

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

Injury No.: 01-087227

Employee: Robert Hemp  
Employer: Christy Minerals Company (Settled)  
Insurer: RTW, Inc. (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 section 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 18, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Ronald Harris, issued November 18, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29th day of July 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Robert Hemp

Injury No. 01-087227

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

Dependents: N/A

Employer: Christy Minerals Company (Settled)

Additional Party: Second Injury Fund

Insurer: RTW Inc. (Settled)

Hearing Date: August 5, 2008 and September 4, 2008

Checked by: RFH:lw

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No additional benefits awarded.
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: August 8, 2001
5. State location where accident occurred or occupational disease was contracted: High Hill  
Montgomery 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:  
Tightening bolt/screw
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right shoulder; BAW  
Re neck and Psychiatric
14. Nature and extent of any permanent disability: Settled 20% right shoulder; 5% BAW (neck); 5%  
BAW (psychiatric)
15. Compensation paid to-date for temporary disability: - 0 -
16. Value necessary medical aid paid to date by employer/insurer? \$3083.89
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$365.52 PTD; \$329.42 PPD
20. Method wages computation: Stipulation

#### COMPENSATION PAYABLE

21. Amount of compensation payable:

SIF: None

TOTAL: None

22. Future Requirements Awarded: N/A

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

#### PRELIMINARIES

On August 5, 2008, Robert Hemp ("Employee") appeared in person and by his attorney Mark Moreland, for a hearing for a final award on this claim. Assistant Attorney General Amber Jordan represented the Second Injury Fund ("SIF"). At the same time this case was heard, evidence was also taken on Employee's three

other claims with Injury Numbers of 02-048940; 02-048937 and 02-158934. Separate awards will be issued for those claims. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

### STIPULATIONS

1. The parties agreed the appropriate compensation rate for Permanent Total Disability (PTD) is \$365.52 and the compensation rate for Permanent Partial Disability (PPD) is \$329.42;
2. The Employer/Insurer have paid Temporary Total Disability (TTD) benefits in the amount of \$4930.50 for the period of May 9, 2002 through August 19, 2002.

### ISSUE TO BE RESOLVED

The parties requested the Division to determine:

1. The nature and extent of SIF liability, PTD or PPD, if any.

### EXHIBITS

Employee offered Exhibits 1 through 21 into evidence. There were no objections to Employee Exhibits 1, 2, 4, 5, 6, 10 or 12 through 21 and those exhibits were admitted into evidence. The SIF objected to Employee's Exhibits 3, 7, 8, 9 and 11 on the grounds those exhibits were not certified as required by 287.140.7 RSMo. The record was left open for thirty (30) days to allow the Employee to submit certified copies of those exhibits. Employee did, within thirty (30) days, submit certified copies of Exhibits 7, 9 and 11 and those exhibits are admitted into evidence. Employee did not submit certified copies of Exhibits 3 or 8. The objections to Employee's Exhibits 3 and 8 are sustained and those exhibits are not admitted into evidence. The SIF offered SIF Exhibit A and with no objection it was admitted into evidence. The record was closed on September 4, 2008.

In the interest of avoiding duplication, the above exhibits have been admitted into evidence with respect to all of the four cases noted earlier.

Any exhibits containing markings, highlighting, etc. were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled. Only evidence necessary to support this award will be summarized below.

### FINDINGS OF FACT

Employee testified that he is 56 years of age and that he graduated from the 8th grade and dropped out of school in the 9th grade. He testified that he repeated kindergarten or the 1st grade. He testified that school was difficult and he often made C's, Ds and F's.

His first job, after dropping out of school, was at a gas station. His duties included pumping gas as well as changing oil and tires. Thereafter, he obtained his GED and went into the Army. He reports that he served in the Armed Forces between 1971 and 1973. He testified that, during this time, he was trained to string telephone poles but was used as a courier and driver. He also testified that during this time, he used crystal meth, marijuana and LSD. He reports, however, that he ceased his drug use in the 1970s and has now not used illegal drugs in more than 30 years.

Following his honorable discharge from the military, Employee obtained jobs at several feed stores and a bottling plant. He also obtained a job for a time as an assistant manager in a service station and convenience store. He testified that this was in the mid-70s and, at that time, they did not use any computers or cash registers. He testified that he would pump gas, stock shelves and use a calculator.

After that job, he obtained work at Christy Minerals in 1977. He started there as a bagger/operator. This required him to lift large bags, weighing 50 pounds to 100 pounds. These bags contained material that was used in the making of cement. He described this work as heavy and repetitious, requiring a great deal of bending, stooping and lifting.

In 1979, he became a maintenance man and an electrician's assistant. This job required him to run conduit, pull wire, install equipment, repair old equipment and trouble shoot electrical problems. He performed this job between 1979 and 2002. He described this as heavy work, requiring him to bend, stoop, walk, climb and get into awkward positions as well as to frequently lift heavy objects and tools.

During that time, the employer sent the Employee to the Mexico Vocational Technical School where he attended classes on Electricity I and II and also reading blueprints and schematics.

In addition, Employee also trained as a police officer. He reported that he took approximately 120 hours of training at the St. Charles Police Academy in or around 1992 or 1993. Thereafter, in addition to his job at Christy Minerals, he became a reserve deputy at the Montgomery County Sheriff's Department from approximately 1993 to 2002. He testified that, in that capacity, he worked county fairs and performed road patrols. He believes that he worked about 16 hours a month in that capacity.

From 1995 through 2001 he also served as the Chief of Police in High Hill, Missouri. He believes that he worked an average of 30 to 40 hours a month. This required him to patrol, hand out speeding tickets and work various traffic accidents or crime scenes. He gave up his police work in 2002 after his last back injury.

He testified that he has never really worked in an office and has no computer or typing skills but acknowledged that he will send e-mails to his daughter.

Employee sustained his first work-related accident at Christy Minerals on or about August 8, 2001. At that time, he injured his right shoulder while pulling on a commercial wrench as he attempted to tighten a bolt. He reported that he felt something pop in his right shoulder and neck. The employer sent him to Dr. Michael Nogalski and, ultimately, to Dr. Ronald Carter.

Dr. Nogalski described this as a right shoulder rotator cuff strain. Employee was treated conservatively with physical therapy, anti-inflammatory medications and, for a time, light duty work.

Although Dr. Nogalski released him on September 10, 2001, with a resolved right shoulder strain, he complained of continuing burning, pinching and a sharp sticking feeling in his right shoulder and neck. Therefore, he went to Dr. Ronald Carter on March 13, 2002. Dr. Carter also noted complaints of neck pain and a history of intermittent pain and numbness in Employee's right hand, post the shoulder injury. Dr. Carter diagnosed a possible rotator cuff tear and glenoid labrum tear. Subsequent to that, on March 15, 2002, an MRI ordered by Dr. Carter revealed an inflammatory degenerative process of the acromioclavicular joint with edema and joint fluid as well as subdeltoid bursal inflammation. There was also impingement of the rotator cuff.

On March 18, 2002 Employee suffered an injury to his low back while at work. At that time, he and a co-worker were lifting a motor when he felt what he described as a snap in low back. He experienced low back pain as well as pain radiating down his right leg. He denied any prior back or shoulder injuries prior to the ones just described.

Employee received treatment for the back injury and was ultimately seen by Dr. Dennis Abernathie. On April 9, 2002 the doctor recommended an MRI and discussed the possibility of epidural steroid injections. During this time, Employee was released to work light duty with restrictions of no bending, stooping or lifting over 25 pounds.

On April 12, 2002 Employee suffered another low back injury as he was walking backwards while carrying a large steel trough, weighing approximately 250 pounds and tripped over a board. He felt severe pain in his low back, hip and right leg. Employee testified that this accident severely increased his low back pain and right leg radiculopathy.

Employee then returned to Dr. Abernathie who noted a large disk fragment at L4-5 which had migrated proximally to the right. Employee underwent a microlaminotomy with discectomy on the right at L4-5 by Dr. Abernathie on May 9, 2002. Employee testified this surgery did not improve his low back pain and he underwent another MRI in late May of 2002. This MRI continued to demonstrate a right paracentral disk protrusion and slight extrusion at L4-5 with some impingement at L5.

Employee was referred to Spine Care Rehabilitation and reported worsening symptoms and complaints in his low back and right shoulder. He was discharged by Dr. Abernathie in August of 2002. At that time, Dr. Abernathie agreed with the permanent restrictions provided by Dr. Carter referable to his neck and right upper extremity.

