

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

Injury No.: 10-063095

Employee: Gary Grossenbacher
Employer: Swisher Mower & Machine Company (Settled)
Insurer: Zurich Insurance Company of North America (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 May 29, 2013. The award and decision of Administrative Law Judge Emily S. Fowler, issued May 29, 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 19th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

**FINAL AWARD
AS TO THE SECOND INJURY FUND ONLY**

Employee: Gary Grossenbacher Injury No. 10-063095

Dependents: N/A

Employer: Swisher Mower & Machine Company

Insurer: Zurich Insurance Company of North America

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

Hearing Date: April 17, 2013 Checked by: ESF/pd

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: July 21, 2010
5. State location where accident occurred or occupational disease was contracted:
Warrensburg, Johnson 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: Employee was lifting log splitter tanks weighing 75 pounds from the overhead paint line when his back popped and he experienced a sudden onset of low back pain.
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, body as a whole
14. Nature and extent of any permanent disability: 13.75 percent permanent partial disability of the low back, body as a whole.
15. Compensation paid to date for temporary disability: \$691
16. Value necessary medical aid paid to date by employer/insurer? \$28,235.00
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$480
19. Weekly compensation rate: \$320/\$320
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: Employee previously settled his claim with the Employer for 13.75 percent permanent partial disability to the low back, body as a whole
22. Second Injury Liability: Weekly differential payable by the Second Injury Fund of \$0 for 56-1/7 weeks beginning March 18, 2011, and thereafter at \$320 per week for Claimant's lifetime.
23. Future requirements awarded: Said payments to begin as of date of this award 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 percent of all payments hereunder in favor of Scott W. Mach, Employee's attorney, for necessary legal services rendered.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gary Grossenbacher Injury No. 10-063095
Dependents: N/A
Employer: Swisher Mower & Machine Company
Insurer: Zurich Insurance Company of North America
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: April 17, 2013 Checked by: ESF/pd

On April 17, 2013, the parties appeared for final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Gary Grossenbacher, appeared in person and with counsel, Scott W. Mach. The Second Injury Fund appeared through Assistant Attorney General, Laura Van Fleet. There was no appearance on behalf of the Employer and Insurer as the claim between the Employer and the Employee has previously been settled.

STIPULATIONS

The parties stipulated to the following:

- 1) That Missouri has jurisdiction to hear this claim under the Missouri Workers' Compensation Act;
- 2) That on or about July 21, 2010 Swisher Mower and Machine Company was an employer operating under and subject to the provisions of Missouri's workers' compensation law and that its liability under the Workers' Compensation Act was fully insured by Zurich Insurance of North America;
- 3) That Employee was its employee and working subject to the law in Warrensburg, Johnson County, Missouri;
- 4) that Employee sustained an injury by accident arising out of and in the course and scope of his employment with Employer on July 21, 2010;
- 5) That Employee notified the employer of his alleged injuries as required by law and his claim was filed within the time allowed by law;
- 6) That Employee's average weekly wage was \$480, rendering a compensation rate of \$320 for permanent partial disability or permanent total disability; and
- 7) That the claim between Employee and Employer was settled for 13.75 permanent partial disability to the low back, body as a whole.

ISSUES

The issues to be resolved by this hearing are as follows:

- 1) Whether the Employee's prior disabilities were a hindrance or obstacle to his ability to maintain employment or to be re-employed should he become unemployed;
- 2) Whether he sustained an accident arising out of and in the course and scope of his employment;
- 3) Whether he sustained any disability as a result of the July 21, 2010 work injury; and
- 4) Whether the Second Injury Fund is liable to the Employee for any disability compensation, either permanent partial or permanent total.

