

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Separate Opinion)

Injury No.: 09-041944

Employee: Robert Goldman
Employer: PCI Filtration Service (Settled)
Insurer: North American Specialty Insurance (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.¹ Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) 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 of the ALJ dated November 17, 2010, by issuing a separate opinion denying compensation in the above-captioned case.

Preliminaries

Employee settled his claim against employer and proceeded to final hearing against the Second Injury Fund. The ALJ heard this matter to consider the nature and extent of any Second Injury Fund liability.

The ALJ found that although employee is permanently and totally disabled, his claim against the Second Injury Fund is denied because employee did not sustain any permanent disability from the primary injury.

Employee appealed to the Commission alleging that the ALJ erred in denying him permanent total disability benefits against the Second Injury Fund.

The only issue currently before the Commission is the nature and extent of any Second Injury Fund liability.

Findings of Fact

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

On June 9, 2009, employee climbed to the roof of an office building to change filters in an air-conditioning unit. As he stepped up on a cinder block to reach to remove the

¹ Statutory references are to the Revised Statutes of Missouri 2008 unless otherwise indicated.

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filter, the cinder block gave way; employee fell backwards, striking his head on another cinder block. Employee was sent to the emergency room for medical treatment, where he was kept overnight for observation. He was released the following day and returned to work on June 11, 2009.

On June 15, 2009, employee reported to Concentra Medical Center with complaints of back pain. Dr. Carper was the treating physician and saw employee on four occasions spanning between June 15, 2009 and July 2, 2009. On July 2, 2009, Dr. Carper released employee from his treatment without any restrictions, a diagnosis of a lumbar strain, and opined that employee sustained 0% impairment due to the primary injury.

Law

The first sentence of § 287.220.1 RSMo provides that “[a]ll cases of permanent disability where there has been previous disability shall be compensated as herein provided.” The Courts have consistently interpreted this first sentence of § 287.220 RSMo as stating that “[i]n order for a claimant to recover against the [Second Injury Fund], he must prove that he sustained a compensable injury, referred to as “the last injury,” which resulted in permanent partial disability.” *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. 2008). Consequently, if the last injury does not result in any permanent disability, there is no need to proceed to the next step in the Second Injury Fund liability analysis.

Conclusions of Law

In this case, we find, as did the ALJ, that the competent and substantial evidence establishes that employee sustained no permanent disability as a result of the June 9, 2009, work-related injury.

We find Dr. Carper’s and Mr. England’s opinions are more credible than Ms. Gonzalez’s and Dr. Volarich’s opinions. Neither Ms. Gonzalez nor Dr. Volarich reviewed Dr. Carper’s records from employee’s final visit on July 2, 2009. Ms. Gonzalez and Dr. Volarich came to their conclusions that employee sustained permanent disability from the work injury without the knowledge that employee had been released to work without restrictions after four visits and that Dr. Carper was of the opinion that employee had sustained 0% impairment due to the June 9, 2009, injury. Because Ms. Gonzalez’s and Dr. Volarich’s opinions were made without this information, we do not find their opinions as credible as those of Dr. Carper and Mr. England. Dr. Carper was the treating physician for employee’s primary injury and Mr. England is a vocational rehabilitation expert who reviewed employee’s **entire** medical file. Because Dr. Carper and Mr. England had all of the relevant primary injury medical information available to them at the time they offered their opinions, they were in a position to give a much more educated and credible opinion regarding whether employee sustained permanent disability from the work injury.

Employee argues on appeal that Dr. Carper’s opinion is not credible because he indicated in his records that his professional opinion was within “a reasonable degree of medical *probability*” as opposed to a “reasonable degree of medical *certainty*.” (Emphasis added). Employee maintains that § 287.190.6(2) RSMo clearly states that

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“[m]edical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty.”

The Court in *Williams v. Daus*, 114 S.W.3d 351 (Mo. App. 2003) noted that “the precise words used by an expert witness do not necessarily render his testimony inadmissible if he intended to express his opinion or judgment.” *Id.* at 363 (citations omitted). The Court found that the experts in that case intended to express their opinions and/or judgments regarding the respondent’s physical condition, “despite the fact that they did not always use the assertedly talismanic phrase, within a ‘reasonable degree of medical certainty.’” *Id.* The Court also noted that the appellant in that case did not raise an objection to the experts’ failure to use the phrase “within a reasonable degree of medical certainty” when soliciting testimony from the experts. The Court held that “[b]y failing to offer a specific objection at trial or during deposition, appellant deprived respondent of the opportunity to rephrase her questions in the form that he now demands on appeal.” Ultimately, the Court held that by waiting until the case was being heard on appeal to challenge the basis of the experts’ opinions, appellant waived its contention that the experts’ testimony is inadmissible.