Dr. Carter's report of July 17, 2002, stated that he felt Employee would never have the ability to do any more than 10 pounds of lifting, pushing or pulling at or above shoulder level with the right arm and that these restrictions would be permanent. These limitations were more restrictive than those imposed following the March 2002 accident.

In his report of August 2, 2002, Dr. Abernathie placed Employee at maximum medical improvement, noting he plateaued in his rehabilitation efforts. Dr. Abernathie placed restrictions of no lifting over 10 pounds with respect to his back and lower extremities. Employee testified that he never returned to work at Christy Mineral or in law enforcement after the May 9, 2002 surgery. Employee testified Dr. Abernathie told him at that time: "You're done".

In addition to his work injuries, Employee testified he began to experience anxiety in 1982 or 1983 and depression in 1990 following the passing of his mother. He treated with Dr. Keim Baird from 1991 through 1993. Dr. Baird noted that his anxiety was related to childhood traumas. Employee testified he was prescribed valium for the anxiety.

Employee later came under the care of Dr. Peggy Weiler. He treated with her from June of 2000 through September 27, 2001. Dr. Weiler noted that Employee had marital problems and that he worried obsessively about his health and cardiac problems. Employee stated he had problems falling asleep as well as problems with restful sleep. He likewise described financial problems, sexual problems, mood swings and prior suicidal thoughts. On cross-examination, Employee testified that the Valium helped him control his anxiety

and that his law enforcement work helped him deal with his depression.

During the time Dr. Weiler treated Employee, she would periodically perform global assessment function tests ("GAF"). In December of 2000, Dr. Weiler diagnosed general anxiety disorder, panic disorder and GAF of 65. On April 17, 2001 the doctor noted a GAF of 65 and on July 10, 2001, just under a month prior to the August 2001 shoulder injury, a GAF of 68.

Employee testified that his father had died of a heart attack when he was 7 years old and that his stepfather died of a heart attack when he was 16 years old and that he had witnessed that event.

Subsequent to the 2 back injuries and low back surgery, Employee's condition deteriorated. Employee testified that his back injury "wiped him out" and when asked if his anxiety and depression was worse after the second back injury in April 2002 he responded "Oh yes".

After the last back injury, he was referred to The Arthur Center in Mexico, Missouri, by a counselor. The records and Employee's testimony reflect that he was depressed; he had difficulty over his finances and worried about his health. He was experiencing problems with his memory and concentration as well as his energy level. He reported that his pain kept him awake at night. In September 2002 he was diagnosed with major depression and his GAF at that time was 48. In addition, a report dated December 18, 2002, indicated that he had symptoms which included crying, a sense of worthlessness, helplessness, sleep disturbance, decreased appetite and anxiety.

Employee also testified that he thought about suicide in 2003. He testified that his wife caught him lying in bed with a 38-caliber gun in his hand which scared her. He testified that it kind of scared him so he got the guns out of the house. He testified that he went as far as having the gun cocked and in his mouth but could not pull the trigger because he knew his wife and daughter would come in and find him.

Employee testified that currently he doesn't sleep well. He wakes up hurting and tries to get back to sleep but that the pain will wake him up again. He also testified that he doesn't have a lot of energy. On a typical day, he watches television, does the dishes and runs errands. He testified that he is able to drive himself and he takes care of his personal hygiene. He does report that he does do some furniture refinishing; however, he can only stand 20 to 30 minutes at a time before he has to sit. Mr. Hemp testified that he was able to sit perhaps 2 hours at the most before having to get up and move around.

Dr. Bruce Harry testified that Employee suffers from major depressive disorder, recurrent and severe as well as a generalized anxiety disorder. The doctor explained that a GAF assessment is an attempt to define a person's ability to function using a scale of 1, which would indicate bed ridden with total care, to 100 which would indicate no problems. He stated that the average person would range between 75-90 on a daily basis. He further stated that a range of 50-55 is significant and results in limitations and at a level of 40 or below a person is generally hospitalized. On cross-examination, the doctor acknowledged that while a GAF of 65 would indicate limitations it would not be enough to disable a person. He also acknowledged Employee was able to cope with and function with his anxiety.

Dr. Harry testified that he believed that Employee had a 5% psychiatric disability pre-existing the work injuries and that Employee had an additional 35% psychiatric disability of the body as a whole, approximately 10% of it related to the injury of August, 2001, and the remaining 25% due to the injuries of March and April of 2002. The doctor did not attempt to assign separate disability ratings with respect to the two 2002 back injuries. The doctor states that Employee continues to need ongoing psychiatric care for the management of his condition.

Additionally, Employee has a cardiac condition. He testified that, in 1999, while working at a fair as a

security guard, he got dizzy. Testing revealed a blockage in his heart and he ultimately had three stents inserted. Employee testified that he would have chest pain, shortness of breath, fatigue and a lot of anxiety. He testified that he continued to do everything that he was told to do but that sometimes he had problems with some of his duties. For example, with climbing he felt that at times he would be short of breath, fatigued and have chest pain. He occasionally had to take nitro glycerin.

Dr. Thomas F. Musich evaluated Employee with respect to his low back, right shoulder and cardiac condition. Dr. Musich noted that Employee continued to complain of pain and numbness in his cervical spine and down his right leg. He also noted that Employee complained of chronic pain and weakness in his right shoulder girdle as well as daily low back pain, aggravated by prolonged positioning, or with repetitive flexion, extension, bending or with lifting over 15 - 20 pounds.

Dr. Musich noted that a decompression test of the right shoulder was positive, that there was impingement of the right shoulder, and that there was pain with flexion, abduction and rotation of the right shoulder. Dr. Musich likewise noted neck pain and paracervical muscle spasm.

In reference to the low back, Dr. Musich noted that lumbar extension was diminished by 30%, right lateral flexion was diminished by 25% and that there was quadriceps weakness and right ankle weakness consistent with a dermatomal pattern of L5.

Dr. Musich opined that Employee had 35% disability of the upper extremity at the level of the right shoulder as a result of the injury of August 8, 2001. In addition, he had 25% disability in the neck for the injury of August 8, 2001. The doctor further opined Employee had a 45% disability of the body as a whole due to the injuries of March and April, 2002. The doctor did not attempt to separate the percentage of disability attributable to each one of the 2002 back injuries. He also noted that Employee continues to suffer from symptomatic coronary artery disease which had required stents in 1999 but did not assign any restrictions or a permanent disability rating for the cardiac condition.

It was Dr. Musich's opinion that Employee is totally and permanently disabled due to a combination of his past and present disabilities as well as his age, limited education, lack of transferable skills, inability to focus and concentrate as well as his need for ongoing narcotic analgesic medication.

Gary Weimholt, a vocational expert, also evaluated Employee. Mr. Weimholt interviewed Employee and attempted to consider jobs that would either be sedentary or possibly some light jobs with no more than 10 pounds of pushing or pulling at above shoulder level of the right arm. (Employee's Exhibit 20, p.23).

Weimholt also took into account the restrictions from Dr. Abernathie of 10 pounds repetitive and 20 pounds occasional lifting, sitting, standing and walking intermittently and nothing above shoulder level or below the knee level. He also noted that, in addition, he then had to take into account the depression and global average functioning (GAF) as opined by Dr. Harry in the mid-40s. This is in the severe range in terms of being able to function occupationally, socially or in school. He also noted that Employee had only a GED, no computer skills, no typing skills and opined this limited Employee in terms of certain sedentary jobs that he could perform. Mr. Weimholt also noted that, due to the limitations, he had to limit climbing jobs and crawling jobs as well as jobs that would have involved kneeling or crouching. Mr. Weimholt also noted that Employee had lost his ability to be in law enforcement and that he was unable to take various tests that require physical dexterity because of his injuries.

After taking all of this into consideration, Mr. Weimholt indicated that he did not believe that Employee could perform a full range of light or sedentary work given his capabilities. In addition, he felt Employee's depression and anxiety limited his ability to function on the job as well as to compete adequately for work in the open labor market.

Mr. Weimholt ultimately concluded that Employee was unable to work or engage in any work in the open labor market. His opinion is that this was based upon a combination of Employee's past and present disabilities.

On cross-examination, Weimholt acknowledged that based simply upon the physical restrictions and limitations imposed by the treating doctors the Employee would be capable of performing light or sedentary duties. (Employee's Exhibit 20, p.33).