FINDINGS OF FACT AND RULINGS OF LAW

The Employee, Gary Grossenbacher, testified on his own behalf and offered the following exhibits, all of which were admitted into evidence without objection:

Claimant's Exhibit A – Stipulation for Compromise Settlement (Injury No. 10-063095)

Claimant's Exhibit B – Deposition of Dr. William Hopkins

Claimant's Exhibit C – Deposition of Mary Titterington

Claimant's Exhibit D – Rating report of Dr. William Hopkins

Claimant's Exhibit E – Vocational Report of Mary Titterington

Claimant's Exhibit F – Records from Department of Veterans Affairs

Claimant's Exhibit G – Medical records from Metro Spine & Rehab/Dr. Joseph Galate

Claimant's Exhibit H – Miscellaneous medical records

Claimant's Exhibit I – Medical records from Premier Spine Care/Dr. John Ciccarelli

Claimant's Exhibit J – Medical records of Select Physical Therapy

Claimant's Exhibit K – Medical records from Western Missouri Medical Center

Claimant's Exhibit L – Medical records from USAF Hospital

The Second Injury Fund offered the following exhibits which were admitted into evidence without objection:

Second Injury Fund Exhibit No. 1 – Deposition of Claimant

Second Injury Fund Exhibit No. 2 – Deposition of Dr. Alexander Bailey

Based on the above exhibits and the testimony of Claimant, I make the following findings:

Gary Grossenbacher was born on September 2, 1948 and was 64 years old at the time of the hearing.

The highest level of formal education completed by him was an Associate of Arts degree from Muskegon Community College in Computer Science. During the 1960's, he attended machinist classes at a skills training center. He has also had multiple on-the-job training classes as needed throughout the years.

Mr. Grossenbacher attended Muskegon High School in Muskegon, Michigan, through the tenth grade. While in the military he attended Rudyard High School and completed his high school diploma.

Mr. Grossenbacher testified that he lived in a ranch style home in a subdivision and had lived in the one-level home with a basement since 1989.

Considering his employment history, Mr. Grossenbacher testified that he had some odd jobs that were mainly factory work prior to entering the Air Force in 1971. He was in the Air Force working in civil engineering doing heavy labor such as paving, and ground and maintenance work until his discharge in January of 1985. At that time, he went to computer programming school. It is important to note that the computer programming school would not currently benefit him as his abilities as a computer programmer are totally out of date.

In 1986 Mr. Grossenbacher worked for 7-8 months for Pinkerton Security Guards in Warrensburg and Sedalia, Missouri. In 1987 he began a 13-year stint at Payless Cashways, which he likened to a large Lowes store. He performed heavy work and had help from coworkers who helped him lift heavy boxes and loads.

Mr. Grossenbacher began work at Swisher Mower in January 2002 and worked there until March 18, 2011 when he was forced into retirement because of the back pain he was experiencing. He has not worked since March 18, 2011. He described his job at Swisher as factory work on an overhead conveyor line.

Regarding Mr. Grossenbacher's injuries, he was first injured in 1966 while playing high school football when he injured his low back. Medical records were not available for that injury, but he had what he described as a fusion surgery in his low back in Michigan. He indicated that he has had periodic problems with his back, especially while in the military. He told his superiors in the military that he had back surgery. He was asked if his back was symptomatic at the time he entered the military. His response was, no, and he was allowed to enter the Air Force. Mr. Grossenbacher experienced low back pain and was treated in the military which caused him to miss work while in the military. He would be put on light duty from time to time after performing heavy work.

Exhibit L is a packet of records from Mr. Grossenbacher's time in the Air Force. The records from January 24, 1980 state, "low back pain after lifting 50 pound weight. Had fusion for disc problems in low back 1966 ... no problem since until present episode." (Exhibit L, Bates number 1).

Again, on January 29, 1980, Exhibit L, states at Bates number 2, "follow up for low back. Discomfort persists. Has low back pain with prolonged standing." At that time, Motrin was prescribed. Mr. Grossenbacher was treated again in 1982 for low back problems while in the military which were described as a low back strain. The military medical records, Exhibit L, Bates number 8 state, "34 year old male with low back pain after exercises to loose (sic) weight 2 weeks ago. Physical therapy. Had fusion on L3-4 in 1966." The same records reflect a discharge summary, "patient reports an 85-90 % relief of pain." He was instructed not to perform exercise that he could not tolerate. The final record from the military is dated December 29, 1982, which indicates that Mr. Grossenbacher is to resume exercise classes carefully. There

was no tenderness and the neurologic examination was normal.