In this case, we find that Dr. Carper’s opinions were intended to express his opinion or judgment regarding employee’s physical condition and, therefore, are not rendered useless simply because he did not use the phrase “within a reasonable degree of medical certainty.” Further, we find that employee declined to depose Dr. Carper prior to the hearing, and failed to object to Dr. Carper’s records being made a part of the record when they were offered at the final hearing. We find that by employee failing to object or raise doubts about Dr. Carper’s records before the ALJ, he waived his contention on appeal that Dr. Carper’s opinions do not conform to § 287.190.6(2) RSMo.

Employee also argues that Dr. Carper’s opinions were not based on objective medical findings or diagnostic procedures. We disagree.

Dr. Carper performed a physical examination during each of his visits with employee. In addition, on June 15, 2009, employee’s first date of treatment with employee, Dr. Carper ordered an x-ray of employee’s lumbar spine and reviewed the results on the same date. Dr. Carper also reviewed physical therapy records documenting employee’s progression.

We find that Dr. Carper’s opinions were based on objective medical findings.

Based upon the aforementioned, we find that employee sustained no permanent disability as a result of the primary injury. Consequently, our analysis ends at the first sentence of § 287.220 RSMo.

We find that employee failed to prove Second Injury Fund liability.

Award

We affirm the ALJ’s denial of Second Injury Fund liability for the reasons set forth herein.

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The award and decision of Administrative Law Judge Margaret D. Landolt, issued November 17, 2010, is attached and incorporated to the extent it is not inconsistent with this final award.

Given at Jefferson City, State of Missouri, this 2nd day of June 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer

Alice A. Bartlett, Member

NOT SITTING

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Robert Goldman

Injury No.: 09-041944

Dependents: N/A

Employer: PCI Filtration Service (Settled)

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: North American Specialty Insurance (Settled)

Hearing Date: September 2, 2010

Checked by: MDL

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: June 9, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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:
While attempting to change a filter on an air conditioning unit, Claimant fell backward, striking his head on a cinder block and injuring his back.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Body as a whole referable to the low back
14. Nature and extent of any permanent disability: 0%
15. Compensation paid to-date for temporary disability: \$1,079.70
16. Value necessary medical aid paid to date by employer/insurer? \$1,108.05

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$772.53/\$404.66
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Second Injury Fund liability: No

TOTAL: 0

- 22. Future requirements awarded: None

Said payments to begin 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Goldman

Injury No.: 09-041944

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: PCI Filtration Service (settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: North American Specialty Insurance (Settled)

Checked by: MDL

PRELIMINARIES

A hearing was held on September 2, 2010, at the Division of Worker's Compensation in the City of St. Louis, Missouri. Robert Goldman ("Claimant") was represented by Mr. James Sievers. PCI Filtration Service ("Employer") previously settled its liability with Claimant, and this case proceeded to hearing against the Second Injury Fund ("SIF"), which was represented by Assistant Attorney General Karin Schute. Mr. Sievers requested a fee of 25% of Claimant's Award.

The parties stipulated that on or about June 9, 2009 Claimant sustained an accidental injury arising out of and in the course and scope of employment, and Claimant was earning an average weekly wage sufficient to yield compensation rates of \$772.53 for Permanent Total Disability ("PTD") benefits, and \$404.66 for Permanent Partial Disability ("PPD") benefits. The parties further stipulated Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; and the claim was timely filed. Employer paid TTD benefits in the amount of \$1,079.70, and medical benefits of \$1,108.05. It was further stipulated if Claimant is found to be permanently and totally disabled, benefits shall commence on July 2, 2009.

The sole issue for determination by hearing is the liability of the Second Injury Fund for permanent total or permanent partial disability benefits.