I find the Employee to be a credible witness.

### RULINGS OF LAW

Based upon a comprehensive review of the substantial and competent evidence, including Employee's testimony, the expert medical opinions and depositions, the medical records, my personal observations at the hearing, and the relevant statutory and case law, I find the following:

#### ***Nature and extent of SIF liability, PTD or PPD, if any.***

Employee seeks benefits for either permanent total or permanent partial disability from the SIF. Employee previously entered into a voluntary settlement of his claim against the employer/insurer on this August 8, 2001 accident for 20% PPD of the right shoulder, 5% PPD of the BAW with respect to the neck and 5% BAW with respect to psychiatric condition.

The term "total disability" refers to the "inability to return to any employment and not merely [an] inability to return to employment in which the employee was engaged at the time of the accident." Section 287.020.6 RSMo.

The legal standard for permanent total disability is as follows: (1) Whether the person is able to compete in the open job market and (2) Whether an employer, in the usual course of business would employ this person in his present condition with the reasonable expectation he can successfully perform the work. *Forshee v. Landmark Excavating and Equipment*, 165 S.W. 3d 533, 537 (Mo. App. 2005).

There is no evidence to support a claim of PTD in this case as Employee did in fact return to work following the August 2001 accident. No medical evidence has been submitted which would support a finding of permanent total disability with respect to this claim. Consequently it is determined the Employee is not entitled to PTD benefits. The inquiry then turns to whether Employee is entitled to PPD benefits from the SIF.

A "permanent partial disability" refers to a disability that is "permanent in nature and partial in degree." Section 287.190.6 RSMo. With respect to the degree of permanent partial disability, a determination of the specific amount or percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo. App. 1983) (overruled on other grounds).

The Second Injury Fund is a creature of statute, and benefits from the Second Injury Fund are awarded only if Employee proves that under 287.220.1 RSMo., he is entitled to such benefits. Employee has the burden of proving all essential elements of his workers' compensation claim. *Royal v. Advantica Restaurant Group, Inc.*, 194 S.W.3d 371 (Mo. App. 2006). Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a

disability greater than the simple sums of disabilities. 287.220.1 RSMo. 2000. When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990).

In order to receive compensation from the Second Injury Fund for a permanent partial disability, specific requirements as to the pre-existing disability and the disability from the work-related injury must be satisfied. Specifically, the pre-existing permanent partial disability must be of such seriousness as to constitute a hindrance or obstacle to employment (or to obtaining reemployment if the employee has become unemployed following the work-related injury). Section 287.220.1 RSMo. Additionally, the percentage of disability attributable to a pre-existing disability must equal a minimum of fifty weeks of compensation for pre-existing disabilities of the body as a whole (or the equivalent of 12.5%) or be at least 15% of a major extremity. Employee claims cardiovascular disease as a pre-existing disability.

Employee testified that he began experiencing problems with his heart in 1999. He testified that while working a fair in Montgomery City for the Police Department he began to stagger. He testified that he was taken to St. Joseph West and that tests were run on his heart. He underwent a three vessel stent placement in 1999. (Employee's Exhibit 1). No permanent restrictions were placed on Employee by any treating doctor after the stent placements. (Employee's Exhibits 1 and 2). He testified on cross-examination that he did not miss time from work after the healing period associated with the stent placement within his heart.

On cross-examination, Employee testified that he was still able to do some overtime work after the stent placement. He testified that over the next several years he experienced panic attacks which he thought were heart attacks. The medical records do not reveal any evidence of heart attacks subsequent to 1999. (Employee's Exhibit 2). Employee testified on cross-examination that after his heart condition he was still able to work his scheduled shifts for the employer and both police departments as well through 2001.

Dr. Musich, who performed an evaluation at Employee's request, noted that he continued to suffer from symptomatic coronary artery disease which had required stents in 1999. However, the doctor did not impose any restrictions or indicate he felt that translated into any permanent partial disability.

Based upon employee's testimony and the medical evidence, I conclude Employee's pre-existing cardiac condition does not constitute a hindrance or obstacle to employment and does not constitute a disability as contemplated by statute.

Consequently, the SIF has no liability for permanent partial disability.

### CONCLUSION

Employee has failed to meet his burden of proving that he is entitled to either PTD or PPD benefits from the SIF. Employee's claim for benefits from the SIF is denied.

### FINAL AWARD

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Ronald F. Harris  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Jeffrey Buker  
*Director*  
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-048937

Employee: Robert Hemp  
Employer: Christy Minerals Company (Settled)  
Insurer: RTW, Inc. (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 section 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 18, 2008. The award and decision of Administrative Law Judge Ronald Harris, issued November 18, 2008, 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 29th day of July 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

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Issued by DIVISION OF WORKERS' COMPENSATION

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## AWARD

Employee: Robert Hemp

Injury No. 02-048937

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: N/A

Employer: Christy Minerals Company (settled)

Additional Party: Second Injury Fund

Insurer: RTW Inc. (settled)

Hearing Date: August 5, 2008 and September 4, 2008

Checked by: RH:lw

### 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: April 12, 2002
5. State location where accident occurred or occupational disease was contracted: High Hill, Montgomery 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: Carrying a large steel trough and tripped.
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: Back, Depression (BAW)
  - Nature and extent of any permanent disability: Settled 20% BAW (back) and 10% BAW (psychiatric)
15. Compensation paid to-date for temporary disability: \$4930.50
16. Value necessary medical aid paid to date by employer/insurer? N/A
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$365.52 PTD; \$329.42 PPD
20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

(See Award) 33.28 weeks x \$329.42 = \$10,963.10

**TOTAL: \$10,963.10**

22. Future Requirements Awarded: N/A

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mark Moreland

## PRELIMINARIES

On August 5, 2008, Robert Hemp ("Employee") appeared in person and by his attorney Mark Moreland, for a hearing for a final award on this claim. Assistant Attorney General Amber Jordan represented the Second Injury Fund ("SIF"). At the same time this case was heard, evidence was also taken on Employee's three other claims with Injury Numbers of 01-087227; 02-048940 and 02-158934. Separate awards will be issued for those claims. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

### STIPULATIONS

1. The parties agreed the appropriate compensation rate for Permanent Total Disability (PTD) is \$365.52 and the compensation rate for Permanent Partial Disability (PPD) is \$329.42;
2. The Employer/Insurer have paid Temporary Total Disability (TTD) benefits in the amount of \$4930.50 for the period of May 9, 2002 through August 19, 2002.

### ISSUE TO BE RESOLVED

The parties requested the Division to determine:

1. The nature and extent of SIF liability, PTD or PPD, if any.

### EXHIBITS

Employee offered Exhibit's 1 through 21 into evidence. There were no objections to Employee Exhibits 1, 2, 4, 5, 6, 10 or 12 through 21 and those exhibits were admitted into evidence. The SIF objected to Employee's Exhibits 3, 7, 8, 9 and 11 on the grounds those exhibits were not certified as required by 287.140.7 RSMo. The record was left open for thirty (30) days to allow the Employee to submit certified copies of those exhibits. Employee did, within thirty (30) days, submit certified copies of Exhibits 7, 9 and 11 and those exhibits are admitted into evidence. Employee did not submit certified copies of Exhibits 3 or 8. The objections to Employee's Exhibits 3 and 8 are sustained and those exhibits are not admitted into evidence. The SIF offered SIF Exhibit A and with no objection it was admitted into evidence. The record was closed on September 4, 2008.

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Any exhibits containing markings, highlighting, etc. were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled. Only evidence necessary to support this award will be summarized below.

### FINDINGS OF FACT

Employee testified that he is 56 years of age and that he graduated from the 8th grade and dropped out of school in the 9th grade. He testified that he repeated kindergarten or the 1st grade. He testified that school was difficult and he often made C's, Ds and F's.

His first job, after dropping out of school, was at a gas station. His duties included pumping gas as well as changing oil and tires. Thereafter, he obtained his GED and went into the Army. He reports that he served in the Armed Forces between 1971 and 1973. He testified that, during this time, he was trained to string telephone poles but was used as a courier and driver. He also testified that during this time, he used crystal meth, marijuana and LSD. He reports, however, that he ceased his drug use in the 1970s and has now not used illegal drugs in more than 30 years.