Mr. Grossenbacher testified that he would have occasional back issues after he began working at Payless Cashways in 1988. He did pass a physical to work at Payless. He required help with lifting heavy objects with intermittent back pain.

In 1997 Mr. Grossenbacher reinjured his back and had a second back surgery. Dr. Stuckmeyer performed that surgery. The records for this surgery are found at Exhibit K. The preoperative diagnosis was central L5-S1 disc herniation with impingement of left nerve. The operation was a mini decompressive laminectomy at L5-S1 on the left with excision of disc L5-S1 and foraminotomy left S1 nerve root. Successful surgery was performed on February 7, 1997. Dr. Stuckmeyer's notes also indicate that a fusion was not necessary. The MRI demonstrated a central disc herniation at L5-S1 with degenerative joint disease. A laminectomy was performed. By March 26, 1997, six weeks following surgery, Mr. Grossenbacher was sent to work hardening.

Following work hardening, Mr. Grossenbacher returned to work at Payless. He indicated that he told his boss that he needed to heal and he was given help with lifting while working for Payless following the back surgery. There are no records and no history was given of any treatment to Mr. Grossenbacher's back following the surgery in 1997 until the accident of July 21, 2010, a period of approximately 13 years.

In that interim, Mr. Grossenbacher suffered an injury to his right shoulder while at Swisher. He said he tripped over some wooden pallets and rolled onto his right shoulder. Dr. Bliss at Western Missouri Medical Center in Warrensburg, Missouri performed shoulder surgery. Mr. Grossenbacher demonstrated that his right shoulder will move only approximately parallel with his face and that he can move his left shoulder well behind his head. Mr. Grossenbacher described how the shoulder surgery affected his ability to lift on the overhead line while at Swisher. He would have to use his left arm to lift items off the conveyor line. He would then cradle the item with his right arm at approximately chest level so that he did not reinjure his right shoulder. He described ongoing problems with his right shoulder since the surgery, indicating that he could not lift much at all with his right arm and could not lift above shoulder level. Mr. Grossenbacher further described that he had to lift with his left arm because he was not able to lift with his right. He testified that the right shoulder continually aches.

Also in the interim, Mr. Grossenbacher had a total right knee replacement performed by Dr. Bliss. He described the right knee as deteriorating until surgery was performed in 2008. Prior to surgery, he described a "bone-on-bone" grinding in the right knee. Mr. Grossenbacher testified and demonstrated how the right knee pops, he has trouble kneeling on the right knee, and that he has used a cane from time to time because of the right knee injury. He has had to use the cane more since the last injury to his back on July 21, 2010. Mr. Grossenbacher testified that his right knee continues to ache and said he did not know if the right knee was weaker than the left because the left knee is also bad.

Turning to the last accident giving rise to this claim, Mr. Grossenbacher described working on the line at Swisher performing overhead work while attempting to lift a 75-pound gas tank from the overhead line that would be put on a log splitter. He described hearing and feeling a "pop" in his low back as he and a coworker lifted the gas tank off the line. He

described the “pop” as something he had never felt before. He said the pain knocked him to his knees. The pain radiated into his legs. Mr. Grossenbacher testified that he reported the injury to his manager within 15 minutes and that he was previously scheduled off from work the next few days to attend a funeral in Michigan. He testified that he attempted to drive to Michigan the next day but only got as far as Sedalia, Missouri before his wife had to take over the driving. He had to stop approximately every 45 minutes to get out of the car to walk and stretch his back. Mr. Grossenbacher went to the emergency room while in Michigan. He began treatment under the workers’ compensation system as soon as he returned to Warrensburg, Missouri.