FINDINGS OF FACT

Claimant is a 68 year old male with a GED, and 40 years of experience working as an HVAC Service Technician for Employer, an air filter company

PRIMARY INJURY

On June 9, 2009, Claimant climbed to the roof of an office building to change filters in an air-conditioning unit. As he stepped up on a cinder block to reach to remove the filter, the cinder block gave way, and Claimant fell, striking his head on another cinder block. Claimant went to the emergency room, where he stayed overnight for observation.

On June 15, 2009, Claimant reported to Concentra Medical Center with complaints of back pain. Dr. Carper's examination of Claimant's lumbar spine revealed full range of motion. His bilateral leg raise test was negative. X-rays were performed, and he was diagnosed with a sacrum strain. Claimant was referred to physical therapy, and placed on a 20 pound lifting restriction. On June 19, 2009, Claimant returned to Concentra with continued complaints of back pain. His lumbar examination was normal with full range of motion. He was advised to continue therapy, and was restricted to no lifting over 30 pounds. Claimant was seen again on June 26, 2009. He noted improved pain symptoms, and denied numbness, paresthesias, and weakness. His lumbar range of motion was again normal. His restrictions were relaxed to no lifting over 40 pounds. On July 2, 2009, Claimant returned to Concentra and told the doctor he no longer had any significant discomfort and was back to baseline function. He had full range of motion. He did not have any radicular pain, numbness, paresthesias or weakness. Dr. Carper released Claimant to return to work without restrictions. Dr. Carper stated Claimant was at maximum medical improvement and concluded Claimant sustained no impairment due to the June 9, 2009 work related injury.

Following Claimant's release from treatment, Employer sent him a letter on July 6, 2009. In the letter his supervisor informed Claimant he had been performing his job at a level well below the standard. She stated Claimant could return to work in his regular position; however, she was concerned that a return to his regular position would lead to his termination due to substandard performance. Employer offered Claimant an alternative position performing odd jobs three days a week, at an hourly wage that was almost \$6 an hour less than what he was paid in his serviceman position. Claimant did not attempt to work in the alternative position, but instead retired, because he felt he could not perform the necessary work for either position. Claimant testified his back still hurts constantly, and he has limited motion in his back with difficulties sitting and standing for a long time.

Claimant settled his claim with Employer based upon an approximate permanent partial disability of 7.5% of the body as a whole.

PRIOR INJURIES

Prior to the work related injury of June 9, 2009, Claimant suffered injuries to his lumbosacral spine, right wrist, left wrist, right knee, left knee, right shoulder and left shoulder.

In 1996, Claimant was diagnosed with herniated nucleus pulposus L1-2. A lumbar laminectomy and discectomy was performed on November 19, 1996. On August 13, 2002, Claimant underwent a decompressive laminectomy L2-3 with discectomy L2-3. Claimant testified he returned to work in the same capacity following each back surgery; however he was unable to work as fast and the injuries caused him to slow down walking, carrying ladders and getting filters and other materials to roofs.

On October 21, 1992, Claimant reported right wrist pain. He was administered a cortisone injection and provided with a wrist splint. On August 10, 1993, Claimant underwent an arthrodesis of the right wrist with autologous right iliac crest bone graft. Claimant was given injections and underwent a course of physical therapy. In May 1997, Claimant slipped off a ladder. He reported continued pain and was diagnosed with degenerative changes to the scapula, trapezium articulus and basal thumb joint. On April 14, 2005, Claimant complained of ongoing

problems with his right hand. On April 28, 2005, Claimant received an injection in the flexor tendon. Claimant testified as a result of the injuries to his wrist, he experienced pain and loss of strength and grip in his right hand.

On September 8, 1994, Claimant was diagnosed with left lateral epicondylitis. Claimant received an injection, and he continues to experience pain and difficulty with pinch and grip strength as a result of the CMC degenerative arthritis which developed in his left wrist.

On December 7, 1995, Claimant underwent arthroscopic partial medial meniscectomy of his right knee. Postoperatively over the next several years, he was administered injections. On September 8, 1999, Claimant underwent a medial hemiarthroplasty of the right knee with Schulzer natural knee replacement.

In 1982, Claimant underwent a left knee arthroscopy. On March 15, 2000, Claimant underwent a second arthroscopy and resection of torn medial meniscus. He was later diagnosed with degenerative arthritis of the left knee and administered an injection. On April 30, 2008, Claimant reported to Dr. Sedgwick with complaints of bilateral knee pain. Dr. Sedgwick recommended surgery, and on May 20, 2008, performed a total left knee arthroplasty.