Following his honorable discharge from the military, Employee obtained jobs at several feed stores and a bottling plant. He also obtained a job for a time as an assistant manager in a service station and convenience store. He testified that this was in the mid-70s and, at that time, they did not use any computers or cash registers. He testified that he would pump gas, stock shelves and use a calculator.

After that job, he obtained work at Christy Minerals in 1977. He started there as a bagger/operator. This required him to lift large bags, weighing 50 pounds to 100 pounds. These bags contained material that was used in the making of cement. He described this work as heavy and repetitious, requiring a great deal of bending, stooping and lifting.

In 1979, he became a maintenance man and an electrician's assistant. This job required him to run conduit, pull wire, install equipment, repair old equipment and trouble shoot electrical problems. He performed this job between 1979 and 2002. He described this as heavy work, requiring him to bend, stoop, walk, climb and get into awkward positions as well as to frequently lift heavy objects and tools.

During that time, the employer sent the Employee to the Mexico Vocational Technical School where he attended classes on Electricity I and II and also reading blueprints and schematics.

In addition, Employee also trained as a police officer. He reported that he took approximately 120 hours of training at the St. Charles Police Academy in or around 1992 or 1993. Thereafter, in addition to his job at Christy Minerals, he became a reserve deputy at the Montgomery County Sheriff's Department from approximately 1993 to 2002. He testified that, in that capacity, he worked county fairs and performed road patrols. He believes that he worked about 16 hours a month in that capacity.

From 1995 through 2001 he also served as the Chief of Police in High Hill, Missouri. He believes that he worked an average of 30 to 40 hours a month. This required him to patrol, hand out speeding tickets and work various traffic accidents or crime scenes. He gave up his police work in 2002 after his last back injury.

He testified that he has never really worked in an office and has no computer or typing skills but acknowledged that he will send e-mails to his daughter.

Employee sustained his first work-related accident at Christy Minerals on or about August 8, 2001. At that time, he injured his right shoulder while pulling on a commercial wrench as he attempted to tighten a bolt. He reported that he felt something pop in his right shoulder and neck. The employer sent him to Dr. Michael Nogalski and, ultimately, to Dr. Ronald Carter.

Dr. Nogalski described this as a right shoulder rotator cuff strain. Employee was treated conservatively with physical therapy, anti-inflammatory medications and, for a time, light duty work.

Although Dr. Nogalski released him on September 10, 2001, with a resolved right shoulder strain, he complained of continuing burning, pinching and a sharp sticking feeling in his right shoulder and neck. Therefore, he went to Dr. Ronald Carter on March 13, 2002. Dr. Carter also noted complaints of neck pain and a history of intermittent pain and numbness in Employee's right hand, post the shoulder injury. Dr.

Carter diagnosed a possible rotator cuff tear and glenoid labrum tear. Subsequent to that, on March 15, 2002, an MRI ordered by Dr. Carter revealed an inflammatory degenerative process of the acromioclavicular joint with edema and joint fluid as well as subdeltoid bursal inflammation. There was also impingement of the rotator cuff.

On March 18, 2002 Employee suffered an injury to his low back while at work. At that time, he and a co-worker were lifting a when he felt what he described as a snap in low back. He experienced low back pain as well as pain radiating down his right leg. He denied any prior back or shoulder injuries prior to the ones just described.

Employee received treatment for the back injury and was ultimately seen by Dr. Dennis Abernathie. On April 9, 2002 the doctor recommended an MRI and discussed the possibility of epidural steroid injections. During this time, Employee was released to work light duty with restrictions of no bending, stooping or lifting over 25 pounds.

On April 12, 2002 Employee suffered another low back injury as he was walking backwards while carrying a large steel trough, weighing approximately 250 pounds and tripped over a board. He felt severe pain in his low back, hip and right leg. Employee testified that this accident severely increased his low back pain and right leg radiculopathy.

Employee then returned to Dr. Abernathie who noted a large disk fragment at L4-5 which had migrated proximally to the right. Employee underwent a microlaminotomy with discectomy on the right at L4-5 by Dr. Abernathie on May 9, 2002. Employee testified this surgery did not improve his low back pain and he underwent another MRI in late May of 2002. This MRI continued to demonstrate a right paracentral disk protrusion and slight extrusion at L4-5 with some impingement at L5.

Employee was referred to Spine Care Rehabilitation and reported worsening symptoms and complaints in his low back and right shoulder. He was discharged by Dr. Abernathie in August of 2002. At that time, Dr. Abernathie agreed with the permanent restrictions provided by Dr. Carter referable to his neck and right upper extremity.

Dr. Carter's report of July 17, 2002, stated that he felt Employee would never have the ability to do any more than 10 pounds of lifting, pushing or pulling at or above shoulder level with the right arm and that these restrictions would be permanent. These limitations were more restrictive than those imposed following the March 2002 accident.

In his report of August 2, 2002, Dr. Abernathie placed Employee at maximum medical improvement, noting he had plateaued in his rehabilitation efforts. Dr. Abernathie placed restrictions of no lifting over 10 pounds with respect to his back and lower extremities. Employee testified that he never returned to work at Christy Mineral or in law enforcement after the May 9, 2002 surgery. Employee testified Dr. Abernathie told him at that time: "You're done".

In addition to his work injuries, Employee he began to experience anxiety in 1982 or 1983 and depression in 1990 following the passing of his mother. He treated with Dr. Keim Baird from 1991 through 1993. Dr. Baird noted that his anxiety was related to childhood traumas. Employee testified he was prescribed valium for the anxiety.

Employee later came under the care of Dr. Peggy Weiler. He treated with her from June of 2000 through September 27, 2001. Dr. Weiler noted that Employee had marital problems and that he worried obsessively about his health and cardiac problems. Employee stated he had problems falling asleep as well as problems with restful sleep. He likewise described financial problems, sexual problems, mood swings and prior

suicidal thoughts. On cross-examination, Employee testified that the Valium helped him control his anxiety and that his law enforcement work helped him deal with his depression.

During the time Dr. Weiler treated Employee, she would periodically perform global assessment function tests ("GAF"). In December of 2000, Dr. Weiler diagnosed general anxiety disorder, panic disorder and GAF of 65. On April 17, 2001 the doctor noted a GAF of 65 and on July 10, 2001, just under a month prior to the August 2001 shoulder injury, a GAF of 68.

Employee testified that his father had died of a heart attack when he was 7 years old and that his stepfather died of a heart attack when he was 16 years old and that he had witnessed that event.

Subsequent to the 2 back injuries and low back surgery, Employee's condition deteriorated. Employee testified that his back injury "wiped him out" and when asked if his anxiety and depression was worse after the second back injury in April 2002 he responded "Oh yes".

After the last back injury, he was referred to The Arthur Center in Mexico, Missouri, by a counselor. The records and Employee's testimony reflect that he was depressed; he had difficulty over his finances and worried about his health. He was experiencing problems with his memory and concentration as well as his energy level. He reported that his pain kept him awake at night. In September 2002 he was diagnosed with major depression and his GAF at that time was 48. In addition, a report dated December 18, 2002, indicated that he had symptoms which included crying, a sense of worthlessness, helplessness, sleep disturbance, decreased appetite and anxiety.

Employee also testified that he thought about suicide in 2003. He testified that his wife caught him lying in bed with a 38-caliber gun in his hand which scared her. He testified that it kind of scared him so he got the guns out of the house. He testified that he went as far as having the gun cocked and in his mouth but could not pull the trigger because he knew his wife and daughter would come in and find him.

Employee testified that currently he doesn't sleep well. He wakes up hurting and tries to get back to sleep but that the pain will wake him up again. He also testified that he doesn't have a lot of energy. On a typical day, he watches television, does the dishes and runs errands. He testified that he is able to drive himself and he takes care of his personal hygiene. He does report that he does do some furniture refinishing; however, he can only stand 20 to 30 minutes at a time before he has to sit. Mr. Hemp testified that he was able to sit perhaps 2 hours at the most before having to get up and move around.

Dr. Bruce Harry testified that Employee suffers from major depressive disorder, recurrent and severe as well as a generalized anxiety disorder. He testified that he believed that Employee had a 5% psychiatric disability pre-existing the work injuries and that Employee had an additional 35% psychiatric disability of the body as a whole, approximately 10% of it related to the injury of August, 2001, and the remaining 25% due to the injuries of March and April of 2002. The doctor did not attempt to assign separate disability ratings with respect to the two 2002 back injuries. The doctor states that Employee continues to need ongoing psychiatric care for the management of his condition.

Additionally, Employee has a cardiac condition. He testified that, in 1999, while working at a fair as a security guard, he got dizzy. He noted that testing revealed a blockage in his heart and he ultimately had three stents inserted. Employee testified that he would have chest pain, shortness of breath, fatigue and a lot of anxiety. He testified that he continued to do everything that he was told to do but that sometimes he had problems with some of his duties. For example, with climbing he felt that at times he would be short of breath, fatigued and have chest pain. He occasionally had to take nitro glycerin.

Dr. Thomas F. Musich evaluated Employee with respect to his low back, right shoulder and cardiac condition. Dr. Musich noted that Employee continued to complain of pain and numbness in his cervical

spine and down his right leg. He also noted that Employee complained of chronic pain and weakness in his right shoulder girdle as well as daily low back pain, aggravated by prolonged positioning, or with repetitive flexion, extension, bending or with lifting over 15 - 20 pounds.

Dr. Musich noted that a decompression test of the right shoulder was positive, that there was impingement of the right shoulder, and that there was pain with flexion, abduction and rotation of the right shoulder. Dr. Musich likewise noted neck pain and paracervical muscle spasm.

In reference to the low back, Dr. Musich noted that lumbar extension was diminished by 30%, right lateral flexion was diminished by 25% and that there was quadriceps weakness and right ankle weakness consistent with a dermatomal pattern of L5.

Dr. Musich opined that Employee had 35% disability of the upper extremity at the level of the right shoulder as a result of the injury of August 8, 2001. In addition, he had 25% disability in the neck for the injury of August 8, 2001. The doctor further opined Employee had a 45% disability of the body as a whole due to the injuries of March and April, 2002. The doctor did not attempt to separate the percentage of disability attributable to each one of the 2002 back injuries. He also noted that Employee continues to suffer from symptomatic coronary artery disease which had required stents in 1999 but did not assign any restrictions or assign a permanent disability rating for the cardiac condition.

It was Dr. Musich's opinion that Employee is totally and permanently disabled due to a combination of his past and present disabilities as well as his age, limited education, lack of transferable skills, inability to focus and concentrate as well as his need for ongoing narcotic analgesic medication.

Gary Weimholt, a vocational expert, also evaluated Employee. Mr. Weimholt interviewed Employee and attempted to consider jobs that would either be sedentary or possibly some light jobs with no more than 10 pounds of pushing or pulling at above shoulder level of the right arm. (Employee's Exhibit 20, p.23).

Weimholt also took into account the restrictions from Dr. Abernathie of 10 pounds repetitive and 20 pounds occasional lifting, sitting, standing and walking intermittently and nothing above shoulder level or below the knee level. He also noted that, in addition, he then had to take into account the depression and global average functioning (GAF) as opined by Dr. Harry in the mid-40s. This is in the severe range in terms of being able to function occupationally, socially or in school. He had to take that into account and, in addition, noted that he had only a GED, no computer skills, no typing skills and opined this limited Employee in terms of certain sedentary jobs that he could perform. Mr. Weimholt also noted that, due to the limitations, he had to limit climbing jobs and crawling jobs as well as jobs that would have involved kneeling or crouching. Mr. Weimholt also noted that Employee had lost his ability to be in law enforcement and that he was unable to take various tests that require physical dexterity because of his injuries.

After taking all of this into consideration, Mr. Weimholt indicated that he did not believe that Employee could perform a full range of light or sedentary work given his capabilities. In addition, he felt Employee's depression and anxiety limited his ability to function on the job as well as to compete adequately for work in the open labor market.

Mr. Weimholt ultimately concluded that Employee was unable to work or engage in any work in the open labor market. His opinion is that this was based upon a combination of Employee's past and present disabilities.

On cross-examination, Weimholt acknowledged that based simply upon the physical restrictions and limitations imposed by the treating doctors the Employee would be capable of performing light or sedentary duties. (Employee's Exhibit 20, p.33).

I find the Employee to be a credible witness.

## RULINGS OF LAW

Based upon a comprehensive review of the substantial and competent evidence, including Employee's testimony, the expert medical opinions and depositions, the medical records, my personal observations at the hearing, and the relevant statutory and case law, I find the following:

### ***Nature and extent of SIF liability, PTD or PPD, if any.***

Employee seeks benefits for either permanent total or permanent partial disability from the SIF. Employee previously entered into a voluntary settlement of his claim against the employer/insurer on this April 12, 2002 accident for 20% PPD of the body as a whole referable to the back and 10% PPD of the body as a whole referable to his psychiatric condition. Employee asserts as the basis of his claim for PTD benefits against the SIF pre-existing cardiovascular disease; right shoulder, low back and psychiatric conditions.

The term "total disability" refers to the "inability to return to any employment and not merely [an] inability to return to employment in which the employee was engaged at the time of the accident." Section 287.020.6 RSMo.

The legal standard for permanent total disability is as follows: (1) Whether the person is able to compete in the open job market and (2) Whether an employer, in the usual course of business would employ this person in his present condition with the reasonable expectation he can successfully perform the work. *Forshee v. Landmark Excavating and Equipment*, 165 S.W. 3d 533, 537 (Mo. App. 2005). The employee has the burden to prove all essential elements of his claim. *Royal v. Advantica Restaurant Group, Inc.*, 194 S.W.3d 371 (Mo. App. 2006).

In support of his claim for PTD benefits Employee relies on the opinions of Dr. Musich and Mr. Weimholdt, a vocational specialist. With respect to this injury, Dr. Musich noted diminishment in lumbar extension and right lateral flexion as well as weakness in the quadriceps and right ankle. In his opinion with respect to the PPD from this injury, the doctor did not separate the prior back injury from March 2002 from this injury in April 2002. Instead the doctor combined them together and opined Employee had a 45% PPD of the BAW with respect to the low back as a result of the March and April 2002 accidents.

Dr. Musich also evaluated Employee's pre-existing disabilities with respect to the right shoulder and cardiac condition. He opined Employee had a 35% PPD of the right shoulder and 25% PPD of the body as a whole with respect to the neck arising from an August 8, 2001 work related accident. The doctor did not assign a disability with respect to the cardiac condition.

Dr. Musich then went on to opine the Employee was permanently and totally disabled due to a combination of past and present disabilities.

Mr. Weimholt then evaluated the Employee from the perspective of his employability in the open labor market. Mr. Weimholt took into consideration the restrictions imposed by Dr. Abernathie; that Employee's education was limited to a GED; he had no computer skills to speak of and that he had a GAF in the mid 40's which would severely impact his ability to function occupationally. Mr. Weimholt concluded that as a result of the combination of his physical limitations when combined with the depression and anxiety the Employee

was not employable in the open labor market.

However, upon cross-examination Mr. Weimholt acknowledged that based simply upon the physical restrictions and limitations imposed by the treating doctors the Employee would be capable of performing light or sedentary duties. Clearly, Mr. Weimholdt felt the anxiety and depression represented a significant component of the Employee's inability to compete in the open labor market.

Employee's testimony and the evidence reveal that although he admittedly experienced some unpleasant and traumatic events at various times in his life, that prior to this work injury in 2002 any anxiety or depression he might have had did not constitute a disability.

Employee testified that prior to the work injuries the medication and his law enforcement work helped him to cope. In fact Employee testified that up to this accident the anxiety and depression were not a problem. Neither the anxiety nor depression caused him to miss work or impacted his ability to perform his duties at work. In fact Dr. Weiler's office notes from July 10, 2001, less than 30 days prior to the first work injury in August of 2001 indicated Employee had a GAF of 68.

Dr. Harry, a psychiatrist retained by the Employee, diagnosed Employee as having a major depressive disorder with a generalized anxiety disorder. He explained that a GAF assessment is an attempt to define a person's ability to function using a scale of 1 to 100. He further testified that at a GAF level of 40 or below the person is generally hospitalized and a 50-55 level is significant and results in limitations. On cross-examination he acknowledged that while a GAF of 65 would indicate limitations it would not be enough to disable a person. The doctor testified that employee's last GAF prior to the April 2002 accident of 68 would not have disabled him. That is consistent with the employee's testimony that he was doing fine and that neither the anxiety nor the depression created a hindrance or obstacle to his employment.

Employee testified that following the May 9, 2002 surgery the doctor advised the employee he was "done" and that the back surgery "wiped him out". The evidence shows all the GAF's prior to September 2002 were in the 65-68 range which Dr. Harry admitted would not be disabling. It wasn't until September 2002 when the Employee was diagnosed with a GAF of 48 as well as being diagnosed with major depression. It was in 2003 when employee's wife found him lying in bed with a pistol in his mouth.

The instant case poses a similar situation as a case decided recently by the Missouri Court of Appeals. See *Garrett v. Treasurer of the State of Missouri*, 215 S.W.3d 244 (Mo. App. 2007). In *Garrett*, the Court noted that while the employee had pre-existing PTSD it was not severe or debilitating prior to the work related accident. The competent and substantial evidence in the instant case, including the Employee's testimony and the testimony of the experts, leads to the conclusion Employee's anxiety and depression, which existed at the time of the accident occurring April 12, 2002, subsequently blossomed into a disability which did not exist as of the date of the accident. The SIF is not liable for post-accident progression of pre-existing conditions. *Garrett* at 250 citing *Lammert v. Vess Beverages, Inc.*, 968 S.W.2d 720, 725 (Mo. App. 1998).

Consequently, Employee's claim for PTD benefits against the SIF is denied.

The inquiry then turns to whether Employee is entitled to PPD benefits from the SIF.

A "permanent partial disability" refers to a disability that is "permanent in nature and partial in degree." Section 287.190.6 RSMo. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo. App. 1983) (overruled on other grounds).

The Second Injury Fund is a creature of statute, and benefits from the Second Injury Fund are

awarded only if Employee proves that under 287.220.1 RSMo. he is entitled to such benefits. Employee has the burden of proving all essential elements of his workers' compensation claim. *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793 (Mo. App. S.D. 1992). Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a disability greater than the simple sums of disabilities. 287.220.1 RSMo. 2000. When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990).

In order to receive compensation from the Second Injury Fund for a permanent partial disability, specific requirements as to the pre-existing disability and the disability from the work-related injury must be satisfied. Specifically, the pre-existing permanent partial disability must be of such seriousness as to constitute a hindrance or obstacle to employment (or to obtaining reemployment if the employee has become unemployed following the work-related injury). Section 287.220.1 RSMo. Additionally, the percentage of disability attributable to a pre-existing disability must equal a minimum of fifty weeks of compensation for pre-existing disabilities of the body as a whole (or the equivalent of 12.5%) or be at least 15% of a major extremity.

Based upon the restrictions and limitations noted in the medical records, the employee's testimony and taking into consideration the expert opinions, I find the employee did have a pre-existing 20% permanent partial disability of the right shoulder at the time of the April 12, 2002 accident. I further find the pre-existing disability combines with the employee's 30% permanent partial disability of the body as a whole (20% referable to the back and 10% referable to the psychiatric condition) arising from the April 12, 2002 work related accident to create a greater disability than the simple sum of the disabilities. A loading factor of 20% shall be applied in recognition of the enhanced overall disability.

The SIF is liable for 33.28 weeks of PPD benefits at the agreed upon rate of \$329.42 for a total amount of \$10,963.10.

### CONCLUSION

Employee has failed to meet his burden of proving that he is entitled to PTD benefits from the SIF. Employee has met his burden of proving entitlement to compensation from the SIF for 33.28 weeks of compensation for PPD for the enhanced disability upon combination of his pre-existing and work related disabilities. The SIF shall pay Employee PPD benefits in the amount of \$10,963.10.

Employee's attorney requests and is awarded a fee of 20% of the benefits awarded herein.

### FINAL AWARD

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Ronald Harris  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffrey Buker  
*Director*  
*Division of Workers' Compensation*

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION \_\_\_\_\_

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

Injury No.: 02-048940

Employee: Robert Hemp  
Employer: Christy Minerals Company (Settled)  
Insurer: RTW, Inc. (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 section 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 18, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Ronald Harris, issued November 18, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29th day of July 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

**AWARD**

Employee: Robert Hemp

Injury No. 02-048940

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: N/A

Employer: Christy Minerals Company (Settled)

Additional Party: Second Injury Fund

Insurer: RTW Inc. (Settled)

Hearing Date: August 5, 2008 and September 4, 2008

Checked by: RH:lw

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No additional benefits awarded.
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 18, 2002
5. State location where accident occurred or occupational disease was contracted: High Hill, Montgomery 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: Picking up a 350 pound motor
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: Back; Depression (BAW)
14. Nature and extent of any permanent disability: Settled 5% BAW (Back)
15. Compensation paid to-date for temporary disability: \$493.50
16. Value necessary medical aid paid to date by employer/insurer? \$14,289.88
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$365.52 PTD; \$329.42 PPD
20. Method wages computation: Stipulation

#### **COMPENSATION PAYABLE**

21. Amount of compensation payable: None

**TOTAL: None**

22. Future Requirements Awarded: N/A

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

#### PRELIMINARIES

On August 5, 2008, Robert Hemp ("Employee") appeared in person and by his attorney Mark Moreland, for a hearing for a final award on this claim. Assistant Attorney General Amber Jordan represented the Second Injury Fund ("SIF"). At the same time this case was heard, evidence was also taken on Employee's three

other claims with Injury Numbers of 01-087227; 02-048937 and 02-158934. Separate awards will be issued for those claims. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

## STIPULATIONS

1. The parties agreed the appropriate compensation rate for Permanent Total Disability (PTD) is \$365.52 and the compensation rate for Permanent Partial Disability (PPD) is \$329.42;
2. The Employer/Insurer have paid Temporary Total Disability (TTD) benefits in the amount of \$4930.50 for the period of May 9, 2002 through August 19, 2002.

## ISSUE TO BE RESOLVED

The parties requested the Division to determine:

1. The nature and extent of SIF liability, PTD or PPD, if any.

## EXHIBITS

Employee offered Exhibits 1 through 21 into evidence. There were no objections to Employee Exhibits 1, 2, 4, 5, 6, 10 or 12 through 21 and those exhibits were admitted into evidence. The SIF objected to Employee's Exhibits 3, 7, 8, 9 and 11 on the grounds those exhibits were not certified as required by 287.140.7 RSMo. The record was left open for thirty (30) days to allow the Employee to submit certified copies of those exhibits. Employee did, within thirty (30) days, submit certified copies of Exhibits 7, 9 and 11 and those exhibits are admitted into evidence. Employee did not submit certified copies of Exhibits 3 or 8. The objections to Employee's Exhibits 3 and 8 are sustained and those exhibits are not admitted into evidence. The SIF offered SIF Exhibit A and with no objection it was admitted into evidence. The record was closed on September 4, 2008.

In the interest of avoiding duplication, the above exhibits have been admitted into evidence with respect to all of the four cases noted earlier.

Any exhibits containing markings, highlighting, etc. were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled. Only evidence necessary to support this award will be summarized below.

## FINDINGS OF FACT

Employee testified that he is 56 years of age and that he graduated from the 8th grade and dropped out of school in the 9th grade. He testified that he repeated kindergarten or the 1st grade. He testified that school was difficult and he often made C's, Ds and F's.

His first job, after dropping out of school, was at a gas station. His duties included pumping gas as well as changing oil and tires. Thereafter, he obtained his GED and went into the Army. He reports that he served in the Armed Forces between 1971 and 1973. He testified that, during this time, he was trained to string telephone poles but was used as a courier and driver. He also testified that during this time, he used crystal meth, marijuana and LSD. He reports, however, that he ceased his drug use in the 1970s and has now not used illegal drugs in more than 30 years.

Following his honorable discharge from the military, Employee obtained jobs at several feed stores and a bottling plant. He also obtained a job for a time as an assistant manager in a service station and convenience store. He testified that this was in the mid-70s and, at that time, they did not use any computers or cash registers. He testified that he would pump gas, stock shelves and use a calculator.

After that job, he obtained work at Christy Minerals in 1977. He started there as a bagger/operator. This required him to lift large bags, weighing 50 pounds to 100 pounds. These bags contained material that was used in the making of cement. He described this work as heavy and repetitious, requiring a great deal of bending, stooping and lifting.

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During that time, the employer sent the Employee to the Mexico Vocational Technical School where he attended classes on Electricity I and II and also reading blueprints and schematics.

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From 1995 through 2001 he also served as the Chief of Police in High Hill, Missouri. He believes that he worked an average of 30 to 40 hours a month. This required him to patrol, hand out speeding tickets and work various traffic accidents or crime scenes. He gave up his police work in 2002 after his last back injury.