Mr. Grossenbacher was first seen by Dr. Anderson, the workers’ compensation doctor for Swisher. He was then sent by Dr. Anderson to Dr. Ciccarelli, a spine surgeon. Dr. Ciccarelli’s records are found at Exhibit I. Of importance in Dr. Ciccarelli’s records is reference to the injury at Bates number 3, “IMPRESSION: Patient sustained a work related injury 7/21/10 which is the prevailing factor for his present symptoms and matching MRI findings from 8/3/10 of a broad based annular bulge bilateral lateral recess stenosis right greater than left. He has prior surgical history of left L5-S 1 laminectomy 1966 and 1997. He reports full recovery without residual numbness, tingling or pain. I do not believe these previous injuries are contributing factors to his present situation.” Dr. Ciccarelli gave restrictions of “no repetitive bending, lifting, no loads exceeding 15 lb repetitively. No working on the line over the next four weeks.” Dr. Ciccarelli’s notes regarding the MRI are also of importance which show “desiccatory changes at T11-S1. Mild spondylitic changes are present L2-DS.” Of additional importance are the bulging discs which Dr. Ciccarelli indicates are present at L2-3 and L3-4, the area above the prior back surgeries. The MRI results indicate that there is also anterior annular bulging present at L3-S1 with a laminectomy defect left L5-S1. Also, noted was facet hypertrophy present at L3-S1.

Mr. Grossenbacher testified that he and Dr. Ciccarelli discussed surgery. Dr. Ciccarelli did not believe that surgery would be of benefit because of the advanced problems in Mr. Grossenbacher’s back, coupled with the danger of surgery because of his poor circulation.

On October 14, 2010, Dr. Ciccarelli’s records indicate: “Mr. Grossenbacher returns today. He has failed two epidurals. He has most of his pain in the right hip area. He is taking intermittent pain pills. He has not been able to return to his line type work. Unfortunately, Mr. Grossenbacher suffers from multi-level stenosis. He has had two prior surgeries at 5-1. Despite his multi level changes I feel most of his stenosis is at 3-4 and 4-5. This may contribute to some of his hip pain.” (Exhibit I, at Bates number 5)

Finally, on February 8, 2011, Dr. Ciccarelli states: “I reviewed the additional treatments he has had with Dr. Galate. Unfortunately I continue to feel given the patient’s significant venous peripheral vascular disease and venous status changes that I think he is a very poor candidate for surgery and I don’t believe that I would be able to provide him any additional surgical intervention without significant risks that I feel would outweigh the potential benefits.” He then prescribed a functional capacities examination. (Exhibit I, at Bates number 6)

Dr. Galate’s treatment was also provided under the Missouri Workers’ Compensation Act. He provided pain management, including two epidural injections. Dr. Galate continued to treat Mr. Grossenbacher through the fall of 2010 until early 2011. He prescribed physical therapy and continued to inject the SI joint. Dr. Galate provided a rating of permanent partial disability indicating there was no further treatment available that would be of benefit.

After this time, Mr. Grossenbacher attempted to continue working light duty but was in such pain that he left work every day bent over. He finally told Swisher on March 18, 2011 that he could no longer continue working because of his pain. He has not had any employment since that date.

Mr. Grossenbacher was seen by Dr. William O. Hopkins at the request of Claimant's attorney. Dr. Hopkins' deposition is Exhibit B. Dr. Hopkins testified that Mr. Grossenbacher sustained an injury on July 21, 2011, to his lumbar spine while in the employ of Swisher Company. Although Mr. Grossenbacher had prior back problems and operative procedures for many years, he indicated that he was doing well and was able to return to full and unhampered work capabilities for many years. Dr. Hopkins testified that the July 21, 2010, accident was the direct and prevailing cause for Mr. Grossenbacher's last injury and subsequent treatment. This was also concurred by Dr. Ciccarelli's and Dr. Galate's records and reports. Dr. Hopkins assigned permanent partial disability at 22.5 percent permanent partial disability at the 400-week level for the last accident on July 21, 2010. As to the preexisting disability to the low back from the two prior laminectomies, Dr. Hopkins testified that Mr. Grossenbacher had a preexisting 25 percent permanent partial disability at the 400-week level. He found that those back injuries had a synergistic effect giving a total of 62.5 percent disability. He also found the right shoulder to have a 15 percent preexisting disability, and the right knee to have a 20 percent preexisting disability.