Claimant testified the injuries to his knees caused him difficulty with steps, ladders and uneven surfaces, and caused him to move slowly. He further testified his knee injuries caused increased pain and discomfort when he was performing various aspects of his job.

On November 26, 1993, Claimant underwent a right shoulder manipulation and arthroscopy with anterior acromioplasty and subacromial scope. Following surgery, he received an injection and underwent a course of physical therapy. On September 17, 2003, Claimant underwent a right shoulder arthroscopic debridement with biceps tendon remnant resection and torn labral tissue subacromial decompression, acromioplasty, excision of CA ligament and distal clavicle excision. In August 2008, Claimant was diagnosed with capsulitis, and received injections in his right shoulder. After minimal resolution of his symptoms, Claimant underwent a right shoulder arthroscopic extensive debridement.

Claimant testified as a result of his right shoulder injuries he has limited range of motion, and limited ability to work overhead. He cannot carry items that weigh more than ten pounds away from his body. As a result of his continuous pain and aching, he has limited himself to a 40 pound lifting limit. He testified he did not miss work because of the right shoulder pain; however, the pain caused him to work more slowly.

On April 14, 2005, Claimant reported left shoulder pain with impingement testing and palm down abduction. Claimant received an injection in the subacromial space on April 28, 2005. On April 14, 2009, Claimant once again complained of left shoulder pain when working overhead. Claimant was diagnosed with impingement with bursitis in the left shoulder.

Claimant testified his left shoulder symptoms were similar to the right. He also restricted himself to a 40 pound lifting limit on the left, and had to keep items close to his body when lifting. He experienced difficulty with gripping on the left. Claimant also testified the combination of shoulder problems slowed him down at work.

On June 4, 2004, Dr. Volarich saw Claimant for an independent medical examination. Prior to the evaluation, Dr. Volarich obtained and reviewed Claimant's complete medical file. Following the examination, Dr. Volarich opined as a result of a work related injury of August 11, 2003, Claimant suffered an internal derangement right shoulder in the form of a complete biceps tendon tear, partial rotator cuff tear and impingement with labral tear. He noted a 45% permanent partial disability of the right upper extremity rated at the shoulder. Dr. Volarich also found Claimant to suffer from pre-existing permanent partial disabilities of 20% of the right upper extremity rated at the shoulder, 40% of the body as a whole rated at the lumbosacral spine, 35% of the right upper extremity rated at the wrist, 65% of the right lower extremity rated at the knee and 50% of the left lower extremity.

Dr. Volarich further opined, "I am extremely concerned that if Mr. Goldman sustains another injury to his person, he will become permanently and totally disabled. He has sustained multiple severe injuries to the spine, right upper extremity, and both lower extremities. I strongly recommend that he be limited to light duty work, if possible, to prevent further injury."

Beginning in 1997, Employer began to reprimand Claimant for performing his job in a sub-standard fashion. In August, 1997, Employer warned Claimant if his output did not improve, he would be suspended without pay. Claimant was warned again in 2007 and 2008 to improve his output or face disciplinary action. In January, 2009, Claimant was warned of possible termination for insufficient output. On May 14, 2009, Claimant was told his work since the beginning of 2009 had been substandard, and he was suspended for two weeks without pay from May 18 to May 29. On June 4, 2009, Claimant complained about his two week suspension, stating he was working as hard as he could, but his knees, shoulders, and back hurt, and he was working as fast as he could, and doing the best he could. Claimant was informed again on June 18, 2009, that his production from June 3, 2009 to June 9, 2009 was substandard, and it would be addressed after he returned to work.

On October 7, 2009, Claimant was reevaluated by Dr. Volarich. Prior to reevaluation, Dr. Volarich obtained and reviewed Claimant's updated medical file which contained most of Claimant's medical records. Following examination and evaluation, Dr. Volarich opined that as a result of the work related injury of June 9, 2009, Claimant suffered aggravation of his lumbar syndrome. Dr. Volarich found 15% PPD of the body as a whole rated at the lumbosacral spine. Dr. Volarich also offered updated disability ratings for Claimant's pre-existing permanent partial disabilities. He found 40% PPD of the body as a whole rated at the lumbosacral spine, 75% PPD of the right upper extremity rated at the shoulder, 35% PPD of the left upper extremity rated at the shoulder, 25% PPD of the right upper extremity rated at the wrist, 15% PPD of the left upper extremity rated at the wrist, 70% PPD of the right lower extremity rated at the knee and 75% PPD of the left lower extremity rated at the knee.