He testified that he has never really worked in an office and has no computer or typing skills but acknowledged that he will send e-mails to his daughter.

Employee sustained his first work-related accident at Christy Minerals on or about August 8, 2001. At that time, he injured his right shoulder while pulling on a commercial wrench as he attempted to tighten a bolt. He reported that he felt something pop in his right shoulder and neck. The employer sent him to Dr. Michael Nogalski and, ultimately, to Dr. Ronald Carter.

Dr. Nogalski described this as a right shoulder rotator cuff strain. Employee was treated conservatively with physical therapy, anti-inflammatory medications and, for a time, light duty work.

Although Dr. Nogalski released him on September 10, 2001, with a resolved right shoulder strain, he complained of continuing burning, pinching and a sharp sticking feeling in his right shoulder and neck. Therefore, he went to Dr. Ronald Carter on March 13, 2002. Dr. Carter also noted complaints of neck pain and a history of intermittent pain and numbness in Employee's right hand, post the shoulder injury. Dr. Carter diagnosed a possible rotator cuff tear and glenoid labrum tear. Subsequent to that, on March 15, 2002, an MRI ordered by Dr. Carter revealed an inflammatory degenerative process of the acromioclavicular joint with edema and joint fluid as well as subdeltoid bursal inflammation. There was also impingement of the rotator cuff.

On March 18, 2002 Employee suffered an injury to his low back while at work. At that time, he and a co-worker were lifting a motor when he felt what he described as a snap in low back. He experienced low back pain as well as pain radiating down his right leg. He denied any prior back or shoulder injuries prior to the ones just described.

Employee received treatment for the back injury and was ultimately seen by Dr. Dennis Abernathie. On April 9, 2002 the doctor recommended an MRI and discussed the possibility of epidural steroid injections. During this time, Employee was released to work light duty with restrictions of no bending, stooping or lifting over 25 pounds.

On April 12, 2002 Employee suffered another low back injury as he was walking backwards while carrying a large steel trough, weighing approximately 250 pounds and tripped over a board. He felt severe pain in his low back, hip and right leg. Employee testified that this accident severely increased his low back pain and right leg radiculopathy.

Employee then returned to Dr. Abernathie who noted a large disk fragment at L4-5 which had migrated proximally to the right. Employee underwent a microlaminotomy with discectomy on the right at L4-5 by Dr. Abernathie on May 9, 2002. Employee testified this surgery did not improve his low back pain and he underwent another MRI in late May of 2002. This MRI continued to demonstrate a right paracentral disk protrusion and slight extrusion at L4-5 with some impingement at L5.

Employee was referred to Spine Care Rehabilitation and reported worsening symptoms and complaints in his low back and right shoulder. He was discharged by Dr. Abernathie in August of 2002. At that time, Dr. Abernathie agreed with the permanent restrictions provided by Dr. Carter referable to his neck and right upper extremity.

Dr. Carter's report of July 17, 2002, stated that he felt Employee would never have the ability to do any more than 10 pounds of lifting, pushing or pulling at or above shoulder level with the right arm and that these restrictions would be permanent. These limitations were more restrictive than those imposed following the March 2002 accident.

In his report of August 2, 2002, Dr. Abernathie placed Employee at maximum medical improvement, noting he plateaued in his rehabilitation efforts. Dr. Abernathie placed restrictions of no lifting over 10 pounds with respect to his back and lower extremities. Employee testified that he never returned to work at Christy Mineral or in law enforcement after the May 9, 2002 surgery. Employee testified Dr. Abernathie told him at that time: "You're done".

In addition to his work injuries, Employee testified he began to experience anxiety in 1982 or 1983 and depression in 1990 following the passing of his mother. He treated with Dr. Keim Baird from 1991 through 1993. Dr. Baird noted that his anxiety was related to childhood traumas. Employee testified he was prescribed valium for the anxiety.

Employee later came under the care of Dr. Peggy Weiler. He treated with her from June of 2000 through September 27, 2001. Dr. Weiler noted that Employee had marital problems and that he worried obsessively about his health and cardiac problems. Employee stated he had problems falling asleep as well as problems with restful sleep. He likewise described financial

problems, sexual problems, mood swings and prior suicidal thoughts. On cross-examination, Employee testified that the Valium helped him control his anxiety and that his law enforcement work helped him deal with his depression.

During the time Dr. Weiler treated Employee, she would periodically perform global assessment function tests ("GAF"). In December of 2000, Dr. Weiler diagnosed general anxiety disorder, panic disorder and GAF of 65. On April 17, 2001 the doctor noted a GAF of 65 and on July 10, 2001, just under a month prior to the August 2001 shoulder injury, a GAF of 68.

Employee testified that his father had died of a heart attack when he was 7 years old and that his stepfather died of a heart attack when he was 16 years old and that he had witnessed that event.

Subsequent to the 2 back injuries and low back surgery, Employee's condition deteriorated. Employee testified that his back injury "wiped him out" and when asked if his anxiety and depression was worse after the second back injury in April 2002 he responded "Oh yes".

After the last back injury, he was referred to The Arthur Center in Mexico, Missouri, by a counselor. The records and Employee's testimony reflect that he was depressed, he had difficulty over his finances and worried about his health. He was experiencing problems with his memory and concentration as well as his energy level. He reported that his pain kept him awake at night. In September 2002 he was diagnosed with major depression and his GAF at that time was 48. In addition, a report dated December 18, 2002, indicated that he had symptoms which included crying, a sense of worthlessness, helplessness, sleep disturbance, decreased appetite and anxiety.

Employee also testified that he thought about suicide in 2003. He testified that his wife caught him lying in bed with a 38-caliber gun in his hand which scared her. He testified that it kind of scared him so he got the guns out of the house. He testified that he went as far as having the gun cocked and in his mouth but could not pull the trigger because he knew his wife and daughter would come in and find him.

Employee testified that currently he doesn't sleep well. He wakes up hurting and tries to get back to sleep but that the pain will wake him up again. He also testified that he doesn't have a lot of energy. On a typical day, he watches television, does the dishes and runs errands. He testified that he is able to drive himself and he takes care of his personal hygiene. He does report that he does do some furniture refinishing, however, he can only stand 20 to 30 minutes at a time before he has to sit. Mr. Hemp testified that he was able to sit perhaps 2 hours at the most before having to get up and move around.

Dr. Bruce Harry testified that Employee suffers from major depressive disorder, recurrent and severe as well as a generalized anxiety disorder. The doctor explained that a GAF assessment is an attempt to define a person's ability to function using a scale of 1, which would indicate bed ridden with total care, to 100 which would indicate no problems. He stated that the average person would range between 75-90 on a daily basis. He further stated that a range of 50-55 is significant and results in limitations and at a level of 40 or below a person is generally hospitalized. On cross-examination, the doctor acknowledged that while a GAF of 65 would indicate limitations it would not be enough to disable a person. He also acknowledged Employee was able to cope with and function with his anxiety.

He testified that he believed that Employee had a 5% psychiatric disability pre-existing the work injuries and that Employee had an additional 35% psychiatric disability of the body as a whole, approximately 10% of it related to the injury of August, 2001, and the remaining 25% due to the injuries of March and April of 2002. The doctor did not attempt to assign separate disability ratings with respect to the two 2002 back injuries. The doctor states that Employee continues to need ongoing psychiatric care for the management of his condition.

Additionally, Employee has a cardiac condition. He testified that, in 1999, while working at a fair as a security guard, he got dizzy. Testing revealed a blockage in his heart and he ultimately had three stents inserted. Employee testified that he would have chest pain, shortness of breath, fatigue and a lot of anxiety. He testified that he continued to do everything that he was told to do but that sometimes he had problems with some of his duties. For example, with climbing he felt that at times he would be short of breath, fatigued and have chest pain. He occasionally had to take nitro glycerin.

Dr. Thomas F. Musich evaluated Employee with respect to his low back, right shoulder and cardiac condition. Dr. Musich noted that Employee continued to complain of pain and numbness in his cervical spine and down his right leg. He also noted that Employee complained of chronic pain and weakness in his right shoulder girdle as well as daily low back pain, aggravated by prolonged positioning, or with repetitive flexion, extension, bending or with lifting over 15 - 20 pounds.

Dr. Musich noted that a decompression test of the right shoulder was positive, that there was impingement of the right shoulder, and that there was pain with flexion, abduction and rotation of the right shoulder. Dr. Musich likewise noted neck pain and paracervical muscle spasm.

In reference to the low back, Dr. Musich noted that lumbar extension was diminished by 30%, right lateral flexion was diminished by 25% and that there was quadriceps weakness and right ankle weakness consistent with a dermatomal pattern of L5.

Dr. Musich opined that Employee had 35% disability of the upper extremity at the level of the right shoulder as a result of the injury of August 8, 2001. In addition, he had 25% disability in the neck for the injury of August 8, 2001. The doctor further opined Employee had a 45% disability of the body as a whole due to the injuries of March and April, 2002. The doctor did not attempt to separate the percentage of disability attributable to each one of the 2002 back injuries. He also noted that Employee continues to suffer from symptomatic coronary artery disease which had required stents in 1999 but did not assign any restrictions or a permanent disability rating for the cardiac condition.

It was Dr. Musich's opinion that Employee is totally and permanently disabled due to a combination of his past and present disabilities as well as his age, limited education, lack of transferable skills, inability to focus and concentrate as well as his need for ongoing narcotic analgesic medication.

Gary Weimholt, a vocational expert, also evaluated Employee. Mr. Weimholt interviewed Employee and attempted to consider jobs that would either be sedentary or possibly some light jobs with no more than 10 pounds of pushing or pulling at above shoulder level of the right arm. (Employee's Exhibit 20, p.23).

Weimholt also took into account the restrictions from Dr. Abernathie of 10 pounds repetitive and 20 pounds occasional lifting, sitting, standing and walking intermittently and nothing above shoulder level or below the knee level. He also noted that, in addition, he then had to take into account the depression and global average functioning (GAF) as opined by Dr. Harry in the mid-40s. This is in the severe range in terms of being able to function occupationally, socially or in school. He also noted that Employee had only a GED, no computer skills, no typing skills and opined this limited Employee in terms of certain sedentary jobs that he could perform. Mr. Weimholt also noted that, due to the limitations, he had to limit climbing jobs and crawling jobs as well as jobs that would have involved kneeling or crouching. Mr. Weimholt also noted that Employee had lost his ability to be in law enforcement and that he was unable to take various tests that require physical dexterity because of his injuries.

After taking all of this into consideration, Mr. Weimholt indicated that he did not believe that Employee could perform a full range of light or sedentary work given his capabilities. In addition, he felt Employee's depression and anxiety limited his ability to function on the job as well as to compete adequately for work in

the open labor market.

Mr. Weimholt ultimately concluded that Employee was unable to work or engage in any work in the open labor market. His opinion is that this was based upon a combination of Employee's past and present disabilities.

On cross-examination, Weimholt acknowledged that based simply upon the physical restrictions and limitations imposed by the treating doctors the Employee would be capable of performing light or sedentary duties. (Employee's Exhibit 20, p.33).

I find the Employee to be a credible witness.

### RULINGS OF LAW

Based upon a comprehensive review of the substantial and competent evidence, including Employee's testimony, the expert medical opinions and depositions, the medical records, my personal observations at the hearing, and the relevant statutory and case law, I find the following:

#### ***Nature and extent of SIF liability, PTD or PPD, if any.***

Employee seeks benefits for either permanent total or permanent partial disability from the SIF. Employee previously entered into a voluntary settlement of his claim against the employer/insurer on this March 18, 2002 accident for 5% PPD of the BAW with respect to the low back. Employee alleges cardiovascular disease and a 2001 right shoulder injury as pre-existing disabilities.

The term "total disability" refers to the "inability to return to any employment and not merely [an] inability to return to employment in which the employee was engaged at the time of the accident." Section 287.020.6 RSMo.

The legal standard for permanent total disability is as follows: (1) Whether the person is able to compete in the open job market and (2) Whether an employer, in the usual course of business would employ this person in his present condition with the reasonable expectation he can successfully perform the work. *Forshee v. Landmark Excavating and Equipment*, 165 S.W. 3d 533, 537 (Mo. App. 2005).

Employee has the burden of proving all essential elements of his workers' compensation claim. *Royal v. Advantica Restaurant Group, Inc.*, 194 S.W.3d 371 (Mo. App. 2006).

Employee argues he is entitled to PTD against the SIF when one combines his pre-existing disabilities pertaining to his cardiac condition and prior right shoulder injury and the disability from this March 18, 2002 injury. As noted earlier both Dr. Volarich and Mr. Weimholt opine Employee is permanently and totally disabled but neither offers an opinion that it was the March 18, 2002 injury in combination with Employee's preexisting disabilities that would render Employee permanently and totally disabled. While not bound by the terms of the voluntary compromise settlement agreement between the Employee and the Employer/Insurer, when one considers that claim against the Employer/Insurer settled for 5% PPD of the body as a whole along with no medical or vocational opinion concluding permanent total disability as the result of this injury with any pre-existing disabilities along with the fact Employee did return to work following this accident, the Employee has clearly failed to meet his burden of proving he is permanently and totally disabled. The claim for PTD benefits must be and is denied.

The inquiry now turns to whether Employee is entitled to PPD benefits from the SIF.

A “permanent partial disability” refers to a disability that is “permanent in nature and partial in degree.” Section 287.190.6 RSMo. With respect to the degree of permanent partial disability, a determination of the specific amount or percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo. App. 1983) (overruled on other grounds).

The Second Injury Fund is a creature of statute, and benefits from the Second Injury Fund are awarded only if Employee proves that under 287.220.1 RSMo., he is entitled to such benefits. Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a disability greater than the simple sums of disabilities. 287.220.1 RSMo. 2000. When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990).

In order to receive compensation from the Second Injury Fund for a permanent partial disability, specific requirements as to the pre-existing disability and the disability from the work-related injury must be satisfied. Specifically, the pre-existing permanent partial disability must be of such seriousness as to constitute a hindrance or obstacle to employment (or to obtaining reemployment if the employee has become unemployed following the work-related injury). Section [287.220.1](#) RSMo. Additionally, the percentage of disability attributable to both the pre-existing disability and the disability from the work related injury must each equal a minimum of fifty weeks of compensation of the body as a whole (or the equivalent of 12.5%) or be at least 15% of a major extremity.

As noted earlier, the Employee and the Employer/Insurer entered into a voluntary agreement to settle for 5% PPD of the body as a whole with respect to the March 18, 2002 injury. While not bound by that percentage of disability, there is nothing in the evidence to support a conclusion that was not a fair and reasonable representation of the Employee’s disability.

Based upon employee’s testimony and the medical evidence, I conclude Employee has failed to prove that his permanent disability arising from the March 18, 2002 accident constitutes a disability of such magnitude as to meet the minimum 12.5% PPD threshold required by statute.

Consequently, the SIF has no liability for permanent partial disability.

### CONCLUSION

Employee has failed to meet his burden of proving that he is entitled to either PTD or PPD benefits from the SIF. Employee’s claim for benefits from the SIF is denied.

### FINAL AWARD

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Ronald Harris

*Administrative Law Judge  
Division of Workers' Compensation*

A true copy: Attest:

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Jeffrey Buker  
*Director*  
*Division of Workers' Compensation*

Official notice is taken of the compromise settlement between the Employee and the Employer/Insurer contained in the Division of Workers' Compensation file.

Official notice is taken of the compromise settlement between the Employee and Employer/Insurer contained in the Division of Workers' Compensation file.

The March 18, 2002 accident was the subject of a workers' compensation claim injury number 02-048940 which was resolved by means of a voluntary settlement between the employee and the employer/insurer for 5% PPD of the BAW re the low back and an award issued regarding liability of the SIF. Official notice is taken of both the compromise settlement and the award contained within the Division of Workers' Compensation file.

The August 8, 2001 accident was the subject of a workers' compensation claim injury number 01-087227 which was resolved by means of a voluntary settlement between the employee and the employer/insurer for 20% PPD of the right shoulder, 5% PPD of the BAW re the neck and 5% BAW re psychiatric condition and an award issued regarding liability of the SIF. Official notice is taken of both the settlement and the award contained within the Division of Workers' Compensation file.

Employee's claim with respect to his alleged pre-existing cardiovascular, low back and psychiatric conditions do not constitute a hindrance or obstacle to employment and do not rise to the level of disability required by statute in order to invoke Second Injury Fund liability.

Official notice is taken of the compromise settlement between the Employee and the Employer/Insurer contained in the Division of Workers' Compensation file.