Looking next at Mary Titterington's testimony found at Exhibit C, Ms. Titterington is a vocational rehabilitation counselor and consultant. She has done many Missouri examinations and reports regarding the vocational abilities of injured employees. Ms. Titterington reviewed Mr. Grossenbacher's education and work background, as well as his medical conditions and restrictions from various physicians. She also administered three standard tests, the Wide Range Intelligence test where his verbal IQ was found to be average at approximately 100. The visual IQ was in the superior range at 129. Ms. Titterington testified that because of the significant variance, the results were somewhat indicative of a learning disability, although Mr. Grossenbacher was never actually diagnosed with a learning disability. He was also given the Wide Range Achievement Test-Revision IV. The results of that test showed Mr. Grossenbacher's reading and pronunciation of words were at a ninth grade level, with spelling at a seventh grade level. His math was good at the post-high school level which correlates with the performance aspect of his IQ test. Ms. Titterington also gave the Adult Basic Learning Examination, Level III, which showed reading comprehension at approximately the seventh grade level, with language and grammar at a ninth grade level, and spelling at a tenth grade level.

Ms. Titterington's conclusions from her testing, interview of Claimant and review of his medical records, education records, and vocational background led her to testify that Mr. Grossenbacher could not actually perform any job in the open labor market with his skill set and physical condition. She testified that:

“...from my perspective and from the records that I reviewed is that he is not going to be able to work in a job in the open labor market that is not on [sic] highly accommodated. I mean, he has significant difficulty just walking. He has significant difficulty with fatigue. I mean, his shortness of breath just walking into an interview, any employer is going to have real concerns that why is this

man so short of breath walking across a lobby to go to an interview.” (Exhibit C, Bates number 25)

She further testified that Mr. Grossenbacher will not be able to meet what they call in her business “the basic expectations of work.” “He will not be able to stay on task. He is not going to be able to apply himself enough to meet production goals for quality or quantity of work, even if in a sedentary job. With the difficulties he has with pain, it is not likely that an employer could count on him to be on the job day after day.”

Mary Titterington’s final conclusion is that Mr. Grossenbacher is unemployable in the open labor market because of the combination of all of these issues.

The Second Injury Fund offered the deposition of Dr. Alexander Bailey, a board-certified orthopedic surgeon. Dr. Bailey never actually examined Claimant but did review the records. He testified that he sees approximately 100 patients a week in clinic with 75 percent of those having lumbar issues. Dr. Bailey reviewed reports of diagnostic tests but did not review any actual films. He testified that Mr. Grossenbacher had a variety of complaints dating back many, many years, even into the 60’s. He testified that Mr. Grossenbacher has a long standing history of back problems and a degenerative spine. Dr. Bailey testified that Mr. Grossenbacher had a multiply operated back with waxing and waning episodic symptomatology that the patient indicated increased on or about his reported date of injury. Because of the previous history of waxing and waning of symptoms in his back, it was Dr. Bailey’s opinion that the work related complaint is incidental and not directly causative of Mr. Grossenbacher’s condition. His testimony stated, “It was equally likely to occur irregardless of that specific event and would have happened irregardless given the medical record review.” (Fund Exhibit 1, page 8)

Dr. Bailey testified that the patient reported the onset of pain on or about that date, but he did not think the actual work event contributed to his condition. He testified that the injury Mr. Grossenbacher sustained at work on July 21, 2010, would have occurred “irregardless” of any specific event and could have occurred at any cause for any reason. Dr. Bailey blames Mr. Grossenbacher’s need for treatment on his prior medical condition. He indicated that Mr. Grossenbacher had prior problems at both L4-5 and L5-S1 with prior surgical interventions.

On cross-examination, Dr. Bailey admitted that he had not actually seen Mr. Grossenbacher and had no communication with him in order to clear any uncertainties. Dr. Bailey did not take a history from Mr. Grossenbacher, nor palpate to determine where Mr. Grossenbacher’s pain was. He testified that 85 percent of his worker’s compensation practice is for the defense. Dr. Bailey has written more than one of these reports where he does not actually see the patient for the Second Injury Fund. He testified that he did not have enough information to do a rating on Mr. Grossenbacher for the universe of his back injuries. Dr. Bailey gave Mr. Grossenbacher a zero percent rating for the current on-the-job injury.

Dr. Bailey further testified that he disagreed with Dr. Hopkins’ medical examination and rating, particularly the causation. He also disagrees with Dr. Galate’s report. Of importance, he testified that he is familiar with Dr. Galate and that Dr. Galate is a pain management physiatrist in Dr. Bailey’s own office. Dr. Bailey testified that he would disagree with Dr. Galate regarding causation even though Dr. Galate was in his office and actually saw the patient and Dr. Bailey did not.

Dr. Bailey is also familiar with Dr. Ciccarelli who is the neurosurgeon who treated Mr. Grossenbacher. He also disagrees with Dr. Ciccarelli regarding causation. Dr. Bailey did admit that both Dr. Ciccarelli and Dr. Galate treated Mr. Grossenbacher and that he did not even see him. Dr. Bailey's reference to the L3-4 surgery was made only because the VA records in the 1960's made mention of treatment at L3-4. He agreed that the VA military records regarding any injury at L3-4 were short.

Dr. Bailey admitted that there were no doctor's restrictions on Mr. Grossenbacher at the time of the 2010 on-the-job injury. He also admitted that Mr. Grossenbacher currently uses a TENS unit for pain management but did not use the unit prior to the 2010 on-the-job injury.

Finally, Dr. Bailey charged \$560 per hour for one hour of file review, and \$1,150 for his deposition which lasted less than one hour. He admitted that there were no medical records indicating that there was any treatment or issues with Mr. Grossenbacher's back following the 1997 surgery until on-the-job injury on July 21, 2010.

RULINGS OF LAW

The issues which must be decided must begin with whether a compensable accident occurred on July 21, 2010, as Claimant alleges, and subsequently, whether that accident caused any permanent partial disability to Claimant. Finding both of these in the affirmative, I then turn to whether the employee had any preexisting disabilities which were a hindrance or obstacle to his ability to maintain his employment or to become reemployed should he become unemployed and, therefore, whether the Second Injury Fund is liable to Mr. Grossenbacher for either permanent partial disability or permanent total disability.

As set out below, I find by a preponderance of the credible evidence that Mr. Grossenbacher did suffer an on-the-job injury which was compensable and that resulted in permanent partial disability on July 21, 2010. I also find that the permanent partial injury that resulted from that accident joined with preexisting disabilities that he had involving his back, right arm and right knee that were enhanced and through a synergistic effect between all of the injuries created permanent total disability in Mr. Grossenbacher. As a result, I find Mr. Grossenbacher is entitled to permanent total disability benefits from the Second Injury Fund.

Looking first at whether there was a compensable injury, the evidence was clear that there was a compensable injury. Section 287.020.2 provides the definition for "accident." Claimant testified as to having to reach above his head to lift a 75-pound gas tank for a log splitter off an overhead conveyor line, at which time after he took it off the line, he heard a "pop" and felt a "pop" in his back with pain shooting into his legs that drove him to his knees. This certainly qualifies as an unexpected traumatic event or unusual strain identified by time and place of occurrence producing at that time objective symptoms of an injury all done within a single work shift. See Section 287.020.0, RSMo defining "accident." The first issue of whether there was a compensable accident is found in favor of claimant. Next, regarding whether there was any permanent partial disability as a result of that on-the-job accident, we look to the medical evidence. The worker's compensation carrier treated this as a compensable event and sent claimant to authorized treating physicians, Dr. Ciccarelli and Dr. Galate. Dr. Ciccarelli specifically states in his records from September 7, 2010, that the patient sustained a work

related injury, that an MRI taken on August 3, 2010, showed an annular bulge, and that he had a prior surgical history at left L5-S1. Of importance, Dr. Ciccarelli states, "I do not believe these previous injuries are contributing factors to his present situation."

Both Dr. Galate, the authorized treating pain management physician, and Dr. Hopkins, Claimant's examining orthopedic surgeon, concurred that this was a work related injury from which the work was the prevailing cause, and that claimant suffered permanent partial disability as a result of that injury. Dr. Hopkins rated the injury at 25 percent of the body. Dr. Galate rates the injury at 5 percent of the body. Although not binding on the Fund, further evidence of both the compensability of the accident and the fact that there was permanent disability from the last accident is the fact that the case was settled for 13 3/4 percent of the body permanent partial disability related to the low back.

Therefore, after a finding that there was a compensable accident with permanent partial disability from the last accident on July 21, 2010, we turn next to the analysis of liability, if any, for the Second Injury Fund.

Section 287.020.5 RSMo 1986, defines "total disability" as the inability to return to any employment and not merely . . . to return to employment in which the employee was engaged in at the time of the accident. The terms "any employment" mean "any reasonable or normal employment or occupation." *Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App. 1996). It is not necessary that an individual be completely inactive or inert in order to meet the statutory definition of permanent total disability. It is necessary, however, that the employee be unable to compete in the open labor market. See *Fletcher v. Second Injury Fund*, above, and *Searcy v. McDonald Douglas Aircraft*, 894 S.W.2d 1173 (Mo.App. 1995).

Missouri courts have repeatedly held the test for determining permanent total disability as whether the individual is able to compete in the open labor market, and whether an employer in the usual course of its business would be reasonably expected to employ the employee in his present condition. *Sullivan v. Mastaers Jackson Paving*, 35 S.W.3d 879 (Mo.App. S.D. 2001). Thus, a determination of permanent total disability focuses on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri State Motor Transit*, 908 S.W.2d 849 (Mo.App. 1995).

Even though a claimant might be able to work for brief periods of time or on a part-time basis, it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (MO.App. 1995). Courts have held that various factors may be considered, including claimant's physical and mental condition, age, education, job experience, and skills in making a determination as to whether the claimant is permanently, totally disabled. See *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo.App. 1997).

In order to establish Second Injury Fund liability for permanent, total disability benefits, Mr. Grossenbacher must prove that:

- (1) He has permanent disability resulting from a compensable work-related injury;
- (2) He has permanent disability predating the compensable work-related injury which

is of “such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployed.” Section 287.220.1 RSMo 1993; *Garibay v. Treasurer*, 930 S.W.2d 57 (Mo.App. 1996); *Rose v. Treasurer*, 899 S.W.2d 563 (Mo.App. 1995); *Leutzinger v. Treasurer*, 895 S.W.2d 591 (Mo.App. 1995); and *Wuebbeling v. West County Drywall*, 898 S.W.2d 615 (Mo.App. 1995) and finally;

(3) The combined effect of the disability resulting from the work-related injury and the disability attributable to all conditions existing at the time the last injury was sustained results in permanent total disability. *Boring v. Treasurer*, 947 S.W.2d 483 (Mo.App. 1997).

In deciding whether the Second Injury Fund has liability, the first determination is the degree of disability from the last injury. *Stewart v. Johnson*, 398 S.W.2d 850, 852 (Mo.App. 1966). “Until that disability is determined, it is not known whether the Second Injury Fund had any liability. . .” *Stewart*, 398 S.W.2d at 854. Accordingly, a claimant’s preexisting disabilities are irrelevant until employer’s liability for the last injury is determined. *Kizior v. Trans World Airlines*, 5 S.W.3d 195, 201 (Mo.App. W.D. 1999); *Roller*, 935 S.W.2d 739, 743 (Mo.App. S.D. 1996). If claimant’s last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and the employer is responsible for the entire amount.

The Second Injury Fund does not seriously dispute that Claimant is permanently and totally disabled. Its defense centers around Dr. Bailey’s testimony that Mr. Grossenbacher had a bad back over the course of years, and that it was a “time bomb” waiting to go off and could have gone off at any time for any reason. As previously discussed, claimant presented substantial evidence from at least three board certified doctors that the accident described by claimant was the prevailing cause of his need for treatment, additional and ongoing complaints, and permanent partial disability in his low back.