Based on his medical assessment alone, Dr. Volarich opined Claimant was permanently and totally disabled as a direct result of the work related injuries of June 9, 2009, in combination with all his pre-existing medical conditions.

On cross-examination, Dr. Volarich admitted he did not review the last treatment record from Concentra, dated July 2, 2009, issued by Dr. Carper regarding Claimant's June 9, 2009 work-related injury. Dr. Volarich agreed this record reflected Dr. Carper released Claimant to return to work without any permanent restrictions, and opined Claimant had 0% impairment as a

result of the June 9, 2009 injury. Dr. Volarich also agreed the record reflected Claimant no longer had any significant discomfort, and was back to his baseline function at the time of his release in July 2009. Dr. Volarich stated this was inconsistent with the history and subjective complaints Claimant reported to him. Dr. Volarich further agreed that the work restriction issued by Dr. Carper which is listed on page 2 of Volarich's 2009 report was actually a temporary restriction and, in fact, Claimant was released without any permanent work restrictions.

Delores Gonzalez, a rehabilitation counselor, met with Claimant on November 25, 2009. Prior to her evaluation, Ms. Gonzalez obtained and reviewed most, but not all, of Claimant's medical file. Ms. Gonzalez opined Claimant is PTD as a direct result of the work related injury of June 9, 2009, in combination with all of his preexisting medical conditions. Ms. Gonzalez further opined Claimant is not a candidate for vocational rehabilitation, and he is not capable of any competitive work for which there is a reasonably stable job market. She testified Claimant has a combination of adverse vocational factors that would preclude employment currently and in the future. On cross-examination, Ms. Gonzales admitted she had not reviewed the final treatment record issued by Dr. Carper on July 2, 2009. Ms. Gonzales was under the impression Dr. Carper released Claimant with a permanent work restriction of no lifting over 40 pounds. Ms. Gonzales was also unaware Dr. Carper opined Claimant sustained 0% impairment as a result of the June 9, 2009 work-related injury.

On August 16, 2010, James England performed a records review to evaluate Claimant's employability in the open labor market. After a record review, Mr. England testified Claimant could perform jobs in the sedentary to light range that would offer flexibility of movement. Mr. England also testified based upon Claimant's subjective complaints, he described himself as functioning within the light category, with the ability to lift up to 30 pounds. Mr. England testified Claimant could work as a parking booth attendant, security person in an office building, and an alarm monitor for a security company. Mr. England also opined the June 9, 2009 work-related injury had no impact on Claimant's employability, meaning he would not be any more or less employable after the June 9, 2009 work-related injury.

Claimant testified as he suffered additional injuries, he was often reprimanded by Employer for not performing well or fast enough. He testified that following each injury, he was able to return to work; however he had additional difficulties with the physical job requirements such as walking, carrying ladders, lifting, kneeling and bending. Claimant testified his back complaints remained the same before and after the primary injury. A typical day for Claimant includes getting up by 8 or 9 a.m., taking care of his house and dog, reading the paper and watching television. Claimant is able to mow the grass, grocery shop, and perform household chores such as vacuuming, dusting, and dish washing. Claimant takes Mobic, an anti-inflammatory medication.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

Although I find Claimant is permanently and totally disabled and unable to compete in the open labor market, SIF is not liable for PTD benefits because the primary injury and the prior injuries did not combine to create the PTD.

Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the Fund in all 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, RSMo 2000. 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 *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. *Id.* at 48. Missouri courts require that the permanent nature of an injury be shown to a reasonable certainty and that proof may not rest upon surmise and speculation. *Sanders v. St. Clair Corp.*, 943 S.W.2d 12, 16 (Mo.App). S.D. 1997). A disability is "permanent" if it is shown to be of indefinite duration in recover or substantial improvement is not expected. *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

I find Claimant is permanently and totally disabled, and unable to compete in the open labor market. I find the testimony of Dr. Volarich, and the vocational testimony of Ms. Gonzalez more credible than that of the vocational testimony of Mr. England with respect to the issue of whether Claimant can compete in the open labor market. I find no employer in the usual course of business, would reasonably be expected to employ Claimant in his existing physical condition. I find Claimant is not realistically employable in the labor market.

Although I find Claimant is permanently and totally disabled, SIF is not liable for PTD benefits, because I do not find Claimant sustained any PPD as a result of the primary work related injury of June 9, 2009, and therefore the primary injury does not combine with his prior injuries to create the permanent total disability. Dr. Volarich's opinion of permanent total disability due to the combination of the June 9, 2009 work-related injury and pre-existing injuries is not credible because it lacks foundation. Dr. Volarich did not review the complete treatment records regarding the June 9, 2009 work-related injury before he rendered his opinion. Dr. Volarich was under the impression Claimant was released by his treating physician, Dr. Carper, with a permanent lifting restriction. This was a temporary restriction, and Dr. Carper released Claimant to work full duty. Dr. Volarich only became aware of this fact upon cross-examination. Furthermore, I do not find Claimant's statements and complaints to Dr. Volarich at an independent medical examination to be credible. That Claimant told his treating doctor he

had no significant discomfort and was back to baseline is a more credible statement. At trial, Claimant testified his back complaints were essentially the same before and after the primary injury.

Ms. Gonzales' opinion of permanent total disability due to the combination of the June 9, 2009 work-related injury and pre-existing injuries is also not credible because she did not see the complete treatment records regarding the June 9, 2009 work-related injury. Ms. Gonzales, like Dr. Volarich, was under the impression Claimant was released by Dr. Carper with a permanent work restriction limiting his lifting to no more than 40 pounds. Ms. Gonzales relied upon the medical opinion of Dr. Volarich, which lack foundation. On cross-examination, Ms. Gonzales was asked to consider Dr. Carper's opinion that Claimant had no additional injury following the June 2009 injury and whether this would indicate Claimant was actually unable to compete in the open labor market prior to June 2009. Ms. Gonzales' answer is unintelligible. The fact that Claimant was working for his long term employer does not establish he was employable prior to the date of injury. In reality, his ability to work was so impaired it was unrealistic to expect him to be employable in the open labor market, even before the primary injury.

Mr. England's opinion that the June 9, 2009 work-related injury had no impact on his employability is more credible than the vocational opinion offered by Ms. Gonzales. Unlike, Ms. Gonzales and Dr. Volarich, Mr. England reviewed all of the treatment records of Dr. Carper, including the record dated July 2, 2009. Mr. England was the only expert who reviewed the complete treatment records at the time of his evaluation.

Claimant's ability to compete in the open labor market did not change after the June 9, 2009 injury. Claimant was repeatedly reprimanded for not being able to perform the functions of his job long before the primary injury occurred. After the accident of June 9, 2009, Employer provided him with medical treatment to cure and relieve him from the effects of his injury. After his treatment, Claimant's condition returned to baseline, and he was still unable to perform the functions of his job.

I also find Claimant is not entitled to PPD benefits from SIF. In order for a claimant to recover permanent partial disability benefits against the Second Injury Fund, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1, RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App). E.D. 2008) (Citations omitted). In addition, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities.

Based upon the competent and substantial evidence, I find Claimant sustained 0% PPD of the body as a whole referable to the low back as a result of the June 9, 2009 work-related injury. I find the treating physician, Dr. Carper's opinion, that Claimant sustained 0% impairment due to the June 9, 2009 work-related injury, to be more credible than that of Dr. Volarich. Although Employer settled for PPD of 7.5% of the body as a whole, under *Totten v. Treasurer*, 116 S.W.3d 624 (Mo.App). E.D. 2003), SIF is not bound by the terms of a settlement agreement to

which it was not a party.

Dr. Volarich's rating is based in part on Claimant's reported subjective complaints of increased back pain following the 2009 injury, which is contrary to Claimant's report to Dr. Carper of no significant discomfort, and a return to baseline function following the 2009 injury. Claimant's subjective complaints were the same before and after the primary injury.

Claimant is not entitled to any permanent partial disability benefits from the Second Injury Fund because he did not sustain any PPD as a result of the primary injury.

CONCLUSION

Although Claimant is permanently and totally disabled, he is not entitled to any PTD benefits or PPD benefits from SIF because his primary injury did not combine with the preexisting disabilities to create permanent total disability or a greater overall disability.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

Issued by DIVISION OF WORKERS' COMPENSATION