

Maximum Medical Improvement

In his report of July 10, 2006, Dr. Bennoch said Claimant reached maximum medical improvement as of last date he worked for Employer, which would have been August 27, 2003 (Ex. B, depo. ex. 2, p. 26). There is substantial evidence, however, that Claimant was not “permanently” disabled as of that date. In fact, Claimant had hardly begun, much less exhausted his treatment options by then. Dr. Ceola did not perform the fusion until five months later on February 27, 2004. It was nearly a year of that, on December 23, 2004, that the dorsal column stimulator was implanted. I find that Claimant had not reached maximum medical improvement until December 23, 2004.

Settlement of Primary Claim

The settlement between Claimant and Employer/Insurer, approved May 5, 2009, recites a lump sum of \$60,156.39. Of this amount, \$12,539.59 was for medical bills. Using the weekly compensation rate of \$340.12 recited in the document, the remaining \$47,616.80 would yield a 35 percent permanent partial disability to the body as a whole. This is equivalent to 140 weeks of disability.

Degree of Disability from Primary Injury

Based on a review of Claimant’s testimony and medical records, the opinion of Dr. Bennoch, and the stipulation between Claimant and Employer/Insurer, I find that Claimant sustained a 35 percent permanent partial disability to the whole body attributable to all of the injuries that were sustained as a result of the last or primary accident on March 3, 2003.

CONCLUSIONS OF LAW

The law in effect at the time of Claimant’s last injury provides that the Workers’ Compensation Act is to be broadly and liberally interpreted and doubts are to be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo. App. E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo. banc 1983). The Second Injury Fund’s liability is based on the four part test set forth in *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1, 3 (Mo. App. W.D. 2007):

We first consider the liability of the employer in isolation by determining the degree of the employee's disability due to the last injury. Then the degree of the employee's disability attributable to all injuries is determined; followed by a deduction of the degree of preexisting injury from the total disability following the last injury. The balance of liability is assigned to the Second Injury Fund. In order for the preexisting disability to be eligible for Second Injury Fund liability, the preexisting disability must be of such seriousness that it constituted a “hindrance or obstacle to employment or to obtaining reemployment.” § 287.220.1. [case citations omitted].

As noted in *Hughey v. Chrysler Corp.* 34 S.W.3d 845, 847 (Mo. App. E.D. 2000), the first determination is the degree of disability from the last injury. If Claimant’s last

injury in and of itself rendered him permanently and totally disabled, then the Second Injury Fund has no liability. *Feld v. Treasurer of Missouri as Custodian of Second Injury Fund*, 203 S.W.3d 230, 233 (Mo. App. E.D. 2006).

Disability – Last Injury

I have found, and conclude, that Claimant was not permanently and totally disabled from the last accident, alone. Rather, I have found that Claimant sustained a 35 percent permanent partial disability to the whole body as a result of the last injury. There is no medical or vocational opinion suggesting that the last injury, alone, is responsible for rendering Claimant permanently and totally disabled. Certainly, that is not the opinion of the sole medical expert who testified in this case. Moreover, the stipulation for compromise settlement between Claimant and Employer/Insurer does not contemplate permanent total disability from the last accident.

Combined Disability

Prior to the primary injury, Claimant suffered a number of preexisting conditions. Dr. Bennoch has identified preexisting impairments to the cervical spine, the lumbar spine, sleep apnea, hypertension, and borderline intellectual functioning and/or learning disability. It is evident from the testimony of Claimant, as well as Dr. Bennoch, that the prior lumbar spine injury was a significant disability that posed a hindrance or obstacle to employment or reemployment. Claimant indicated that he could work in his new position only through the use of narcotic pain killers. Further, Claimant's testimony and that of Dr. Bennoch clearly establishes that Claimant's preexisting neck injury, with the restrictions in movement and pain, was a disability of such seriousness as to pose a hindrance or obstacle to his employment or reemployment. Dr. Bennoch rated each of these preexisting disabilities at 30 percent to the body as a whole. I conclude that Claimant has met the threshold requirements of the §287.220.1 RSMo.

I further conclude that the combined effect of the last work related disability and the disabilities attributable to all conditions existing at the time of the last injury create permanent total disability. Total disability is defined as the inability to return to employment in the open labor market. § 287.020.7, RSMo. The central question is whether any employer in the usual course of business could reasonably be expected to employ Claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo. App. E.D. 1995) *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). The overwhelming evidence in the record supports a finding and conclusion that Claimant is not employable in the open labor market given the combination of all his preexisting and current disabilities, as well as his age, education, and work history.

As noted in the above Findings of Fact, Claimant's date of maximum medical improvement did not occur until the provision of the spinal cord stimulator on December 23, 2004. Because the permanent partial disability from the primary injury is the equivalent of 140 weeks, the Second Injury Fund shall not begin paying permanent total disability benefits until August 30, 2007, which is 140 weeks after the date of maximum medical improvement. From that date forward, and for the remainder of Claimant's

lifetime, the Second Injury Fund shall pay to Claimant the weekly benefit amount of \$340.12. No differential is due between December 23, 2004 and August 30, 2007.

This award is subject to modification and review as provided by law.

Attorney Jay Cummings shall have a lien in the amount of 25 percent of all amounts awarded for necessary and reasonable legal services provided to Claimant.

Made by: _____

Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation