

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

Injury No.: 07-080543

Employee: Darrell L. Hendrix
Employer: SR Processing Incorporated (Settled)
Insurer: New Hampshire Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Preliminaries

The parties asked the administrative law judge to resolve the issue of Second Injury Fund liability for permanent partial or permanent total disability benefits.

The administrative law judge rendered the following findings and conclusions:

(1) Dr. Volarich's assessment of employee's preexisting disabilities is not credible; (2) none of employee's preexisting disabilities meet the minimum threshold requirements for Second Injury Fund liability; (3) employee was not permanently and totally disabled at the time of trial in a manner that invoked Second Injury Fund liability; (4) even if employee was permanently and totally disabled at the time of trial, the administrative law judge would find that employee's inability to work is due to subsequent deterioration of his preexisting back condition and breathing problems; and (5) the Second Injury Fund has no liability in this case.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in finding employee is not permanently and totally disabled owing to a combination of the work injury and preexisting conditions; (2) in failing to properly analyze the medical evidence; (3) in crediting the Second Injury Fund's vocational expert; (4) in finding employee's preexisting conditions were not hindrances to employment; and (5) in providing a hypothetical opinion regarding subsequent deterioration of employee's back condition and breathing disorder.

Findings of Fact

Primary injury

On May 24, 2007, employee was working for employer when he injured his right shoulder rolling a large roll of cloth. An MRI taken August 24, 2007, revealed an insertional tear of the supraspinatus, full thickness tear with moderate AC hypertrophy, and Type II acromion. On October 12, 2007, employee underwent a right shoulder surgery performed by Dr. Keith Nord. Dr. Nord released employee to return to work on April 18, 2008, with restrictions of no lifting with the right arm greater than 20 pounds forward of the waist, and 10 pounds from waist to chest.

Employee: Darrell L. Hendrix

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Employee continued to experience significant problems with his right shoulder. On October 17, 2008, employer sent employee to be evaluated by Dr. Brian Schafer, who ordered an MRI and recommended injections and anti-inflammatory medications to address employee's ongoing pain complaints. The MRI revealed high-grade partial tear of the anterior leading edge of the supraspinatus tendon at the site of the previous surgery. Dr. Schafer performed an injection, which provided employee with little relief, and recommended employee undergo a platelet-rich plasma injection.

Employer denied the treatment recommended by Dr. Schafer, and instead sent employee to be evaluated by Dr. Mitchell Rotman on July 13, 2009. Dr. Rotman opined that employee had an incomplete healing of his rotator cuff tear, and possibly a re-tear. Dr. Rotman recommended a repeat arthroscopy and re-repair of the shoulder. This surgery was never performed.

Currently, employee suffers from aching pain whenever he moves his right shoulder, and he is unable to do much with his right arm. Employee rates the pain at a six or seven out of ten in intensity. Employee takes over-the-counter pain and anti-inflammatory medications to address the pain. Employee has reduced grip in his right hand, and has problems driving. Employee cannot thread his belt through the belt loops on his pants, and cannot use a hair dryer. Employee has been forced to give up his hobby of bow hunting, because he can't pull the bow back. We find that employee sustained a 40% permanent partial disability of the right shoulder as a result of the primary injury.

Preexisting conditions of ill-being

Employee began having back problems in the late 1980s or early 1990s. Employee's back problems made it more difficult for employee to perform certain job duties for employer, such as unloading trucks. Employee had to lie down in a recliner after finishing his work day to rest his back. Dr. David Volarich diagnosed employee's condition as a chronic thoracic strain injury, which he rated at 20% permanent partial disability of the body as a whole.

Employee has experienced trouble breathing since he was a child. In 2005, doctors diagnosed employee as having one lung smaller than the other. Employee feels as if he is out of breath with any exertion, even walking short distances. Dr. Volarich diagnosed this condition as mild shortness of breath secondary to body habitus, which he rated at 7.5% permanent partial disability of the body as a whole.

Employee has experienced problems with his urethra requiring surgical intervention. Employee underwent four surgeries to address this condition, which leaves employee with a need to use the restroom at least once hourly. Dr. Volarich diagnosed this condition as urethral stenosis, which he declined to rate, deferring to an urologist. Employee has not provided a rating from a urologist.

We are not persuaded by Dr. Volarich's testimony that employee's preexisting breathing problems constituted a permanent partially disabling condition at the time of the primary injury. Nor are we persuaded that employee's preexisting urethral stenosis amounted to a preexisting permanent partial disability at the time of the primary injury. We do find

Employee: Darrell L. Hendrix

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persuasive Dr. Volarich's testimony (and so find) that employee suffered a preexisting 15% permanent partial disability of the body as a whole referable to the thoracic spine at the time of the primary injury, and that this condition constituted a hindrance or obstacle to employment.

Nature and extent of disability

Employee presents the testimony of vocational expert James England, who performed a vocational assessment and opined that employee is permanently and totally disabled owing to a combination of his preexisting problems and the effects of the right shoulder injury. Mr. England opined that employee's need to rest frequently and his inability to use his right arm render him unemployable on the open labor market.

The Second Injury Fund presents the testimony of vocational expert Stephen Dolan, who performed a vocational assessment and opined that employee is not permanently and totally disabled. Mr. Dolan explained that employee is qualified for many unskilled jobs in the area where he lives, and that a stable market exists for these jobs.

After careful consideration, we are not persuaded by Mr. England's testimony that employee is permanently and totally disabled. We find more persuasive the testimony from Mr. Dolan that employee is not permanently and totally disabled.

On the other hand, we find persuasive the testimony from Dr. Volarich that the effects of employee's preexisting thoracic spine condition and the effects of the primary right shoulder injury combine in a synergistic fashion. We find that the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained is equal to 50% permanent partial disability of the body as a whole.

Conclusions of Law

Section 287.220.1 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." That section provides that a preexisting disability must meet certain thresholds before Second Injury Fund liability is triggered.

We have found that employee suffered from a 15% preexisting permanent partial disability of the body as a whole referable to his chronic thoracic spine injury at the time he suffered the compensable work injury, and that employee's primary injury amounts to a 40% permanent partial disability of the right shoulder; both of these conditions meet the applicable thresholds under § 287.220.1. We have credited Dr. Volarich's opinion that the thoracic spine condition constituted a hindrance or obstacle to employment at the time the last injury was sustained. We have also credited Dr. Volarich's testimony that employee's right shoulder injury combines synergistically with the preexisting thoracic spine condition.

Section 287.220.1 provides, in relevant part, as follows: "After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury

Employee: Darrell L. Hendrix

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was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund ...”

We have determined that the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained is equal to 50% permanent partial disability of the body as a whole. Applying the foregoing language, we calculate Second Injury Fund liability as follows: 50% permanent partial disability of the body as a whole (200 weeks) – 15% permanent partial disability of the body as a whole referable to the thoracic spine (60 weeks) – 40% permanent partial disability of the right shoulder (92.8 weeks) = 47.2 weeks.

We conclude that the Second Injury Fund is liable for 47.2 weeks of permanent partial disability benefits at the stipulated rate of \$259.56, for a total of \$12,251.23.

Award

We reverse the award of the administrative law judge. The Second Injury Fund is liable for \$12,251.23 in permanent partial disability benefits.

This award is subject to a lien in favor of James Turnbow, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Gary L. Robbins, issued January 25, 2013, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 12th day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

INTER-OFFICE COMMUNICATIONS

DIVISION OF WORKERS' COMPENSATION

January 22, 2013

Ms. Naomi Pearson
Division of Workers' Compensation
PO Box 58
Jefferson City, Missouri 65102-0058

In Re: Injury Number: 07-080543
 Employee: Darrell L. Hendrix
 Employer: SR Processing Incorporated
 Insurer: New Hampshire Insurance Company
 Additional Party: Second Injury Fund

Dear Ms. Pearson:

I have enclosed a final award in the above referenced workers' compensation case. The Second Injury Fund was not ordered to pay any benefits to the employee.

Sincerely,

Gary L. Robbins
Administrative Law Judge
Cape Girardeau, Missouri

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Darrell L. Hendrix Injury No. 07-080543
Dependents: N/A
Employer: SR Processing Incorporated
Additional Party: Second Injury Fund
Insurer: New Hampshire Insurance Company
Appearances: James M. Turnbow, attorney for employee.
Jennifer Kornblum, attorney for Second Injury Fund.
Hearing Date: October 25, 2012 Checked by: GLR/rm

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? May 24, 2007.
5. State location where accident occurred or occupational disease contracted: Pemiscot 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 happened or occupational disease contracted: The employee was moving large rolls of heavy cloth when he injured his right shoulder.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Right shoulder.
14. Nature and extent of any permanent disability: The employee settled his primary claim with the employer-insurer for 28½% permanent partial disability of the right shoulder.
15. Compensation paid to date for temporary total disability: \$7,527.24.
16. Value necessary medical aid paid to date by employer-insurer: \$25,295.40.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$389.34.
19. Weekly compensation rate: \$259.56 per week for all purposes.
20. Method wages computation: By agreement.
21. Amount of compensation payable: None. See Award.
22. Second Injury Fund liability: None. See Award.
23. Future requirements awarded: None.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On October 25, 2012, the employee, Darrell L. Hendrix, appeared in person and with his attorney, James M. Turnbow for a hearing for a final award. The employer-insurer was not represented at the hearing as they already settled their case with the employee. Assistant Attorney General, Jennifer Kornblum represented the Second Injury Fund. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. SR Processing Incorporated was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by New Hampshire Insurance Company.
2. On May 24, 2007, Darrell L. Hendrix was an employee of SR Processing Incorporated and was working under the Workers' Compensation Act.
3. On May 24, 2007, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$389.34 per week. His rate for all purposes is \$259.56 per week.
7. The employee's injury was medically causally rated to the accident or occupational disease.
8. The employer-insurer paid \$25,295.40 in medical aid.
9. The employer-insurer paid \$7,527.24 in temporary disability benefits.
10. The employee had no claim for previously incurred medical bills.
11. The employee has no claim for mileage or future medical care.
12. The employee had no claim for any temporary disability benefits.
13. The employee has no claim for permanent partial or permanent total disability as to the employer-insurer.
14. The parties agree that the employee reached maximum medical improvement on February 2, 2009.

ISSUE:

1. Liability of the Second Injury Fund for permanent partial or permanent total disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employees Exhibits:

- A. Employee medical records.
- B. Deposition of David T. Volarich, D.O.
- C. Deposition of James M. England, Jr.

The Second Injury Fund Exhibit:

- I. Deposition of J. Stephen Dolan.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

The employee, Darrell L. Hendrix and his wife, Judy D. Hendrix were the only witnesses to personally testify at trial. All other evidence was received in the form of written reports, medical records or deposition testimony.

The employee was born September 17, 1947, and resides in Dyersburg, Tennessee. He was sixty-five years old at the time of the trial. He is married and has two adult children who live on their own. Mrs. Hendrix works full time outside the home. The employee worked for Dyersburg Fabrics from 1967 through 2001 when the plant closed down. After that, he worked for various other fabric companies. He began working for SR Processing in 2002 or 2003, and continued to work there full time until he had shoulder surgery on October 12, 2007. At SR Processing Mr. Hendrix worked at a variety of tasks including cutting, sewing and finishing mattress covers. Part of his job involved unrolling rolls of cloth weighing up to 500 pounds. He was on his feet most of the time, although some of the jobs allowed him to sit periodically. He operated a forklift at times to move the heavy rolls of cloth. The work that the employee performed was heavy physical labor.

On or about May 24, 2007, the employee was working with a large roll of cloth when he felt pain in his shoulder. He continued to work full time from his May 2007 date of injury through October 11, 2007, the day before his shoulder surgery. He has not worked in any capacity since October 2007.

X-rays taken August 24, 2007, showed insertional tear of the supraspinatus on the articular side anterior, full thickness tear with moderate AC hypertrophy and Type II acromion. Dr. Nord recommended pain medication and surgery. Dr. Nord performed right shoulder arthroscopy, rotator cuff repair, subacromial decompression distal clavicle resection and co-planning on October 12, 2007. Mr. Hendrix continued to have pain despite several months of physical therapy.

Dr. Nord placed the employee at maximum medical improvement on April 18, 2008. At that time he was given permanent restrictions of no overhead work, no lifting greater than 20 pounds forward of the waist with the right arm and no lifting greater than 10 pounds waist to chest with the right arm. At present the employee is at maximum medical improvement.

The employee had other medical problems that pre-existed his May 24, 2007 accident. The employee suffers from frequent back pain, urinary tract issues and shortness of breath. These problems have been longstanding in that the employee has dealt with them most of his entire life. He has difficulty walking, driving, lifting heavy objects, and numbness in his right fingers. He is unable to sleep through the night and is tired during the day. His current treatment is pain management in the form of narcotic and non-narcotic medications, muscle relaxants, physical therapy and similar treatments.

Experts

Dr. Schafer saw the employee on October 17, 2008, for an independent medical examination. Mr. Hendrix reported continuing pain from the right shoulder. Dr. Schafer determined that the employee had gotten all the benefit he was going to get from physical therapy, he recommended injections and anti-inflammatories, and ordered an MRI. The December 1, 2008 MRI revealed high-grade partial tear of the anterior leading edge of the supraspinatus tendon at the site of the previous surgery. He treated the employee with an injection but did not recommend additional surgery. On February 2, 2009, Mr. Hendrix reported he had little relief from the injection, and Dr. Schafer recommended a platelet rich plasma injection. This treatment was denied because by the employer-insurer.

Dr. Rotman saw the employee on July 13, 2009, for an independent medical examination. At that time the employee complained of constant right shoulder pain that became more severe when he used his arm. He also reported urinary tract issues which he had been experiencing frequently since 2006. Dr. Rotman determined that Mr. Hendrix had incomplete healing of his rotator cuff tear, possibly a re-tear. He did not recommend any platelet rich plasma injections. His only recommendation would be a repeat arthroscopy and re-repair of the shoulder. He did not feel that the employee was at MMI at that time. The surgery was never done.

Dr. Volarich saw the employee on November 23, 2009, for an independent medical exam. The employee again complained of constant right shoulder pain with frequent popping and weakness. He was also experiencing radiating pain down the right arm. Pain increased with movement of the arm. Dr. Volarich placed the employee at MMI. He felt the employee would need ongoing pain management, but additional surgery was not indicated. Dr. Volarich restricted the employee from all overhead use of the right arm and prolonged use of the arm away from the body, to minimize pushing, pulling and traction maneuvers, to use proper ergonomics of the upper extremities, not to handle weights greater than three pounds with the right arm extended away from the body or overhead, and to handle weight to tolerance with right arm dependent. Dr. Volarich gave additional restrictions referable to the spine, including to rest when needed because of his nighttime shoulder pain and worsening back pain. Dr. Volarich indicated that the

employee might be able to perform some work activities on a limited basis with restrictions. He recommended that he undergo a vocational assessment to see if he could return to work.

Dr. Volarich provided his opinions on rating for both the work accident to the employee's right shoulder and his pre-existing disabilities:

Work accident of May 24, 2007

- 45% permanent partial disability of the right upper extremity at the shoulder.

Pre-existing disabilities

- 7½% permanent partial disability of the body as a whole due to the employee's shortness of breath.
- 7 ½% permanent partial disability of the body as a whole due to gastroesophageal reflux disease.
- Disability of the cardiovascular system was not found as the employee was asymptomatic and not on medications.
- 20% permanent partial disability of the body as a whole due to the employees chronic thoracic strain injury.
- A rating for the urethral stenosis was deferred to a urologist.

Mr. Hendrix saw James England June 9, 2010, and reported medical conditions consistent with his reports to the various doctors. Mr. England noted that the employee had an eighth grade education and obtained his GED in 2001. His primary work skills were learned on the job over the years.

Mr. England reported that prior to May 24, 2007, the employee had been treated for back pain, urinary tract complications and shortness of breath. The employee informed Mr. England that the problems with his back had gotten worse since his work accident. He said that the employee reported that his primary complaints were back pain and shoulder pain. Mr. England reported that it was Dr. Volarich's opinion that the employee could work with his lung problems.

Mr. England reported that the employee's inability to be on his feet for more than a few minutes at a time seems to limit him more to sedentary work, and that the limited use of his right arm further limits his ability to do even entry-level, clerical activities as well as packing and assembly tasks. The employee reported that he still goes hunting even though he reported that he can only stand for about ten minutes before his back begins to hurt and after thirty minutes he has to find some place to sit. Mr. England reported that prior to the employee's accident he worked forty hours a week and his job required him to be on his feet most of the time with bending, squatting, reaching, pushing, pulling, stooping, and handling as common place activities of his work.

Mr. England noted that the employee was taking over the counter medication for his pain problems.

Mr. England opined, "I do not believe that he will likely be able to compete successfully for entry-level employment nor do I believe that he would be able to sustain it in the long run".

Stephen Dolan performed a vocational assessment on November 21, 2011, by record review. Mr. Dolan noted that the employee was able to work many years with his back and urethra difficulties, and that they did not interfere with the employee's ability to perform his job duties. He also noted that Mr. Hendrix had acquired several marketable skills in his many years of work, including operating forklifts and commercial sewing machines, cutting cloth to specific measurements and training, directing, monitoring and scheduling production employees. Given the employee's restrictions, Mr. Dolan found that the employee was qualified for many unskilled jobs in the area of his residence and that a stable market existed for those jobs.

In a follow-up report dated December 5, 2011, Mr. Dolan reported that the employee's vocational limitations stemmed solely from his May 24, 2007 injury, and that he was able to work around his prior physical complaints before that injury. Mr. Dolan also noted that the employee's back and breathing problems were worse since the May 24, 2007 injury, and that affected his ability to be marketable in the workplace. Mr. Dolan opined that, "The erosion of Mr. Hendrix's access to the labor market is the result of his right shoulder injury and his age, not the result of any other physical condition." He worked at a high exertion level job and could not have done it if he had any serious physical restrictions. "Based on Mr. Hendrix's education, work experience, academic skills, work skills, and Dr. Nord's and Dr. Rotman's permanent restrictions, Mr. Hendrix is able to perform employment for which a reasonably stable market exists".

RULINGS OF LAW:

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. **Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute**, 793 S.W.2d 195 (Mo. App. E.D. 1990) overruled on other grounds by **Hampton v. Big Boy Steel Erection**, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

Under RSMo. § 287.190.6, "'permanent partial disability' means a disability that is permanent in nature and partial in degree..." The Claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. **Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund**, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. **Griggs v. A.B. Chance Co.**, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the fact finding body, which is not bound by the medical testimony but may consider all the evidence, including the testimony of the claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. **Fogel song v. Banquet Foods Corp.**, 526 S.W.2d 886, 892 (Mo. App. 1975).

Under RSMo. § 287.020.6, "total disability" is defined as the "inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." The test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the

usual course of business could reasonably be expected to employ claimant in his present physical condition. **Searcy v. McDonnell Douglas Aircraft Co.**, 894 S.W.2d 173 (Mo. App. E.D. 1995) overruled on other grounds by **Hampton v. Big Boy Steel Erection**, 121 S.W.3d 220 (Mo. 2003).

In cases such as this one where the Second Injury Fund is involved, we must also look to RSMo. § 287.220 for the appropriate apportionment of benefits under the statute. In order to recover from the Fund, Claimant must prove a pre-existing permanent partial disability, that existed at the time of the primary injury, and which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment should employee become unemployed. **Messex v. Sachs Electric Co.**, 989 S.W.2d 206 (Mo. App. E.D. 1999) overruled on other grounds by **Hampton v. Big Boy Steel Erection**, 121 S.W.3d 220 (Mo. 2003). Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together.

In the second (permanent partial disability) combination scenario, pursuant to RSMo. § 287.220.1, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked. The pre-existing disability and the subsequent compensable injury each must result in a minimum of 12.5% permanent partial disability of the body as a whole or 15% permanent partial disability of a major extremity. These thresholds are not applicable in permanent total disability cases.

Based on a consideration of all of the evidence in this case, the Court does not find Dr. Volarich's assessment of the employee's pre-existing disabilities to be credible. The evidence is quite clear that the employee, despite whatever problems did not let those problems hinder his ability to do his job. The Court specifically finds that none of the pre-existing disabilities meet the minimum threshold requirements for Second Injury Fund liability. The employee settled his primary injury with the employer-insurer for 28½% permanent partial disability of the right shoulder.

Based on the evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational experts, the Court finds that the employee was not permanently and totally disabled at the time of the trial in a manner that invoked Second Injury Fund liability. Dr. Volarich stated that the employee might be able to perform some work activities on a limited basis but deferred to a vocational expert. Mr. England's testimony seems to support permanent total disability in combination with Second Injury Fund liability. Mr. Dolan's opinion was that the employee was employable. The Court finds the opinions of Mr. Dolan more credible than those of Mr. England.

However, even if the Court found that the employee was permanently and totally disabled at the time of the trial, the Court would find that the employee did not meet his burden of proof to prove that his pre-existing disabilities combined with his primary injury to create permanent total disability and Second Injury Fund liability for permanent total disability. The Court would find

that the employee's inability to work is due the subsequent deterioration of his back condition and breathing problems since his work accident of May 24, 2007. The employee worked at a hard physical job for his entire career and was able to do so regardless of his back or breathing problems.

The Court finds that the Second Injury Fund has no liability in this case.

ATTORNEY'S FEE:

No attorney fees are awarded in this case.

INTEREST:

No interest will accrue in this case.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

CASE SUMMARY			
INJURY NUMBER		ALJ	
07-080543		Gary L. Robbins	
EMPLOYEE		EE'S ATTORNEY	
Darrell L. Hendrix		James M. Turnbow	
EMPLOYER		ER'S ATTORNEY	
SR Processing Incorporated			
INSURER		INS ATTORNEY	
New Hampshire Insurance Company			
SIF		SIF ATTORNEY	
Second Injury Fund		Jennifer Kornblum	
DATE OF INJURY	HEARING DATE	DATE AWARD WRITTEN	TYPE OF AWARD
May 24, 2007	October 25, 2012	January 22, 2013	Final
RULING			
The Court denied SIF liability for PPD or PTD.			
STATEMENT OF FACTS			
The EE injured his right shoulder when moving a roll of cloth.			
POINTS OF INTEREST			
None			
KEY WORDS FOR INDEX TOPICS			
Liability of the SIF for PPD or PTD			