Looking at the prior evidence, Claimant certainly had preexisting permanent partial disability to the low back, the right knee and right shoulder. Dr. Hopkins testified that the preexisting disability in the low back would be a hindrance to Mr. Grossenbacher’s employment or reemployment should he become unemployed. His report specifically states:

“At the present time, he has multiple level changes in his spine with persistent pain, significant loss of motion, and very limited physical capabilities in regards to his ability to stand, walk, lift, and carry. He has a 22.5% (twenty two and half percent) permanent partial disability at the at the 400-weak level. (For the last injury.)

“Additionally with his lumbar spine injuries with two prior L5-S laminectomies, I believe presents an obstacle to employment or reemployment if unemployed. For this, I believe that he has an additional 25% (twenty-five percent) permanent partial disability at the 400 week level.

“It is my opinion that when one combines the prior permanent partial disabilities involving the two laminectomies with the additional permanent partial disability from the work injury of July 21, 2010, a significant synergism of the combined

disabilities rises above the simple arithmetic sum of the separate disabilities and there is an synergism of 15% (fifteen-percent) which brings the total permanent partial disability (sic) at the 400-week level to 62.5% (sixty two point five percent).”

Dr. Hopkins also testified that the shoulder surgery represented an obstacle to employment or reemployment if unemployed, and that there was a 15 percent disability at the right shoulder or 232-week level. Likewise, the knee replacement would represent an obstacle to employment or reemployment if unemployed giving an additional 20 percent permanent partial disability at the right knee or 160-week level.

Further, Claimant testified about his need to be accommodated with lifting while he worked at Payless Cashways in the 1990's. He testified about how the Air Force accommodated him with light duty, which is also confirmed in Exhibit L the USAF Hospital record during his stint in the Air Force in the 1970's and early 1980's.

Mr. Grossenbacher also testified about his difficulty with overhead lifting with his right arm after the shoulder surgery. He had to self accommodate with his left arm doing the lifting of items off the overhead conveyor line while working at Swisher from 2001 forward. The Second Injury Fund offered no credible evidence to counter any of these items.

I also agree with Ms. Titterington that Mr. Grossenbacher is permanently and totally disabled by the fact that he cannot compete in the open labor market for jobs. Her testimony found at Exhibit C fairly sums up Mr. Grossenbacher's job situation. At page 25 of her deposition testimony, Ms. Titterington testifies as follows:

“I think clearly from my perspective and from the records that I reviewed is that he is not going to be able to work in a job in the open labor market that is not on [sic] highly accommodated. I mean, he has significant difficulty just walking. He has significant difficulty with fatigue. I mean, his shortness of breath just walking into an interview, any employer is going to have real concerns that why is this man so short of breath walking across a lobby to go to an interview.

“So when you put all of his factors together, his fatigue, his shortness of breath, his -- with minimal exertion, his functional just going to have -- he is not going to meet what we call the basic expectations of work. He is not going to be able to stay on task. He is not going to be able to apply himself enough to meet production goals for quality or quantity of work, even if in a sedentary job. And with the difficulties he has with pain, I think expecting him to be on job day after day is unrealistic, also.

“Q. (Scott Mach) Was it your opinion, then, that he is unemployable in the open labor market because of the constellation of all of these issues that he had?

“A. (Ms. Titterington) Yes.”

The Second Injury Fund did not offer evidence nor take the position that the last accident alone caused this permanent disability. Further after reviewing the evidence herein it does not

appear that Mr. Grossenbacher was rendered permanently and totally disabled due the last accident alone. Therefore, I find by a preponderance of the credible evidence that Mr. Grossenbacher is permanently and totally disabled as a result of the preexisting disabilities, coupled with the synergistic effect of the last injury causing his permanent and total disability.

Therefore, I find the Second Injury Fund liable to the Employee for a weekly differential of \$0 per week beginning on March 18, 2011, the date Mr. Grossenbacher last worked, and extending for 56 1/7 weeks after that date for permanent partial disability paid by the employer following the last injury. The Second Injury Fund is and shall remain liable for the payment of \$320 per week thereafter for the life of Gary Grossenbacher. The Second Injury Fund shall remain liable for such benefits for so long as Mr. Grossenbacher remains so disabled, or until his death.

The Court further awards to employee's attorney, Scott W. Mach, 25 percent of all benefits awarded herein.

Made by: _____

Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation