

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

Injury No.: 00-170217

Employee: Clinton Hulsey
Employer: Kirberg Roofing
Insurer: TIG Premier Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: October 19, 2000

Place and County of Accident: Jefferson County, Missouri

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, as modified, is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge (ALJ) dated October 6, 2004, as modified. The award and decision of Administrative Law Judge Leslie E.H. Brown, is attached and incorporated by this reference.

The Commission modifies the award of the ALJ to include an award of future medical care. Employer shall provide such care as necessary to cure and relieve employee from the vertigo and headaches, which have been caused by the injury. This care shall be including, but not limited to prescriptions. Section 287.140 RSMo. The Commission finds that the need for this future medical has been established to the satisfaction of the requirements of the law. *Tate v. Southwestern Bell*, 715 S.W. 2d 326 (Mo. App. E.D. 1986). We find and believe the testimony of Dr. Volarich establishing the medical basis for the need for this additional care. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. S.D. 2001).

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 22nd day of March 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Clinton Hulsey Injury No. 00-170217

Employer: Kirberg Roofing

Before the
DIVISION OF WORKERS'

Add. Party: State Treasurer, as Custodian of the
Second Injury Fund

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

Insurer: TIG Premier Insurance Company c/o
Uhlemeyer Services, Inc.

Hearing Date: 3/8/04 (finally submitted 4/5/04)

Checked by: LEHB:bb (by df)

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: October 19, 2000
5. State location where accident occurred or occupational disease was contracted: Jefferson County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was working on a ladder and fell off onto the concrete ground.
12. Did accident or occupational disease cause death? No Date of death? --
13. Part(s) of body injured by accident or occupational disease: Body as a whole re: head and residuals, cervical spine; right upper extremity at shoulder
14. Nature and extent of any permanent disability: Permanent Total Disability
15. Compensation paid to-date for temporary disability: \$54,596.36
16. Value necessary medical aid paid to date by employer/insurer? \$42,203.76
17. Value necessary medical aid not furnished by employer/insurer? ---
18. Employee's average weekly wages: Maximum
19. Weekly compensation rate: \$599.96/\$314.26
20. Method wages computation: By agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: ---

--- weeks of temporary total disability (or temporary partial disability)

--- weeks of permanent partial disability from Employer

--- weeks of disfigurement from Employer

At rate of \$599.96/week, permanent total disability benefits from Employer beginning July 2, 2002 for Claimant's lifetime

22. Second Injury Fund liability: No

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:
weekly differential () payable by SIF for weeks beginning
and, thereafter, for Claimant's lifetime

TOTAL: PTD AT RATE OF \$599.96/WK. BEGINNING
ON JULY 2, 2002 FOR LIFE.

23. Future requirements awarded: ---

Said payments to begin as of date of this Award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Daniel McMichael, Attorney for Claimant

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Clinton Hulsey

Injury No: 00-170217

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Employer: Kirberg Roofing

Add. Party: State Treasurer, as Custodian of the
Second Injury Fund

Insurer: TIG Premier Insurance Company c/o
Uhlemeyer Services, Inc.

Checked by: LEHB:bb (by df)

This is a hearing in Injury No. 00-170217. The claimant, Clinton Hulsey, appeared in person and by counsel, Attorney Daniel McMichael. The employer/insurer, Kirberg Roofing//TIG Premier Insurance Company c/o Uhlemeyer Services Incorporated, appeared by and through counsel, Attorney Robert Hinson. The Second Injury Fund appeared by and through Assistant Attorney General Laura Wagener.

The parties entered into certain stipulations, and agreements as to the complex issues to be presented in this hearing.

Memorandums of Law were filed by the parties.

STIPULATIONS:

On or about October 19, 2000: a. the claimant while in the employment of Kirberg Roofing sustained an injury by

accident arising out of and in the course of his employment occurring in Jefferson County, Missouri; b. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law; c. the employer's liability was insured by TIG Premier Insurance Company c/o Uhlemeyer Services Incorporated; d. the employee's average weekly wage was at the maximum, the rate being \$599.96 over \$314.26.

e. The employer had notice of the injury. f. A Claim for Compensation was filed within the time prescribed by law. g. Temporary total disability benefits have been paid to the employee in the total amount of \$54,596.36; those payments represent 91 weeks of benefits covering a period from October 19, 2000 through July 1, 2002. h. Medical aid has been provided in the amount of \$42,203.76.

ISSUES:

1. Nature and extent of permanent disability - whether partial or total
2. Liability of the Second Injury Fund

EXHIBITS:

The following exhibits were admitted into evidence:

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Claimant's Exhibits:

No. A: Medical records of Clint Hulseley, including: St. Anthony's Hospital; Dr. Smith; Dr. Kitchens; Dr. Goldring; Dr. Emanuel; Dr. Benecke; Kitty Nabholtz, who is a case manager for the defendant insurance company; VA Hospital; Missouri Baptist CT scan, Pro Rehab medical records; Dr. Benz; VA Hospital records from 2001 to December, 2002; and Dr. McKinney.

No. B: Deposition transcript of Dr. Volarich with attachments of his report and curriculum vitae (Admitted subject to the objections therein)

No. C: Deposition transcript of Dr. Samuel Bernstein with attachment of his report (Admitted subject to the objections therein)

Employer/Insurer's Exhibits:

No. 1: Deposition transcript of Dr. John McKinney taken on behalf of the employer/insurer on August 28, 2003 (Admitted subject to the objections therein)

No. 2: Deposition transcript of Dr. James Emanuel taken on behalf of the employer/insurer on August 11, 2003 (Admitted subject to the objections therein)

No. 3: Deposition transcript of James England (Admitted subject to the objections therein)

Second Injury Fund:

No exhibits.

SUMMARY OF THE EVIDENCE^[1]

Clinton Hulseley, the claimant, testified that he was born on 9/29/1940. My schooling is through the eighth grade, started the ninth grade and quit three months into it because I was having a hard time with school itself, and I needed a job so I went to work, Hulseley stated. I did not get a GED, he said. I can read though there's lot of words I don't understand so I skip over them; when I'm reading the newspaper I can read the headlines and when I get to words that I don't know then I just skip over them and go on to the next word, the claimant said. The claimant was queried if in preparation for the hearing he read Dr. Volarich's report as instructed, and Hulseley responded that he was not able to read it without assistance. I had to get my wife to help me, because there's a lot of words in there I couldn't pronounce or I didn't know the meaning of, he said. With math, I can do basic math, adding, subtracting, the claimant stated. When we get into any other type of math then I have problems, he said, I don't understand math. I cannot do long division and multiplication that well, the claimant said. Hulseley agreed that at one time he had his own roofing business, and that there was a certain amount of bookwork associated with having your own business. My wife did the bookwork until she got sick and then I hired a secretary to take care of the rest of it and he did it all, Hulseley explained, make out the contracts, typed them and everything. Usually my secretary, or my wife made out the checks and I usually just signed them, he said. Hulseley stated that he can not type. He was asked if he knew anything about using a computer. No, I have no idea

about computers, the claimant replied, I don't operate a computer. Hulseley agreed that in preparation for the hearing today he wanted to look at what was included in an application at Lowes Hardware Store just to have some idea of what might be involved in working there. When I went there they did not have a paper application for me to look at, the claimant said, they said I had to use the computer setup in the entry way where you go in, that's how you fill out your application, you start there. I was not able to call it up myself, Hulseley stated, I sat down and typed -- tried to put my name in and then it asked other questions that I had no idea what I was talking about, so I just quit. The claimant agreed that if it came to looking something up on the Internet or looking up something in some kind of an index on a computer he would have to learn how to do that because he does not know how to do that now.

The last two or three months prior to the October 19, 2000 accident, we were working anywhere from 50 to 60 hours a week, Hulseley testified. I worked on the roofing repair crew, the claimant said, so we would go out to different buildings and we would repair the roof, which included scratching gravel back and sometimes we'd have to tear out a section and we usually used an axe or a hatchet to tear out sections. And then we'd pick it up and get rid of it, and then go back and repatch it and regravel it, and usually use a wheelbarrel to remove the material off the job, he said. Agreeing that they would always have to carry materials on to the job, Hulseley stated that there were only two of them that worked on the small crew he worked, and they usually had to do everything by hand. We'd have to pull the material up on the roof with a rope and pulley, and usually one or the other of us would have to pull it up in order to get it up on the roof, he said. The amount of weight I am talking about lifting and carrying could weigh anywhere from a bucket of roofing cement weighing 50 pounds to a roll of felt which could weigh a 100 to 120 pounds. Hulseley stated that he carried this just about everyday unless it was a small repair then they would go to the lighter weight stuff; but nine times out of ten everyday there was heavy lifting involved one way or the other. The claimant agreed that he had some prior injuries before the October 19, 2000 accident, but these injuries did not keep him from working everyday 50 and 60 hours a week and lifting heavy felt and debris and carrying it. I was working everyday, Hulseley testified.

Hulseley testified about the October 19, 2000 accident. We pulled up on the job and the foreman at that time that I was working with, he went inside to check the leaks and he put the ladder up and I climbed up on the roof to get ready and I took the rope and pulley up to get it set up so you could get the material on the roof. I had everything set up on the roof and I was coming down to get something else, and when I stepped on the ladder, I lost my balance or the ladder slipped and I went backwards and I landed on concrete, Hulseley said. The way I understand it, the claimant said, I landed on my head and right shoulder, and apparently it must have been about the same time. Until I went to the hospital and they put me in Intensive Care I didn't know anything, the claimant stated, and while I was in Intensive Care I was naturally having pains in different areas around my neck and my shoulder. And at the time they were more concerned about the head injury than they were the shoulder and everything, he said, because they was afraid of brain swelling and they would have to do surgery.

After I got out of Intensive Care that's when I really started having pains in my shoulder and in my throat area, the claimant said, I had a big knot that stuck out and then it was pressing against my throat. Hulseley agreed that he was pointing to his neck right at the base of his neck near his voice box as where there was a big knot sticking out. Agreeing that the place where the knot was had an effect on his ability to swallow or speak at that time, Hulseley stated that if he tried to eat solid food and drink any kind of liquid, afterwards it wouldn't go down. I'd have to eat solid food without drinking anything, the claimant testified, as soon as I tried to drink water or any liquids then it would come right back up again and I'd either have to get rid of it or let it slowly go down and into my stomach. I still have a problem with swallowing, Hulseley stated, I still can't swallow liquids, I have problems with trying to drink a soda through a straw or something like that, I got to go slow and easy with that, I can't do like I would normally. Also my speech changed I guess right away, Hulseley testified, I didn't pay that much attention until I'd get on the phone and I'd call my daughter and she'd say: "Dad what's wrong with your voice, you sound funny." And the longer I talked the worse it would get; (there were) words that I would actually lose when I was talking, he said. That's when I told them I was having problems with my speech, that I couldn't continuous talk, that I started losing my voice, the claimant testified. Hulseley agreed that he is continuing to have a problem with his speech even up until today. The problem with my speech as a result of this injury is basically still the same, Hulseley stated, it's not as bad as it was, you know, before the surgery, but still I have a hard time talking a long period of time or talking real loud. The louder I get, the worse; my voice will actually start going down because I can't get the -- my voice just will not continue on; when I talk on the phone it's -- it's worse on the phone than it is like talking to you because I got to speak up on the phone in order for them to hear me, he said.

Eventually something was diagnosed as being wrong with my clavicle, the claimant agreed, and I had to have surgery on March 6, 2002 by Dr. Emanuel where the middle part of my clavicle was removed. Hulseley agreed that this has left him with one shoulder a little bit lower than the other. Well, I also have a dislocated shoulder that was never put back in place, he added. (It was agreed and stipulated to by the employee and employer/insurer that the right shoulder clearly looks asymmetrical as compared to the left with a drop of about an inch or an inch and a half of the outer aspect

of the right shoulder as compared to the left shoulder.) And also when they did the surgery they also made it -- I don't know -- I can only turn my neck so far over because it pulls against this area here, it's like a stretching effect, the claimant said. Hulsey explained that when he turns his head to the left, if he goes all the way around to his left he can only go so far because it pulls and it stretches in the area where the lump was, at the base of his neck on the right side, and will not go. If I'm driving or going somewhere and I have to back up, I have a problem with looking over my left shoulder to see, I either have to use the mirror or rear view mirror to judge, you know, see if anybody is coming because I can't turn all the way around with my head, he said. Agreeing that this has left a deformity that you can see in the clavicle, the claimant stated that you can see the lump still sticking out. The claimant displayed a lump that was described by the claimant's attorney as: Located where the clavicle is and the lump is probably about the size of a golf ball immediately at the base of the claimant's neck just slightly to the right of his throat.

Hulsey agreed that also in the accident he sustained a blow to his head and had a subdural hematoma. This did not have to be operated on, the claimant agreed, and the trauma of the accident has left me with a problem of dizziness, or what the doctors call vertigo. Hulsey agreed that he has received various treatments for this from Dr. Benecke and others. Describing the problem he has with vertigo today, Hulsey stated that if he stares up at, say a TV, for any amount of time and then he tries to move or get up he will actually stumble because he gets real dizzy when that happens. Also when I lay down at night, if I try to lay down on my back and lay that away it's like the ceiling will spin, the claimant said, so I turn over to the left-hand side to try to eliminate this. Now I got to where I -- when I lay down now I just lay down and go to my left side, he stated, to keep the room from spinning around. Describing a recent incident, Hulsey testified that he and his wife were out looking for some kind of a print to go above the fireplace at home and she pointed out in the store and they were up high on the wall. Usually I'm conscious of what I'm doing because I know what causes my problems, and so I looked up and when I come back down I actually staggered into a case behind us with very expensive stuff; she had to grab me to keep from knocking it over because I got dizzy, the claimant said. It only lasts 30 seconds, it's not something that continues; but it's just that sudden when I look or tilt my head back, come back down again, I start getting dizzy, Hulsey stated. Also when I go down for something I usually squat because I know if I bend directly over and I come back up I get the same effect, he said, I get the same dizziness, I will stagger backwards or what have you. In the mornings when I get up I have to set on the side of the bed for a while before I can jump out of bed and just take off, he said, because I run into the dresser or whatever is there until I get my balance back again. Hulsey was asked if he can use a ladder now. No, he answered, I wouldn't attempt to stay up on one very long because of the vertigo, the dizziness that I have. Just looking up trying to go up one would cause me to start falling backwards if I would, he said. With driving I don't drive that far, Hulsey said, more or less I can drive to the doctor's office and everything, but as far as going a long distance or constant driving I would have a problem because moving back and forth -- if I move my head, you know, back and forth a lot then I get the vertigo thing and dizziness.

Hulsey was asked if he has any problem with headaches. Yes, he answered, usually every morning when I get up. The headaches are usually right in back, he said, it starts like in the back of my head.

Hulsey stated that the motion of his right arm is limited now. Hulsey agreed that he is right handed. In the front I can go to here, and Hulsey demonstrated, as described by his attorney, to holding his hand straight out from his body to the right to just about to his ear. With raising his hand straight up over his head like when you raise your hand in school, Hulsey demonstrated, and again as described by his attorney, about 80 percent as high or 90 percent as high as he can on the left. Putting on a belt I can reach behind me, Hulsey said, and agreed that his demonstration showed that he could reach not quite to the midline of his back. I cannot put deodorant in my left armpit with my right hand, I can't get to it, Hulsey said. I cannot comb my hair with my right hand, he said. Agreeing that his shoulder is painful, Hulsey stated that he takes Vioxx in the morning, and sometimes he takes it twice a day. This is because in the evening time if I do any kind of activities at all I start having pain in my shoulder and still get a cracking noise where the surgery was done, he explained. When I'm walking or if I take a walk, normal walking, I usually have to put my hand in my pocket or put my thumb in my pocket to keep my arm from swinging, he said, and explained this is because it causes pressure up in this area here (indicating) and I can hear it pop then, and by the end of the day I really have to take Tylenol or, like I said, take another Vioxx when I start having too much pain.

The claimant testified about any problems he has in his right hand or fingers. Well, I guess my little finger gets very little feeling in it, he said, it's numbness in the right little and ring fingers, but the ring finger is not totally numb like the little one but it's numb. And right now it's cold, ice cold; in the wintertime they're -- it's like freezing all the time (it was noted that the claimant was referring to the right little and right ring fingers). The claimant agreed that he, with his wife's help, has gone through Dr. Volarich's report and the doctor very accurately described the various things that he complained to him about. With my left hand it is no problem handling things such as a jug of milk, the claimant stated, but with my right hand I have a problem with it. It's not only the weight, it's just holding it out there for any period of time; it just actually falls, he stated. The claimant was asked if he can lift anything with his right hand above shoulder level. I

really haven't tried to lift anything other than, like I said, every now and then you forget when you're doing something being naturally right handed, he answered, and I reach in the refrigerator and grab something and then I can tell because then I have to put it down right away because I'm afraid if I pull it out it's either going fall or my hand's going down. I have no strength in it, my shoulder, the claimant said. I cannot throw anything with my right hand overhanded, he said, I can probably underhand a little bit but I wouldn't attempt to do that too often. I cannot shave with my right hand; I don't know how to do left handed, the claimant stated. He was asked if he could paint a wall with a brush or a roller with his right hand. No, no period of time, he answered, in other words, for five minutes I could probably get up there and do a little bit but after five or six minutes my shoulder starts hurting. I can possibly paint for a little bit but not where I could do a whole wall or for a long time without any problems, he said. I couldn't swing a hammer or a hatchet with my right hand, Hulsey stated, like I said I could probably swing it but I couldn't bring it up in order to do any work as far as work is concerned. With the injury to my right shoulder, arm and hand there is no way I can put on a tie or button buttons, the claimant said, the only way I can put a tie on is either tie it around a door knob or have my wife help. She has to put a part in my hair, he said. Hulsey was asked if he had any disturbance and sensation in his chest. Well right below where they did the surgery it's still numb, he answered.

The claimant testified that he has lost hearing in his left ear. I have a problem in using the phone because I can't answer the phone with my right hand because I can't get the phone up with my right hand, I have to use my left hand in order to use the phone, and if I have a hearing aid in and if use my left hand I get a ringing sensation in my ear so I have to try to put it around to my right ear in order to get it or I pull the hearing aid out in order to hear it, Hulsey testified. With the television, he said, I have to turn it up more than normal what you would if I'm a distance.

Hulsey was asked how was his ability to sleep. I sleep in different times, he answered, I sleep three or four hours, and if I roll over or something on to my right shoulder I find my fingers going numb and I start having the pain in my shoulder so I roll back over. So, it's really hard to sleep a full night, he said.

The claimant was questioned about his present ability to work. He stated that he has been a roofer most all of his life, and agreed that whatever working skills and abilities he has have been primarily in the context of roofing. I worked some in the factory after I quit school, but very little, he said. I could not do the work I was doing immediately before the accident, Hulsey testified, because I can't climb ladders and I can't lift anything. The claimant was asked about some ancillary positions that might have something to do with his roofing skills, such as working as a material man at a warehouse that supplies roofing supplies to people that do roofing. I could not do this, the claimant responded, because most of the people, even the people behind the desk in the material company, being having the experience of buying material, a lot of the time they have to go out and help you get the material that you need. In other words, you're not allowed to do it yourself, to go in the yard and everything, he said, so the material company has to have somebody there to load your truck or take care of that. So it's not just standing behind a desk, the claimant stated, there's no such thing as just having somebody answering the phone. Most of the time they are out doing other things besides that; that's my experience going in buying material when I was in the business for myself, Hulsey said, do to insurance purposes and everything they require their people who sell the product to load it. He agreed that in addition to that there is a certain amount of need to refer to the computer to look up product and look up prices of products and so on. Hulsey further stated that he could not stand all day. I have tremendous pain in my back and in my shoulder too, he explained. Just even driving, I can't put my right arm up on the steering wheel and try to drive all day or drive a lot, he added. I usually use my left hand because it's a numbness sensation I get in my shoulder when it's up a certain amount of time, and with standing I have the same problem, the claimant said. It was noted that it had been suggested that maybe he could work as a manufacturer's representative selling or arranging to sell product to contractors who are going to put on a roof. Agreeing that he was familiar with that job and know people who have done it, Hulsey explained why he couldn't do this job. Well, for the simple reason most of your manufacturers have people that a contractor will send blueprints in for them to take the scale off the blueprint for the roofing material so they know how much material to deliver, and I do not read blueprints, I have no idea about blueprints whatsoever, the claimant said. And another thing, Hulsey stated, if you have problems with the material that you sell, the experienced salesman has to go out on the job, check the material. Hulsey agreed that when you check the material that involves climbing a ladder and getting up on a roof. Nowadays, a salesman will have to refer to a computer from time to time to get pricing and research product availability and so on, and I do not know how to do any of that, I'd have to learn, the claimant agreed. I have no idea about computers, period, he added. He agreed that also in his experience a salesman is called upon to read literature that describes product and describes contracts. My reading skills aren't that great, Hulsey stated. The claimant was asked, when he was in business for himself for a while, how did he get around and make bids without being able to read blueprints. Most of the time I would take it back to the office and, like I said, I hired a secretary which was a educated man, and actually he was a rate clerk before he went to work for me, he did most of the work as far as doing the blueprints and figuring them out, the claimant said. And if I just needed material on the job I would take the blueprints to the material company and they would take the measurements and the material that I would need and they would tell me how much material and what

the cost would be of that material, the claimant stated, then I would bid a job that away. It was noted that it had been suggested Hulsey could work at a help desk at a hardware store. I do not believe I could do that work based on the work I've seen people performing at help desks at hardware stores, Hulsey testified, for one thing, most of them use computers, and not only computers, very few of them have that as a single job. In other words, they go out and they have to show customers materials and show them where things are, and a lot of times even have to stock shelves if there's nobody else available to help them, he said. I would not be able to put stock on the shelves in a hardware store or some other retail establishment, the claimant said, I'd fall back down again. If I had to walk around a store and had to assist a customer in finding something by looking up on the top shelf I would get dizzy, the claimant said, I couldn't do it. Like I said, I can do for so long and then that's when I get dizzy; I just actually start stumbling, Hulsey testified. He agreed that by the same token, if he had to reach down to a lower shelf to show somebody something, or get it, or find it, again he'd have the problem with dizziness. It was noted that it had been suggested that Hulsey could maybe sell windows, that he could go around to different people's houses and be a window salesman. In explaining why he couldn't do this, Hulsey stated that you got the same thing here – you still got to go out to the customer's house, you have got to measure all the windows and a lot of times if you're at a two story sometimes you got to go from the outside and do the measurement, so sometimes that includes a ladder that you carry around in your car or truck, and you do a lot of driving, and there is also lifting involved with that too. He agreed that measuring would involve sometimes reaching up above his head to measure things and he has limitations with his shoulder and the pain with it, and holding his hand up high; in addition, he agreed, he has the problem of being dizzy when he's looking up to measure something up high. When queried if he was familiar enough with salesmen to know whether or not they sometimes have to look at a computer to order product or to put orders in and find out what product is available, Hulsey responded - Nowadays that's just about everything you do is computer, as far as materials and selling and everything. The claimant agreed that any kind of retail job that involves standing all day, using a computer, looking up, or bending over would be difficult for him to do. Hulsey stated that when he was in the service he was in the Marine Corp. in the infantry as opposed to some specialized training. I didn't score high enough on my exams they give you when you enter, he explained. Agreeing that he is right handed, Hulsey further agreed that his injury affects his ability to write with his right hand. It affects my fingers, the claimant further stated, if I grab a pencil or something to write for long periods of time then I can't -- wasn't be able to read it. Hulsey agreed that he does not know how to type, and agreed that it is difficult for him to manipulate the fingers of his hand because of injuries that he sustained. I could not write a sentence 30 times on a piece of paper with my right hand, he said, I would have to stop in between and pause and wait because my fingers would actually go numb when I started writing and I'd lose the pencil.

Hulsey testified that when he got up at the break during the hearing he had to kind of stable himself, and agreed that his attorney had to sort of catch him. If I get up too fast I got to hold on to something a few seconds in order to continue walking otherwise I will stumble a little bit, he said.

On cross examination by the employer/insurer, Hulsey stated that he ran his own business for approximately ten years. Explaining why he had stopped running his own business, Hulsey testified that in 1988 he had a fall, and also his wife had a heart attack that same year, and it was kind of too much for both of us to try to operate a business. She couldn't operate it; I didn't have anybody else to operate it, and my son was working for somebody else, so I closed it down, the claimant testified. It depended on the time of the year as to how many employees I would have, Hulsey stated, sometimes I would have 4, sometimes I would have 10 or 13. I mean, it depended on how the year went as far as work and everything, he said. Hulsey agreed that he supervised these men. I supervised them as far as getting them out then I had a foreman a lot of times on the job taking care of everything on the job, he said. Hulsey testified about the fall he had in 1988 and resulting injuries. I happened to stop by the job one day and they were unloading equipment off the roof, and I decided to stop and help them, he said. I got up on the roof and was loading material off and we used a pulley type to get the material down. I was holding the ladder and the rope hung up and when it did it pulled me off the roof and I landed on concrete; I followed the ladder down, and when I got down I swung around and hit my elbow on concrete, Hulsey explained. The claimant agreed that he fractured his right elbow in this fall. When queried if it was true he had a refracture of that elbow during physical therapy, Hulsey responded - It was a preexisting break at the time when I had the fall that refractured during physical. He agreed that he had the hardware removed from his right elbow in 1989. After release from the elbow injury it wasn't a hundred percent, Hulsey said, I have continued to have occasional pain and I have problems with the movement, or range of motion, in my arm. The claimant agreed that in 1999 he had left carpal tunnel release. After I was released from care after the left carpal tunnel release I didn't have a whole lot of complaints, Hulsey stated, I mean, I still didn't have the strength that I normally had before, but eventually I was able to obtain more strength in it the longer I was able to use it. So, I was able to perform my duties as far as any work is concerned, he said. Hulsey agreed, that, as reflected by Dr. Volarich in his report, it is correct that he has diminished strength in his left wrist because of the carpal tunnel. The claimant said, as reflected by Dr. Volarich, at times he has had numbness and tingling in his left hand because of the carpal tunnel. When queried if he still had numbness and tingling now, Hulsey answered: Well, when I was working a lot then I would have certain, you know -- it's like anything else you

grab something real hard and squeeze on it then you get the tingling in your fingers. But I don't have that anymore, he added.

During cross examination by the employer/insurer, the claimant testified about additional prior injuries he had had. Hulsey agreed that he was treated for his back in 1995. I did not really have physical therapy for my back, he said, I just went to the VA and they give me exercises to take and the proper way to bend and how to lift and everything. Hulsey stated that prior to the October 2000 accident he had occasional problems with his back. It wasn't something I had all the time, he said, it was just sporadic, like maybe once every two months or I would move a certain way and then it would flare up. But I was able to go ahead with my job, he said. And at nighttime I'd just put a heating pad on it and it relieved the pain, and take Tylenol, Hulsey further testified. The claimant agreed that in 1957 he had a football injury to his left femur. It was a compound fracture of the left femur, the claimant said, and at that time they did surgery and put a nail in there, a pin in my leg. Hulsey agreed that he reinjured this same leg when he was in the Marines. Hulsey was queried if this injury had caused him to be discharged from the Marine Corp, and he stated they retired him and discharged him because of the problems with his left leg. He agreed that he received and is still receiving VA benefits because of that injury. At the time when they first released me I was getting a ten percent benefit, Hulsey said, and I went back a couple years ago for reexamination and they increased it to 30 percent on the leg. The claimant agreed that, as reflected in the records, his left leg is three-quarters of an inch shorter than his right leg. The way they explained it to me, is that I grew a little bit after the initial injury and the leg didn't grow the same as I did, so they said that I needed to put a half inch or somewhere around a half inch lift on the inside of my shoe to kind of balance it out, the claimant stated. He agreed that he is still using that lift. Hulsey agreed that the hardware in his left leg was removed in 1979. I did not have another surgery on the left leg while I was the Marine Corp, Hulsey stated, I just refractured it and the pin was still in place at the time, so it was just more or less the hospital stay, I was in the hospital for two to three months, something like that.

During cross examination by the employer/insurer, Hulsey stated that the headaches he is having as a result of the October 2000 injury are a daily occurrence. Just about every morning I usually get up and I go in and take my Diazepam, and my Valium, he said. I take a couple of Tylenol; it helps, the claimant said. Hulsey agreed that he fractured some ribs in the October 2000 accident, and stated that he is not having any kind of problems with his ribs. I am not still having the constant ringing in my ear, Hulsey stated. Like I said, the only time I really get a ringing is when I answer the phone with my left hand with the hearing aid, I hear kind of -- the ringing starts. Hulsey stated that he thought the ringing that he gets when he puts the phone up is from his hearing aid.

On cross examination by the Second Injury Fund, Hulsey agreed he had testified earlier that his work at Kirberg Roofing involved climbing ladders and scaffolding on a daily basis. Agreeing that his job also involved pushing and pulling heavy loads, Hulsey explained that a lot of times you had material that you had to get up on the roof, and you had wheel barrels that you put the material in and then had to push it to the job or when tearing off roofing material you had to load the wheel barrels up and take them to the dumpster in order to throw it into the dumpster to haul it away or into the dump truck. The claimant agreed that before October 19, 2000 he was able to perform all of these job duties. Most of the time you did everything yourself, Hulsey testified, if it got too heavy then you would ask for assistance. I had no problem picking up 120 to 130 pounds; if it got over that then I couldn't lift it without assistance, the claimant said.

During cross examination by the Second Injury Fund, Hulsey stated when he had the hardware removed in 1979 from his left leg that had been fractured he didn't have any ongoing problems with the leg. He agreed that no doctor placed any permanent restrictions on his activities because of the left leg. Hulsey stated that at the time he had the hardware removed he was working as a roofer, and agreed he returned to full-time duty as a roofer after that. After the hardware was removed in 1989 from my right elbow/arm I did not have any ongoing treatment for my right arm, Hulsey stated, I did, though, have some ongoing weakness in the right arm but I had no problems with lifting anything. I was not given any permanent physical restrictions on my activity by a doctor because of this right arm injury, the claimant said. Hulsey agreed that after he was released from treatment for the right arm injury he returned to full-time work as roofer and was able to perform all of his job duties as a roofer. After the left carpal tunnel release I have most of my strength back in the left hand, Hulsey testified, I can lift up anything, I don't have no problems with it. He was asked if he had had any ongoing problems with his left hand after being released from treatment for the left carpal tunnel release. No, Hulsey answered. He agreed that after he was released from treatment for the left carpal tunnel he returned to work as a roofer; Hulsey agreed that he didn't change the way he performed any of his job duties because of his left wrist. I was not given any permanent physical restrictions by a physician for my left hand, the claimant agreed. When queried wasn't it true he was still able to grip the tools that he needed to grip in order to do his job and still able to perform the heavy lifting that he needed to perform as a roofer, Hulsey responded -- Yes; I had no problems. The claimant was queried if his low back problems treated in 1995 kept him from being able to lift up to 120 or 130 pounds. No, Hulsey answered, most of the time I never had no problems like that. I said occasionally it would flare up on me, but it wouldn't even be from lifting; I could bend over and tie my shoe and just move a certain way and it would occur, and other times I could grab a hundred

pounds and it wouldn't bother it, the claimant added. From what I understand there was a spur in there that would hit up against the nerve in my back when I moved a certain way, Hulsey said. He agreed that while he was working for Kirberg Roofing he was not under any physical restrictions regarding his back from a doctor, and he stated that he did not change the way he did any job duties because of his back. Agreeing that before October 19, 2000 he was responsible for doing all of the maintenance around his house, Hulsey testified that he did all the painting and any kind of carpenter work usually by himself, including putting the floors in and what have you. I raked the yard, Hulsey said. I still occasionally rake the yard but I can only do it a limited time, he said, because then I start having problems with my shoulder. The claimant agreed that before the October 2000 injury he was involved in hunting. I was a deer hunter, and also I was a rabbit hunter, he said. I can't do any of these since October of 2000, Hulsey testified, I can't get the gun up to my shoulder in order to -- I tried but I couldn't get it up high enough to do any good. I was a golfer before the October of 2000 injury, the claimant said, but I have not attempted to play golf since this injury. I still fish occasionally, he said.

Mary Frances Hulsey testified on behalf of the claimant. Clint Hulsey and I were married on January 9, 1960, Mrs. Hulsey stated. She agreed that she has been with Clint about his whole working life; and he has basically been a roofer. At one time he ran his own business, Mrs. Hulsey agreed, and stated that her role in the business was taking care of all of the bookwork. I wrote up all the contracts, answered the telephone, did the books and the payroll; we had an accountant that every three months did our taxes and filed our taxes, but I did the payroll and the weekly books and paying of the bills; basically ran that part of the business, the administrative side, Mrs. Hulsey said.

Mrs. Hulsey was asked what she had observed about her husband's ability to read. Well, he's not illiterate, she answered, he can read a paper but he skips over words that he doesn't understand and there are quite a few. And he doesn't read a whole paper always; his attention span will be, you know, not that well, Mrs. Hulsey said. So I more less - we kind of go over things together when it's something important; I help him with it, she said. I don't think he could understand real involved instructions or anything like that, she stated. Mrs. Hulsey agreed that she helped her husband go through Dr. Volarich's report when they went over his testimony. We read most everything that he has received, she said.

Mrs. Hulsey testified about what she has seen in instances in which her husband has demonstrated dizziness. We were shopping not long ago and we were in boutique looking at prints for the wall, and I should have known better but I pointed out a print and he went to look up and when he did he got dizzy and I had to kind of catch him because he almost fell into a rack of china and silver and all that kind of stuff, she stated. In a grocery store, forget it, Mrs. Hulsey said, he can't look up very high. I'm short and if it's something high up, we usually have to get the manager or somebody to come pick it up, she stated. When I go shopping now, he wants to go with me, and I park him where the little old men sit and then I do my shopping and pick him up, he said. Also if he gets up real fast or sits down for any amount of time, when he gets up sometimes he'll stumble, Mrs. Hulsey testified, he's almost stumbled into the fireplace a couple times, we have a center fireplace, one of those see-through fireplaces. In the house, like in the cabinets or reaching up real far or anything like that, I get on my little stool and do all that, she said.

Concerning Clint's ability to reach with his hand, Mrs. Hulsey testified, he can't, he cannot reach and he can't get into the upper cabinets or anything like that. It has to be in front of him, she said, something has to be almost eye level for him to do. Mrs. Hulsey stated this was in part because of the vertigo and in part because of his arm. He can't move his hand, so he can't reach, she said.

He is in pain, Mrs. Hulsey stated about her husband. He sets and he's in pain all the time up in his right shoulder area, and he has headaches quite often, and he doesn't sleep well, she said. His right shoulder where he had the injury at goes numb and he has pain there, Mrs. Hulsey stated, and recently it's even gotten worse.

Mrs. Hulsey was asked what she has noticed about her husband's voice. Well, if he talks very long periods of time he loses his voice, he just gets real low and hoarse, she said.

Agreeing that she had observed problems with her husband's eating and drinking, Mrs. Hulsey testified that sometimes when he eats if it's something hard like a steak or something like that, or hard food, it will kind of get caught. Also he has problems when he drinks through a straw or drinks real fast; it'll just come up, he can't swallow it, has problems, she said.

Mrs. Hulsey agreed that they have a computer in the house and she has tried to get her husband to use it. He won't get on it; he gets upset with himself, she said, I try to teach him how and then he gets upset with himself, he gets upset with me and so I just say, forget it.

Medical records in evidence included the following:

A. Records from St. Anthony's Hospital concerned the 10/19-26/00 hospitalization of Hulsey as a result of, per the record, a fall from approximately ten feet off a ladder onto a concrete floor. It was noted that Hulsey had no loss of consciousness to his knowledge after falling. The admission report noted a past surgical history for Hulsey of: right elbow surgery several years ago and right femur fracture as a youth. The diagnosis upon admission, after laboratory testing and radiographic studies, was: 1. Epidural hematoma; 2. right rib fractures; 3. right pulmonary contusion; 4. right scalp laceration (approximately 3 cm laceration on occipital scalp, and closed with staples by emergency room physician); 5. right elbow laceration; 6. right acromioclavicular separation; and 7. right hand numbness. A 10/19/00 consultation report by Dr. Daniel Kitchens reflected the doctor's assessment that Hulsey's neurologic examination was intact; there was no drift on Fabere testing, or cortical motor or sensory findings.

The discharge summary discussed Hulsey's hospital course, noting that consultations had been performed by Dr. Benz from orthopedic surgery and Dr. Kitchens from neurosurgery. It was further noted that Hulsey was given physical therapy while in the hospital. Discharge diagnoses were: 1. (Right posterior parietal) epidural hematoma; 2. Acromioclavicular separation of the right shoulder; 3. right elbow laceration; 4. Rib fractures of 7, 8, and 9 on the right side; 5. Pulmonary contusion; and 6. Right pulmonary effusion.

Reports of radiographic studies included the following: a. a 10/19/00 x-ray of the right elbow revealed post operative changes of resection of the radial head, degenerative changes of the ulnar humeral joint, and no acute fracture or dislocation. b. An 11/8/00 report of a CT scan of the chest reflected an impression of – 1. Comminuted intra-articular fracture of the medial 1.5 cm of the right clavicle with 1 cm anterior dislocation of the clavicle in relation to the right sternoclavicular joint, and 2. Nondisplaced fracture of the posterior right first rib. C. A 10/19/00 report of an x-ray of the cervical spine noted findings of – small anterior vertebral body spurring at C5 level, and no fracture.

B. Records of Kennerly Surgical Group, labeled as records of Dr. Smith, reflected treatment of Hulsey beginning on 10/19/00 for multiple trauma secondary to fall from a ladder. It was noted that Hulsey was discharged (apparently from the hospital) on 10/26/00. The record indicated a first follow-up appointment on 10/31/00 at which time Hulsey's complaints were noted as: still very sore right ribs and shoulder; experiencing vertigo; eating good; continues to have headaches; numbness 4 and 5 fingers of right hand; difficulty swallowing. Medication was prescribed. The record noted some improvement in his symptoms, but that the symptoms continued. The record reflected that further testing and consultation was being performed by other doctors; in one of the last treatment notes of 11/21/00 it was written that Hulsey was to see another orthopedic surgeon and to see a neurologist.

C. Records of Dr. Daniel Kitchens, M.D. of Cardinal Neurosurgery & Spine, Inc. Besides St. Anthony' Medical Center records consisting of his own 10/19/00 consultation report and a report of a chest x-ray performed on 10/23/00 which revealed free right sided effusion on the lateral chest wall, Dr. Kitchen's record consisted of a November 14, 2000 report after examining Hulsey for follow up on that date. The doctor noted Hulsey's complaints of - some dizziness, numbness in the ring and little fingers of the right hand, pain in the right shoulder and clavicle where the fracture was located, some numbness into his thighs that is worse on the right. His neurologic exam reveals minimal difficulty with intrinsic of his right hand with difficulty crossing fingers, and sensation appears to be intact to pinprick, the doctor wrote. Dr. Kitchens recommended further neurology evaluation and EMGs of the right upper extremity to evaluate for a brachial plexus lesion or possible tardy ulnar neuropathy at the elbow.

D. Records of Dr. James M. Goldring, M.D. indicated the Hulsey was evaluated for injuries sustained in the October 18, 2000 work related fall. In a 12/8/00 evaluation report, Dr. Goldring wrote of Hulsey's complaints and symptoms, his review of records, and his examination findings. The doctor had performed a nerve conduction study as well as an MRI and a myelogram of the cervical spine. Dr. Goldring wrote of his opinions:

This patient has persistent headaches and vertigo which I think are related to the head injury. Because of the post-traumatic vertigo which is his most limiting symptom, I have recommended that he be referred to Dr. James Benecke for further evaluation and treatment. His headaches should gradually improve with time.

Given the persistent numbness in the right upper extremity, I have recommended nerve conduction studies and an EMG as well as an MRI of the cervical spine. The nerve conduction studies and EMG were normal. Plain films of the cervical spine with flexion and extension views demonstrated only mild degenerative changes. There was no instability seen with flexion or extension. An MRI of the cervical spine was carried out which again showed evidence only of mild degenerative changes. There was no evidence of focal disc protrusion or canal stenosis. There was no abnormal signal seen within the cord.

I think the symptoms in his right upper extremity are probably related to a brachio-plexus stretch type injury. I

suspect this is relatively mild not causing any active denervation. I suspect it will improve with time.

E. Records of Parkcrest Surgical Associates, Inc./Dr. James Emanuel, M.D. indicated treatment of Hulsey for injuries sustained in the October 18, 2000 work related fall. In an initial report dated 11/27/00 following an independent medical evaluation of Hulsey, Dr. Emanuel wrote of the job injury, Hulsey's injuries and present complaints, as well as his review of medical records and his examination findings. Dr. Emanuel's written recommendations on 11/27/00 included conservative management with physical therapy though no strengthening modalities until the fractures had healed. The doctor further wrote in the recommendation section of his 11/27/00 report the following:

I think the numbness and tingling in his hand could be related to some swelling or inflammation around the brachial plexus, due to the rib fractures and the blunt trauma. The patient also states that he has a little bit of difficulty in swallowing, and his voice is different than it was prior to the injury. There could be some compression in the area of the laryngeal nerve as the result of the fracture of the sternoclavicular joint, as well. Both of these conditions, I think, will improve as time goes on.

Dr. Emanuel wrote in a 01/16/01 treatment note that Hulsey's symptoms persisted with a grabbing and catching type sensation in the sternoclavicular joint. The doctor wrote that physical therapy would be discontinued as he thought it was basically aggravating Hulsey's condition. It was noted that Hulsey would be followed up once he was reviewed and cleared by an inner-ear specialist for his vertigo. Dr. Emanuel also wrote on 01/16/01 the following:

I think if his vertigo does not improve, then there is no way that he would be able to return as a roofer. This would then probably not necessitate any further workup, with regards to his shoulder. If his pain is too severe, or he is able to return as a roofer, he may require a resection of the medial portion of the sternoclavicular joint.

The record included a 03/06/02 surgical report which reflected that on that date Dr. Emanuel performed on Hulsey the procedure of: excision of sternoclavicular joint, medial clavicle of the right sternoclavicular joint. The pre- and post-operative diagnoses were the same: Traumatic arthritis, sternoclavicular joint, right shoulder. In a 04/02/02 follow up treatment note, Dr. Emanuel wrote that Hulsey reported significant improvement in his pain. He still has a little bit of thickness and swelling in the area of the sternoclavicular joint, the doctor wrote, but all in all is significantly improved. Dr. Emanuel further noted in his 04/02/02 note the following:

Would recommend that we wait another month before recommending a barium swallow because of some post operative swelling and, most likely, would anticipate discharge at that time. This patient is not working currently.

Dr. Emanuel saw Hulsey on 05/07/02 and wrote that Hulsey still had some discomfort medially but the sharp pain and the popping had completely resolved. The doctor anticipated that Hulsey would be at maximum medical improvement from the surgery in about six months. A work release slip was in the record reflecting that Hulsey was released to light duty work for the right shoulder with one-arm duty as of 05/07/02.

In a final examination report, Dr. Emanuel wrote that Hulsey reported he was somewhat improved overall, but occasionally will get a twinge of pain and feels a little bit of crepitus, and has restriction of motion. Examination findings on 07/02/02 included: still slightly tender along the scar itself; has a prominence in the medial clavicular region, I think, related to some springing of the clavicle itself following the crush injury but in the area of the distal clavicle resection itself; has about 140 degrees of forward flexion and about 135 degrees of abduction; he is unable to adduct and externally rotate, so he lacks at least 45 degrees of external rotation and lacks about 30 degrees of internal rotation. Dr. Emanuel assessed a percentage of permanent partial disability on 07/02/02, writing:

Based on this patient's diagnosis, which was a crush injury, status post an intraarticular fracture of the medial clavicle with secondary development of degenerative arthritis in the sternoclavicular joint, status post surgery for excision of the medial clavicle at the sternoclavicular joint, with resultant loss of motion, I would state that this patient has sustained a 25% permanent disability of the upper extremity as it relates to the shoulder.

Dr. Emanuel gave some permanent restrictions for Hulsey in his 07/02/02 report, which were: limited to light to medium work demand level, where he is not allowed to lift greater than 20 pounds from floor to waist on an occasional basis; no lifting of any weight from shoulder height above shoulder level; should not push or pull greater than 100 pounds on a four wheel cart or 10 pounds without a cart; no carrying greater than 10 pounds in his right hand; and no climbing ladders and no work on a roof.

F. Records of Dr. Benecke, Jr. M.D., Otolaryngology and Neurotology. An initial examination form reflected that Hulsey was examined by Dr. Benecke on January 22, 2001. The record was filled with the records of other physicians; a work release form by Dr. Kitchens, dated 11/14/00, reflected that Hulsey was released to return to work on

11/15/00 with temporary restrictions concerning the right upper extremity of – light lifting of 10-20 pounds, and only occasional straining, stooping, bending, twisting, turning, pushing, pulling and climbing.

The record contained one narrative report by Dr. Benecke, dated September 25, 2001, in which the doctor wrote:

Mr. Hulsey is a patient of mine who has a work-related injury that has caused dizziness and benign positional vertigo. Additionally, he suffers from tinnitus and hearing loss. Currently, he is unable to return to work. He is improving with treatment but is not yet capable of returning to full work, especially working at heights. I would suggest that we keep him off work until sometime later on in the fall, perhaps November.

G. The records of Dr. John W. McKinney, M.D. consisted of treatment, evaluation and testing records from various providers concerning injuries sustained in the October 19, 2000 work related accident from the initial hospital records of St. Anthony's Medical Center of October and November 2000 through the St. John's Mercy Medical Center Speech/Language Pathology services records of May 2002.

A December 20, 2000 examination report by Dr. Goldring in the record included: "This patient has persistent headaches and vertigo which I think are related to the head injury. Because of the post-traumatic vertigo which is his most limiting symptoms, I have recommended that he be referred to Dr. James Benecke for further evaluation." In a January 22, 2001 report, Dr. Benecke wrote that he had seen Hulsey and that Hulsey had "tinnitus, hearing loss, and dizziness which most likely are the result of the fall". Vestibular testing was recommended by Dr. Benecke; in a March 5, 2001 report, the doctor wrote that Hulsey had a left peripheral vestibular lesion which seemed to be responding to medication. Dr. Benecke wrote in a May 14, 2001 report that Hulsey was having some benign positional vertigo, and he would attempt to eradicate it with the Epley maneuver while Hulsey was continuing with the medication Diazepam. In a June 20, 2001 report, Dr. Benecke wrote that Hulsey improved only a little bit from the Epley maneuver and was still quite symptomatic, and he was going to add an additional medication. The doctor further wrote: "His hearing is stable, and he has reached maximum medical improvement from a hearing standpoint. I have recommended a hearing aid, and my audiologist will discuss this with him today." In a July 2, 2001 report, Dr. Benecke wrote: "In my opinion, the need for the hearing aid is directly related to the trauma." In a September 6, 2001 report, Dr. Benecke wrote that Hulsey had "underwent his Epley maneuver today and was fitted with his hearing aids. His hearing is doing well with the devices, and the smooth pursuit on nystagmus testing is completely normal. I will continue him on the 2 mg of Diazepam daily and then follow up in about eight weeks. Hopefully the combination of the medicine and this maneuver will substantially help the dizziness."

A record of a new patient visit by Hulsey to Dr. Brain McMorrow, M.D. of St. John's Mercy Medical Center was dated 08/01/01 and indicated that Hulsey was being seen for dysphagia. Dr. McMorrow's written impression in the record was:

Dysphagia. Mr. Hulsey's description of his dysphagia specifically occurring with liquids, coughing, and retching, is very consistent with transfer dysphagia. The proximity of his fall and clavicular fracture and symptoms eight months later is concerning for possible secondary involvement with his motor nerves. Alternative diagnoses would include recent stroke which is unlikely, or esophageal motility disorder. However, I would be hard pressed to explain why his symptoms are only liquids that result in coughing.

An August 14, 2001 outpatient Speech Therapy services report to Dr. McMorrow included the following: "Mr. Hulsey demonstrates premature spillage from the oral cavity into the pharynx during swallowing however aside from this, his oropharyngeal function is within normal limits. There is some evidence to suggest impaired functioning of the cricopharyngeus and perhaps cervical esophagus. Esophagram may be helpful."

Dr. McKinney prepared an opinion report, dated November 12, 2001, after examining Hulsey and reviewing medical records and audiometric studies. The October 2000 work related accident of a fall off of a ladder was discussed along with Hulsey's symptoms and complaints and the treatment he had received. Dr. McKinney indicated that his examination of Hulsey included the nose, nasal passages and the ears. Dr. McKinney's written conclusions were:

Concerning the matter of tinnitus, Mr. Hulsey states that initially he had "noise" in his head, but that he no longer is bothered by any extra head noises, sounds, or symptoms that can be considered as tinnitus. He therefore has no permanent partial disability due to a lack of a complaint of tinnitus.

Concerning the matter of vertigo, Mr. Hulsey says that "everyday" when he "looks up or lays down" with his head "back" or "to the right side", he develops benign vertigo. He has been treated in the past by Dr. Benecke with vertigo maneuvers, which have been partially helpful. Mr. Hulsey has been on Valium 2 mg tablets, originally twice per day and now once per day. The vertigo, which lasts from ten to thirty seconds, is benign in origin, but tends to occur everyday. Mr. Hulsey is encouraged to try Cawthorne's Fatiguing Exercises everyday in order to bring these benign vertigo symptoms under control. The presence of vertigo everyday, in spite of medical treatment, is a clear indication that Mr. Hulsey would not be able to work as a roofer. He is able to

drive an automobile without difficulty. He attends Union meetings. Mr. Hulsey would not be able to work on ladders or on roofs or in areas involving heights, where he would have to look up and work, however he would not be disabled from work activities not involving these particular motions.

If asked for a medical opinion on Mr. Hulsey's disequilibrium, he currently falls into a Class II impairment of the whole person rating between 5 and 10 percent disability. This occurs when signs of vestibular disequilibrium are present and the usual activities of daily living are performed, however, separate complex activities, such as bicycle riding, walking on girders, working on scaffolds, or working on ladders can not be completed. If asked for medical opinion on Mr. Hulsey's disequilibrium, I would apply 10 % permanent partial disability of the whole person for disequilibrium.

Concerning the matter of speech, Mr. Hulsey has no identifiable lesions in the oral pharynx, hypopharynx, or larynx that would contribute to his current speech pattern. I would recommend a trial of six weeks of speech therapy to try to improve his overall vocal production, which may have been altered to some extent due to the head injury. There are no identifiable causes of his alteration in speech pattern and this assessment is made based on the patient's private physician, as well as, family members, all of whom have commented on a change in Mr. Hulsey's voice quality after the injury. As of now, Mr. Hulsey has a slightly husky sounding voice with a Class I impairment in audibility, intelligibility, and functional efficiency. These individuals can produce speech of sufficient intensity for most daily needs and can articulate well and at a sufficient speed for everyday speech communication. Mr. Hulsey's voice tends to "wear out towards the end of the day" so that on certain days, he says that when he speaks, "only air comes out" if his voice is particularly tired. Under these circumstances, he would have 2 % permanent partial disability of the whole person due to the Class I defect in his speech audibility and intelligibility. He requires no additional medications or surgery of the ear, nose, and throat areas.

An August 28, 2001 report by Dr. McMorrow was in Dr. McKinney's record, and Dr. McMorrow wrote: "The cookie swallow does not demonstrate frank aspiration, but certainly does show that thin liquids seem to be the most difficult problem for him. I still am of the impression that he very likely has some minor incoordination secondary to his fall and trauma although the cookie swallow does not definitively demonstrate that. At this point alternatives would include having him evaluated by a speech pathologist to help with swallowing....." A Speech/Language Pathology services report from St. John's Mercy Medical Center noted that Hulsey had been seen on that date for voice evaluation. It was written: "He is status post resection of a displaced clavicle. Mr. Husley reports that he is much more comfortable now. He has also noticed some improvement in both voicing and swallowing. He continues to have dysphagia, especially in the morning when coordinating more than one consistency or drinking thin liquids. He also notes persistent dysphonia especially with extended speaking." The findings from a videostroboscopy were discussed, and included: patient demonstrates normal gross abduction and adduction, though may be a slight difference in the strength of adduction with the right arytenoids cartilage moving with slightly less vigor than the left; the right ventricle is also somewhat exaggerated especially the posterior aspect; there is also slight true vocal cord bowing bilaterally with the right true vocal cord margin slightly more affected than the left and as a result the patient has a persistent anterior to posterior spindle shaped glottic gap. It was noted that Hulsey demonstrated compensation behaviors in the form of elevation of the larynx within the neck, squeezing to the anterior to posterior dimension of the supraglottis and hypertrophy of the false vocal cords bilaterally; Hulsey was unable to perform pitch glide very efficiently, which was thought to be due solely with technique vs. superior laryngeal nerve dysfunction; it was noted that at times throughout the exam, Hulsey would produce a lower pitched, relaxed tone and near normal vocal cord amplitude would be seen, and at other times the vocal cords appeared constantly lengthened with little to no amplitude and minimal mucosal wave, and repetitive reproductions of the lower pitched voice were requested and was shown to the patient when reviewing his video. The Speech/Language Pathology summary was:

There is a significant amount of abnormal laryngeal posturing. This was discussed at length with him and he was able to reproduce the more relaxed, nonpressed voice by use of yawn-sigh, tongue trills and recognition of the lower pitch production. I do suspect that at one time Mr. Hulsey struggled with abnormal movement of the right true vocal cord. I believe he instituted the above-mentioned compensations to cope with his disordered voice. I am recommending that Mr. Hulsey receive approximately five voice therapy sessions for the purpose of eliminating muscular tension within the larynx during voice production. He will be in need of voice building exercises to address the vocal cord bowing issues.

H. Records from Department of Veterans Affairs Medical Center reflected treatment of Hulsey for left prior carpal tunnel, with an operative report reflecting the procedure of left carpal tunnel release performed on 03/24/99. Subsequent treatment records reflected treatment for such things as high cholesterol; a 06/14/2000 entry noted that Hulsey reported that Advil helped with his degenerative joint disease, and that he had had complaints of leg cramps for years almost nightly, especially after hard days work.

Dr. James Emanuel, M.D. testified by deposition on behalf of the employer/insurer. An orthopedic surgeon, Dr.

Emanuel stated that he began treating Hulsey at the request of the employer/insurer on 11/27/00. After examination of Hulsey, a review of medical records and a CT scan, my assessment, Dr. Emanuel testified, was that Hulsey "had multiple rib fractures of the right side. He also had an interarticular fracture of the sternoclavicular joint". (Emanuel Dp. pg. 9) Dr. Emanuel further stated: "In addition, yeah, he talked with a raspy kind of voice. And I thought, as well, the laryngeal nerve in that region could have some compression on it." (Emanuel Dp. pg. 10) The doctor stated that he recommended conservative treatment of physical therapy, and agreed that he subsequently recommended that physical therapy be discontinued, explaining that he thought the physical therapy was aggravating the shoulder condition; Dr. Emanuel agreed that he didn't see Hulsey from January of 2001 until October 2001, and explained that Hulsey was having a lot of troubles with vertigo and "was under an extensive workup with the vertigo as well as his voice". (Emanuel Dp. pg. 11)

Dr. Emanuel stated that when he saw Hulsey on October 9, 2001 he recommended a repeat CT scan of the sternoclavicular joint. After reviewing this, the doctor testified, my recommendation would be "to perform an open resection of the medial clavicle at the sternoclavicular joint", and "I performed that on March 6th, 2002". (Emanuel Dp. pp. 12-13) At the last examination, Hulsey's movement of his shoulder was restricted, the doctor said, and explained:

"He had 140 degrees of flexion. Which is significantly better than it was prior to the surgery, but still not normal, in addition to abduction. And he had difficulty adducting the arm, which is bringing it in across his chest, and also extremes of external rotation." (Emanuel Dp. pg. 14)

"Based on his range of motion and the diagnosis and the surgery performed, I rated it as a 25-percent permanent disability of the upper extremity as it related to the shoulder". (Emanuel Dp. pp. 14-15) Dr. Emanuel agreed that Hulsey would have permanent restrictions, and listed his recommended restrictions.

On cross examination by the claimant, Dr. Emanuel agreed that in his 11/27/00 report he had concluded that Hulsey was suffering from difficulty with swallowing and that his voice was different than before the injury. Agreeing that it was his opinion that Hulsey's difficulties with swallowing and with his voice were caused by the work related accident, Dr. Emanuel explained:

"Well, I felt it was related, the difficulty swallowing can be related to the thickness of that sternoclavicular joint, because the esophagus is right underneath that area. So, yes, I believe it was related to the sternoclavicular joint.

The laryngeal nerve, which innervates the trachea, I felt probably was related to the swelling, again, in that area, because the trachea is very close to it." (Emanuel Dp. pg. 21)

The doctor was asked why he was recommending among his restrictions for Hulsey that Hulsey not climb ladders and do no work on a roof. Dr. Emanuel explained:

"One of the reasons was because he was still complaining of the vertigo." (Emanuel Dp. pg. 21)

"And the other is, when you climb a ladder, you have to pull and push getting it up, and I just felt that after removing the medial aspect of the clavicle, that I thought it would be a good idea to restrict him from that type of activity when they're above the ground." (Emanuel Dp. pg. 22)

The doctor was asked about the following complaints by Hulsey and asked to comment on whether or not they would be reasonable in light of the restriction of motion in Hulsey's right upper extremity, and Dr. Emanuel commented: a. it should not be difficult for Hulsey to wash his hair; b. it would not be surprising if Hulsey found it difficult to wash the left side of his body with his right hand; c. "Handling a jug of milk with his arm completely extended away from his body, I could see that", "(B)ut handling a jug of milk with his arms close to his body should not" be a difficulty (Emanuel Dp. pg. 25); d. an inability to golf would not surprise me; e. it would not surprise me if Hulsey could not lift any weight over five pounds above his shoulder level with his right hand; e. it would be consistent that Hulsey could not paint with his right hand extended away from his body or overhead; f. "it would not surprise me (that he could not swing a hammer or it was painful to swing a hammer) if his arm was in a certain position" (Emanuel Dp. pg. 26); g. it would be consistent if he could not start a lawnmower by pulling on the chain with his right hand. Dr. Emanuel agreed that the restrictions he had listed for Hulsey in his July 2, 2002 report were attributable to injuries sustained in the October 19, 2000 work related accident.

Dr. Emanuel agreed, during cross examination by the claimant, that he was not offering any opinions on permanent partial disability for Hulsey's subdural hematoma, his vertigo, his difficulty with swallowing or his difficulty with speaking. Dr. Emanuel agreed that he is not a vocational rehabilitation expert.

Dr. David Thomas Volarich, D.O. testified by deposition on behalf of the claimant. The doctor stated that he performed an examination of Hulsey on November 20, 2002. The doctor discussed Hulsey's relayed history of the October 19, 2000 work related accident. His review of the medical records was discussed by Dr. Volarich. Hulsey's occupational, social and educational history was discussed by the doctor. Dr. Volarich noted that the last day Hulsey worked was October 19, 2000.

Hulsey's pre-existing injuries were discussed by Dr. Volarich. The doctor noted that Hulsey had had a fracture of the left femur in 1957 and a refracture a year later, and that he began to have pain in his left leg in 1979 and the hardware was removed. "Mr. Hulsey reported that after the pin was removed from the femur in 1979, he did well and had no hindrances in his ability to work leading up to October 19th, 2000 referable to that femur fracture", the doctor stated. (Volarich Dp. pg. 20) Dr. Volarich said that medical records reflected that in 1995 Hulsey was seen with complaints of low back pain and was diagnosed with degenerative disc disease and received physical therapy. Hulsey reported that leading up to and continuing beyond October 19, 2000, he had occasional flare-up of back pain, the doctor said. Dr. Volarich further testified: "He told me he would go in and continue to work because he typically ran the crew and functioned as a foreman, and he did not recall missing a whole lot of time from work but admitted that the back caused him recurrent pain...He admitted that the back injury slowed him down leading up to October 19th, 2000." (Volarich Dp. pp. 20 and 21) Dr. Volarich noted that Hulsey relayed that in November of 1997 he began to experience pain in the left wrist and hand accompanied by numbness and tingling in the fingers, and that medical records revealed that Hulsey was ultimately diagnosed with left carpal tunnel syndrome and underwent left open carpal tunnel release in March 1999. Hulsey told me that he had ongoing difficulties with the carpal tunnel syndrome of diminished strength, and numbness and tingling, Dr. Volarich said, "(H)e told me that the carpal tunnel slowed him down leading up to October 19th of 2000". (Volarich Dp. pg. 22) The doctor noted that Hulsey had had a prior right elbow fracture and had difficulties with repetitive use of tools with the right hand.

Examination findings were discussed by the doctor, and included:

"It is noted that several times during the physical examination when asking Mr. Hulsey to perform certain maneuvers such as extending his head or lying down supine, he developed vertigo and associated nystagmus....A rapid flicking of the eyeballs....It confirms the vestibular injury that he had and head injury that he had with the epidural bleed."

"In the ear exam, the canals were patent bilaterally without significant abnormality. The tympanic membranes demonstrated a normal cone of light without perforation. The Rinne Weber Test was negative."

"I asked him to say specific words, and he was unable to properly nor easily pronounce the word world."

"Over the thorax, there was a 9-centimeter scar over the area of the sternoclavicular joint anteriorly on the right. The distal portion of the clavicle, about 2 centimeters had been resected. The exposed end of this bone was tender to palpation."

"In the motor examination, there was asymmetric bulk in the upper and lower extremities....Strength in the right shoulder was weak in confrontational testing...."

"In the lower extremities, the quadriceps on the right was strong....The left was slightly weak..."

"Cerebellar examination revealed abnormalities with balance. I was unable to perform a finger-to-nose test with his eyes closed because of loss of balance and a development of vertigo. Similarly, when I asked him to lie down to perform a heel-to-shin test, he developed vertigo quickly. After about 15 or 20 seconds of sitting upright or lying down or sitting down when standing, the vertigo resolved."

"On the gait examination, he was able to walk flat footed across my examination room without foot drop, limp or ataxia. He was unable to toe walk, heel walk, or tandem walk because of poor balance and complaints of dizziness. He could stand on either foot for a few seconds without too much difficulty but was unable to hop on either leg. He squatted fully and was able to stand back upright to an erect position without difficulty."

(Re: cervical spine) "Motion was restricted...extension was limited 25 percent. Side bending each way was limited 33 percent and rotation was limited 38 percent each way. The worst pain in the neck occurred with left side bending and rotation. Palpation of the neck elicited pain in the right trapezius muscle as well as in the right strap muscles sternocleidomastoid."

"Lumbar spine of the lower back, range of motion was also restricted...Spasm or trigger points were not found. Straight leg raising was accomplished 80 degrees bilaterally without radicular pain."

"In the upper extremities, the left shoulder exam revealed a 10 percent loss in motion as evaluated by the Apley

Scratch test. There was trace crepitus noted with range of motion, but the left shoulder was otherwise normal. In the right shoulder, there was a 60 percent loss in motion as evaluated by the Apley Scratch test. I was unable to perform Impingement, Apprehension, Clunk, and Adson's testing because of the lost motion. Considerable crepitus occurred with this limited motion. There was evidence of a first-degree to second-degree AC separation."

"The clavicle was elevated above the acromion about 3 or 4 millimeters, maybe a little bit more than that, consistent with partial disruption of the ligaments holding that joint together....Again, the right sternoclavicular joint was deformed, and the clavicle medially was elevated at the base of the neck.. He also carried the right shoulder much lower than the left giving him a tilted appearance when looking at the upper torso. Weakness in the right shoulder was again identified."

"The provocative and Tinel's signs were positive on the left and negative on the right. Phalen's, Reverse Phalen's, and Finkelstein's tests were all negative bilaterally." (Volarich Dp. pp. 22-33)

Dr. Volarich testified as to his diagnoses of injuries sustained in the October 19, 2000 work related accident:

"First, closed head trauma with epidural hematoma right occipital parietal region with residual benign positional vertigo and disequilibrium syndrome as well as speech disorder that I described as hoarseness."

(No. 2) "Comminuted right clavicle fracture at the sternoclavicular joint with development of accelerated post-traumatic degenerative arthritis status post medial clavicle excision. The third diagnosis was cervical strain and aggravation of degenerative disc disease and degenerative joint disease to C-5, C5-6, and C6-7 without true radiculopathy. The fourth was right shoulder first-degree AC separation and aggravation of degenerative arthritis. The last was aggravation of right elbow syndrome." (Volarich Dp. pp. 36-37)

The doctor testified as to the diagnoses of Hulsey's pre-existing problems before October 19, 2000:

"The first was right elbow fracture dislocation status post open reduction internal fixation. The second was re-fracture of right elbow status post redo open reduction internal fixation. Next was right elbow hardware removal. Next was left femur fracture status post open reduction internal fixation with intramedullary rod. Next was status post removal of intramedullary rod. Six was left wrist carpal tunnel syndrome status post open carpal tunnel release. Seventh was chronic lumbar syndrome secondary to degenerative disc disease and degenerative joint disease." (Volarich Dp. pg. 37)

Dr. Volarich gave his opinion on causation:

"With regard to causation, it's my opinion the work accident that occurred on October 19, 2000 when Mr. Hulsey slipped and fell off a ladder approximately 10 feet to the concrete surface below striking the back of his head and right side of his body including the right shoulder, right arm, and right ribs is the substantial contributing factor causing the multitude of injuries that I just listed in the diagnosis section of this report referable to the accident of 10/19/2000." (Volarich Dp. pg. 39)

The doctor testified about his assessment of permanent partial disability in regards to the October 19, 2000 work related injuries:

"There's a 25 percent permanent partial disability of the body as a whole at the central nervous system due to the closed head trauma causing right posterior parietal epidural hematoma with recurrent persistent headaches. This rating also accounts for the benign positional vertigo with disequilibrium syndrome and his speech disorder. It is noted that his tinnitus resolved.

There is a 40 percent permanent partial disability of the right upper extremity at the shoulder girdle due to the fracture of the medial head of the clavicle requiring excision due to the development of accelerated post-traumatic degenerative arthritis as well as the first-degree AC separation. This rating accounts for ongoing shoulder pain, abnormal movement of the clavicle, loss motion, and the weakness in the dominant arm.

There's a 15 percent permanent partial disability of the right upper extremity at the elbow due to the aggravation of his right elbow syndrome contributing to pain and lost motion with worsening paresthesias along the ulnar distribution in the right arm. Additional disability exists in this elbow.

There's a 20 percent permanent partial disability of the body as a whole rated at the cervical spine due to a strain/sprain syndrome and aggravation of his degenerative arthritis at C4-5, C5-, and C6-7. This rating accounts for ongoing pain and lost motion in the cervical spine. Permanent disability as a result of his right rib fractures or right upper lobe pulmonary contusion is not identifying since those symptoms resolved.

In addition, it's my opinion that there is a 20 percent permanent partial disability of the body as a whole that I offered as a multiplicity factor due to the combination of injuries in the central nervous system, cervical spine and right upper extremity." (Volarich Dp. pp. 40-41)

Dr. Volarich testified about permanent partial disability as to Hulsey's prior injuries:

"There is a 35 percent permanent partial disability of the right upper extremity rated at the elbow due to the fracture dislocation and subsequent re-fracture that required a total of three surgical repairs including hardware removal. This rating accounts for ongoing stiffness and pain as well as lost motion leading up to October 19 of 2000.

There's a 30 percent permanent partial disability of the left upper extremity at the wrist due to the carpal tunnel syndrome that required open carpal tunnel release. This rating accounts for ongoing pain, paresthesias, and weakness in the non-dominant hand.

There is a 20 percent permanent partial disability of the body as a whole rated at the lumbosacral spine due to his chronic lumbar syndrome due to degenerative disc disease and degenerative joint disease causing recurrent low back pain and lost motion in the lumbar spine. Pre-existing disability as a result of his left femur fracture was not identified since he was asymptomatic in that extremity leading up to October 19, 2000." (Volarich Dp. pg. 42)

Dr. Volarich was asked his opinion as to whether or not Hulsey could engage in substantial gainful activity, and the following testimony occurred:

Q. And what is that opinion?

A. It's my opinion that Mr. Hulsey is not able to engage in any substantial gainful activity, nor can he be expected to perform in an ongoing working capacity in the future. It's my opinion that he could not be reasonably expected to perform on an ongoing basis eight hours per day, five days a week throughout the work year. It is also my opinion that he is unable to continue in his line of work that he last held as a laborer for Kirberg Roofing, nor can he be expected to work on a full-time basis in a similar job.

Q. Even without considering the injuries – or difficulties he was having before October 19th, 2000, do you have an opinion as to whether the injuries that he sustained in the accident of October 19th, 2000 would have rendered him totally disabled from engaging in substantial gainful activity?

A. The severity of that accident, I think, would have rendered him disabled by itself, yes.....

Q. All right. In your report here, you indicated on the next line based on medical assessment alone, Mr. Hulsey is permanently and totally disabled as a result of the 10/19/2000 work accident in combination with his pre-existing injuries. What do you mean by that?

A. Just what it says. I think, though, the question you asked me is a pertinent question as well. If you take the 10/19/2000 work accident by itself would have rendered him disabled, absolutely. The head injury would keep him from any work on heights. He's got vertigo. There's no way he could be on scaffolding, roofs or ladders. That puts him out of his lifelong work right there. What I'm trying to suggest is that he did have some pre-existing problems as I noted with the right elbow, the left wrist and the back, but he was still able to work full-time – full duty as a roofer prior to 10/19/2000.

Q. Okay. And you noted that – you took – in arriving at your conclusions, you took into consideration his age and education and work experience; is that right?

A. Yes. Just to note, he's 62 years old, has a limited education – that being ninth grade without a GED – could not get back to work since October 19th, 2000, and again, received Social Security Disability. (Volarich Dp. pp. 43-45)

Dr. Volarich listed the restrictions he recommended for Hulsey.

On cross examination by the employer/insurer, Dr. Volarich stated that the limitations he had placed on Hulsey in regards to his hand and forearms as well as for his spine were due to a combination of both the October 19, 2000 injuries and the preexisting injuries. The doctor was queried that despite the fact that Hulsey had had three surgeries on his leg he had not rated the leg. Dr. Volarich answered:

"On the femur – this is up to 1979. If we would have been talking back in the '70s, yes, he would have considerable difficulties with the femur, but he said that after that nail was removed from the femur – the plate was removed, he did fine. He could not identify any problem." (Volarich Dp. pg. 53)

The doctor was questioned about his earlier testimony in light of his statement in his report that Hulsey was permanently and totally disabled as a result of the 10/19/00 work accident in combination with his preexisting injuries. Stating that it was his opinion that Hulsey would be unable to work as a roofer due to the head injury and vertigo alone, Dr. Volarich further testified:

"Obviously, the other injuries that he had, particularly the right upper extremity are going to preclude him from additional jobs, you know, anything laboring, carrying, lifting, painting, etc. He can't use the right arm, his dominant arm, like he could in the past, so that's going to take him out of more jobs. When you add the other difficulties in with more problems with the right elbow and difficulties with the cervical spine, again, that adds another group of jobs that he's not suitable for." (Volarich Dp. pg. 54)

Dr. Volarich agreed that he is not a vocational rehabilitation specialist, and that he would defer to such an expert in regard to what jobs are available in the area and what Hulseley could do based on the restrictions he had placed on Hulseley.

On cross examination by the Second Injury Fund, Dr. Volarich agreed that prior to Hulseley's October 19, 2000 work accident, Hulseley was working full time as a roofer, a job that involved lifting 70 to 120 pounds, carrying ladders and scaffolding, and often working 12 to 14 hours a day. The doctor agreed Hulseley reported to him that he was able to perform all of these duties of a roofer before October 19, 2000. When queried if it was correct that he was not aware of any medical restrictions Hulseley was under because of the prior 1988 right elbow injury, Dr. Volarich answered: "I didn't see any permanent restrictions listed by any of his treating physicians. It was just the limitations he had with motion that caused him the problem." (Volarich Dp. pg. 57) Dr. Volarich agreed that regarding his prior low back condition, Hulseley had only conservative treatment, did not miss much work for this condition, was not on any prescription medication for this condition, and there were no medical restrictions given by any treating physician. Dr. Volarich was asked, assuming that Hulseley had no prior injuries or difficulties and was perfectly healthy prior to the October 19, 2000 injury, with the restrictions and limitations he had placed on Hulseley as a result of the October 19, 2000 injury would Hulseley be employable. "Again, I don't think so", Dr. Volarich answered. (Volarich Dp. pg. 59)

Dr. John McKinney, M.D. testified by deposition on behalf of the employer/insurer. The doctor stated that he specializes in treating diseases of the ear, nose and throat, and that he evaluated Hulseley on November 2, 2001 at the request of the workers' compensation insurance company nurse case manager. The doctor discussed the history relayed by Hulseley in regards to the October 19, 2000 work related accident, the injuries and treatment. Dr. McKinney discussed his examination findings:

Nose & Sinuses: "Endoscopic examination of the nose and sinuses showed a deviated nasal septum secondary to injuries not related to the work injury. There was no evidence of infection or polyps in the nasopharynx. The hypopharynx was unremarkable. The true vocal cords were mobile and symmetrical, being slightly bowed in position and with slightly dry mucous membranes. There was no evidence of asymmetry of the pyriform sinuses, in the throat, in the false vocal cords or in the Aryepiglottic folds in the throat. The epiglottis and vallecula were unremarkable. The tongue was mobile and symmetrical. Those findings were confirmed by Berci Ward endoscopy and laryngoscopy." (McKinney Dp. pg. 7)

Ears: "Both eardrums were intact. The eardrum, the tympanic membranes were in a neutral position without perforation, scar tissue, retraction pockets, middle ear fluid, tympanosclerosis or cholesteatoma. There was not increased vasculature on the middle ear promontories, and the fistula test was negative bilaterally." (McKinney Dp. pg. 8)

Dr. McKinney agreed that the nose and sinuses exam as well as the ears exam were normal. The doctor discussed the results of the diagnostic testing on Hulseley:

"Audiometric studies were completed and Tympanometry, a measure of the middle ear pressure, was normal and symmetrical bilaterally. Speech reception threshold was 35 and 40 decibels to the right and left ears and in agreement with pure tone averages. Speech discrimination at 55 decibels was 96 percent and 92 percent for the right and left ears. Stenger testing was negative." (McKinney Dp. pg. 8)

"That's a fairly normal audiometric evaluation", Dr. McKinney said. (McKinney Dp. pg. 8) Dr. McKinney noted that air and bone conduction studies were also completed, and discussed what they revealed:

"They were completed in the ranges of 500 to 8000 Hertz. Concerning this case as a workers' compensation case, the frequencies of 500, 1000, 2000 Hertz were average according to Missouri Workers' Compensation rules to obtain an average hearing level of 18.3 and 20.0 decibels to the right and left ears respectively. Subtracting a correction factor of 10.5 decibels based on Mr. Hulseley's age and years, greater than 40 years, for a nonoccupational hearing loss, the corrected average hearing level was calculated at 7.8 decibels and 9.5 decibels to the right and left ears." (McKinney Dp. pg. 9)

Dr. McKinney testified that these values are not compensable under Missouri Workers' Compensation Law. The doctor agreed that he was not saying Hulseley did not have a hearing loss, just that it was not compensable under the law. When queried if he had evaluated Hulseley for tinnitus, Dr. McKinney responded: "Mr. Hulseley stated to me that he initially had, quote, noise, in his head, but that he no longer was bothered by any extra head noises, sounds, or symptoms that could be considered as tinnitius at the time of my examination in 2001". (McKinney Dp. pg. 10) The doctor was asked his opinion following his evaluation whether or not Hulseley was suffering from vertigo, and Dr. McKinney noted Hulseley's

relayed complaints and that he had been treated by Dr. Beneke with vertigo maneuvers which had been partially successful or helpful. Dr. McKinney further noted: "Mr. Hulsey had been on Valium, two milligram tablets, originally twice per day and was taking them once per day when I saw him in 2001. Mr. Hulsey stated that vertigo, which lasted from 10 to 30 seconds, was benign and tended to occur every day. This is benign vertigo. Then I made some recommendations to Mr. Hulsey." (McKinney Dp. pg. 11) The doctor testified as to the restrictions he placed on Hulsey in regards to work activities:

"I felt that the presence of vertigo every day in spite of medical treatment was an indication that he would not be able to work as a roofer. He was able to drive an automobile without difficulty as he attended union meetings and so forth. I felt that he would not be able to work on ladders or roofs or in areas involving heights where he would have to look up and work at the same time. However, he would not be disabled from work activities not involving the above mentioned particular motion." (McKinney Dp. pg. 11)

Dr. McKinney testified as to any permanent partial disability he felt Hulsey was suffering from. Concerning the vertigo, "(T)hat would be a ten percent disability in my opinion on a Missouri Workers' Compensation". (McKinney Dp. pg. 12)

The doctor was questioned if Hulsey had had any complaints with regard to his speech, and Dr. McKinney replied:

"Well, at the time that I saw him he felt that he was having some difficulty with speech. I examined him and found no identifiable lesions in the hypopharynx or the larynx.....In 2001 that would contribute to his current speech pattern, and I recommended at that time that he consider a trial of approximately six weeks of speech therapy to try to improve his overall vocal production which I felt it may have been a possibility it could have been altered due to the fact that he had an epidural hematoma when he fell which is an indication of head injury. As of the time that I saw him, he had a slight husky-sounding voice; and again, as a benchmark it would be somewhat similar to the Class I impairment in audibility, intelligibility, and functional efficiency. Individuals with a Class I impairment can produce speech of sufficient intensity for most daily needs and can articulate well at a sufficient speed for everyday speech communication. Mr. Hulsey's voice, when I saw him in 2001, tended to, quote, wear out at the end of the day. So that on certain days he stated that when he spoke, quote, only air comes out, unquote, if his voice is particularly tired. Under those circumstances, I gave Mr. Hulsey a two percent permanent partial disability of the whole person due to the Class I defect in his speech audibility and intelligibility. He required no additional medications or surgery for the ear, nose, or throat areas." (McKinney Dp. pp. 12-13)

On cross examination, Dr. McKinney stated that he "didn't find anything wrong in his examination of (Hulsey's) larynx when he saw him, so I'm not sure he developed any injury to the larynx from his fall." (McKinney Dp. pg. 17) The doctor stated that a May 2002 report by a speech therapist noted that Hulsey demonstrated a rather significant muscle tension dysphonia with habitual use of an inappropriate high pitch, and that he would defer to a speech therapist on any question as to the actual vocal production mechanics which is what Hulsey is left with. Dr. McKinney stated that he believed Hulsey's vertigo was caused by the October 19, 2000 work related fall. The doctor agreed that he had testified on direct examination that Hulsey's problem with vertigo prohibits him for working on ladders and roofs, but further testified: "...however, he could still work as a ground roofer such as picking up discarded roofing tiles, loading shingles on a conveyor belt and driving the trucks with the discarded shingles to the dump, you know, moving products from here and there. Because he does operate an automobile, he could, therefore, operate roofing trucks". (McKinney Dp. pg. 19) Dr. McKinney agreed that he was not offering any opinion on what other restrictions may or may not apply because of other injuries that Hulsey sustained in the October 19, 2000 accident. When queried if he knew Hulsey had some disability in his right arm, some loss of motion, some weakness and some pain in it, Dr. McKinney answered: "No, I'm specifically working on the vertigo, so I would defer any other shoulder, arm, leg, so forth, injuries to someone in that area." (McKinney Dp. pg. 19) The doctor admitted that he is not a vocational rehabilitation expert, but further stated that he "would defer to a disability expert for the arms and legs and other areas not involving the ear, nose and throat". (McKinney Dp. pg. 20)

During cross examination, it was noted that a report made reference to Hulsey continuing to have dysphasia (difficulty swallowing), especially in the morning, when coordinating more than one consistency or drinking thin fluids. Responding that this did not mean too much, Dr. McKinney further testified: "...his Barium Swallow was normal. His speech pathology, Cookie Barium Swallow, which checks the function of your swallowing, was normal." (McKinney Dp. pg. 21) It was noted that in Dr. McKinney's record was an August 28, 2001 report by a Dr. McMorro which reflected: a. that the Cookie Swallow does not demonstrate frank aspiration but certainly does show that thin liquids seem to be the

most difficult problem for him; and b. that Dr. McMorrow wrote –I still am of the impression that he very likely has some minor incoordination secondary to his fall and trauma although the cookie swallow does not definitely demonstrate that. “That’s what I said, the cookie swallow does not demonstrate any abnormality”, Dr. McKinney responded.

Dr. McKinney discussed his opinion on Hulsey’s hearing loss during cross examination. “He has a bilateral mild symmetrical high frequency hearing loss” (McKinney Dp. pg. 24) The doctor further testified: “This would be approximately the normal hearing loss you would see in an individual of his age. His hearing right now is approximately the same as my hearing. I’m approximately his age.” (McKinney Dp. pg. 24) Dr. McKinney opined that any hearing loss Hulsey has is likely not from the blow to his head, and the doctor explained: “...he had a symmetrical moderate, mild to moderate high frequency hearing loss which is just as consistent with presbycusis which is the hearing loss that individual sustain with age as it is with anything else. If he had severe hearing loss in one ear that would be a different story, by he has audiometric findings most consistent with presbycusis.” (McKinney Dp. pg. 24)

On cross examination by the Second Injury Fund, Dr. McKinney agreed that the restrictions he gave Hulsey were for the October 19, 2000 injury only.

Samuel Bernstein, Ph.D. testified by deposition on behalf of the claimant. Dr. Bernstein stated that his discipline is in two areas – psychologist and vocational rehabilitation. I met with Hulsey for evaluation on February 25, 2003, the doctor said. “In this case because of the advanced age I did not put (Hulsey) through educational testing”, Dr. Bernstein stated. (Bernstein Dp. pg. 6) The doctor stated that his evaluation included taking some background information about Hulsey; it was noted that Hulsey had worked as a roofer his whole life. Dr. Bernstein listed and discussed the medical records he had reviewed. Dr. Bernstein agreed that Hulsey had some preexisting problems and injuries before October 19, 2000 but reported to him that he was able to work full-time in spite of whatever those difficulties might have been. “It’s the – it’s that injury that occurred that basically knocked him out of employment”, Dr. Bernstein added. (Bernstein Dp. pg. 20)

Dr. Bernstein's conclusions were noted:

In conclusion, Clinton Hulsey is 62 years old and is of advanced age from an employment point of view. In fact, he is of retirement age. He has a limited education, and his work history has been as a roofer which is heavy labor work. His work history has been described in detail above.

The record shows that he was injured on October 19, 2000, and suffered a closed head trauma with hematoma. As a result of that injury he has vertigo and a disequilibrium syndrome, as well as a speech disorder. As a result of that injury he also suffered a comminuted right clavicle fracture of the sternoclavicular joint, and developed degenerative arthritis. As a result of that injury he has undergone a medial clavicle excision. As a result of that injury on October 19, 2000, he had a cervical strain with aggravation of degenerative disc disease and degenerative joint disease at C4-5, C5-6, and C6-7. He also had a shoulder separation and aggravation of degenerative arthritis. He also had an aggravation of a right elbow syndrome as a result of the October 19, 2000, injury.

Besides the vertigo, disequilibrium, and speech problems, he continues to have problems with any movement of the right upper extremity as well as movement of the neck.

The record further shows that he has a number of pre-existing injuries: a right elbow fracture, a dislocation for which he underwent ORIF on two separate occasions. He also had right elbow hardware removal, had a left femur fracture for which he underwent ORIF with rod insertion. He later underwent removal of rods.

The record also shows that he has had left carpal tunnel syndrome and underwent carpal tunnel release. He still has problems with grasping on both the right and the left and with any movement of the right upper extremity. He also has a chronic lumbar syndrome with degenerative disc disease and degenerative joint disease and this particularly bothers him with bending and tortional motions. He is taking a number of medications for pain and his arthritic conditions as well as for dizziness and vertigo.

Mr. Hulsey presents as a very credible man with a good work record. There are no apparent serious psychological problems that I can ascertain. However, given his advanced age, work history, and multiple problems, along with his limited education, it is patently obvious that he is unemployable in the open competitive labor market. He would have difficulty obtaining work or functioning on a sustained basis in any work environment.

I have, therefore, advised Mr. Hulsey to apply for Social Security and, according to Mr. Hulsey, he was granted benefits based on the record alone.

Dr. Bernstein was asked his opinion as to whether Hulsey is able to work at any work that is readily available in the workplace. The doctor answered: “I have based on my training as a – and experience both as a psychologist and a

vocational rehabilitation expert and that conclusion, as contained in the report, is that he is definitely unemployable in the open competitive labor market.” (Bernstein Dp. pg. 28) The doctor was asked, assuming Hulseley did not have any of the preexisting problems and injuries, what was his opinion as to whether his injuries as a result of the October 19, 2000 accident alone rendered Hulseley unable to secure employment in the open competitive market. Dr. Bernstein answered: “It would have rendered him unemployable, yes, because – added to that, of course, is some other factors such as his education and his work history, but that injury alone would have rendered him unemployable.” (Bernstein Dp. pg. 28) Dr. Bernstein agreed that Hulseley’s preexisting problems make it even worse. The doctor was questioned about Hulseley’s hoarseness and difficulty speaking, and Dr. Bernstein responded – “Well, that is a factor. It’s not as important as some other factors but it is a factor.” (Bernstein Dp. pg. 30)

Dr. Bernstein was questioned about whether or not Hulseley could perform the job of doing bids in the roofing business, going out and scooping out jobs and negotiating with people and looking at what needed to be done. “He has a very limited education”, Dr. Bernstein initially responded. (Bernstein Dp. pg. 31) “You have to climb up there and look it over and he couldn’t do it”, the doctor further stated. (Bernstein Dp. pg. 31)

On cross examination by the employer/insurer, Dr. Bernstein was questioned about Hulseley’s prior problems, and the following testimony took place:

- Q. Okay. And you also noted in 2000 that he was having back complaints prior to our injury
A. Yes, sir, it’s all there.
Q. Okay. And you also indicated that because of the – presumably the back injury he was assigning heavier duties to other people that worked for him?
A. That’s correct.
Q. Okay. Based upon that would it be safe to assume that he was having some difficulty performing the duties as a roofer prior to our injury?
A. He was having some difficulties but he was doing it.
Q. Okay. Based upon the history that you took from him was he having some difficulties with his elbow prior to the last injury?
A. He probably was.
Q. Okay. And you also noted that he had missed some work prior to the last injury because of his back problem, is that correct?
A. That’s correct.
Q. And you also noted that he’d had left open carpal tunnel release in March of '99?
A. Yes, sir.
Q. Okay. And since that injury he had had problems grasping and holding things?
A. Yes, sir. It’s all there.
Q. Okay. And that is directly related to the carpal tunnel problem he was having?
A. Sure.
Q. Okay. And when you went back – when you were talking about his daily activities, you indicated that he dropped dishes and he had trouble buttoning clothing. That was because of the carpal tunnel syndrome?
A. Sure. (Bernstein Dp. pp. 32-34)

Dr. Bernstein agreed that Hulseley received a discharge from the Marine Corps for medical reasons. When queried, so the Marine Corps and the rifle company didn’t think Hulseley could perform those duties, Dr. Bernstein responded – “Not as a – not in the line company.” (Bernstein Dp. pg. 35)

It was noted, during cross examination by the employer/insurer, that Dr. Bernstein had written in his report that because of his advanced age, work history and multiple problems, along with his limited education, Hulseley was unemployable in the job market; Dr. Bernstein was asked what he had meant by “multiple problems”. The doctor stated that he meant “(P)reexisting conditions as well as this. As I said, I took everything into consideration – in rendering an opinion.” (Bernstein Dp. pg. 36)

On cross examination by the Second Injury Fund, Dr. Bernstein agreed that he had reviewed the medical records concerning treatment for the prior injuries to the right elbow, low back and carpal tunnel, and that none of the doctors had placed permanent restrictions on Hulseley as a result of these injuries; Dr. Bernstein agreed that Hulseley continued working as a roofer after each of these injuries, and stated that roofing work is “definitely heavy” work. (Bernstein Dp. pg. 39) Dr. Bernstein was queried, if Hulseley had not had the prior leg break, prior back, prior carpal tunnel and prior elbow and had just had the October 19, 2000 injury in combination with his age education and work experience, would he be employable. “No”, the doctor answered. (Bernstein Dp. pg. 41)

James England testified by deposition on behalf of the employer/insurer. A rehabilitation counselor, England stated that he evaluated Hulsey's case and wrote a report dated 11/26/03. England stated that he did not actually see Hulsey, but he reviewed Hulsey's deposition taken on 06/24/02, and reviewed medical records. Agreeing that his evaluation included also analyzing Hulsey's vocational and educational background, England testified as to his conclusions:

"Well, educationally he had completed the eighth grade and started the ninth and then stopped to go on to work. He was questioned about his academic abilities. He said he really had no problems with reading or with basic math. And he had served in the Marine Corps before entering the roofing field. As far as his career, roofing had really been the type of work that he had done pretty much his entire career. He had operated his own company – well, he had actually started in roofing in 1962. Then from 1978 to 1989 he operated his own company called Meramec Roofing. His wife did the book work, but he did cost estimates, dealt with customers, supervised a number of employees. And then more recently he had worked for Connelly Roofing for about two years, and the ultimately he had gone to Kirberg Roofing in September of 1999, and that was primarily commercial roofing. And that's what he was doing, the most recent work history that I'm aware of would have been with Kirberg. But essentially you've got a guy that from 1962 through the time of the primary injury was involved in roofing." (England Dp. pp. 7-8)

England testified as to his conclusions after his evaluation:

"Well, at the time I reviewed the information, Mr. Hulsey was 63 years old. He had worked his entire career as a roofer after coming out of the Marine Corps. He was an honorably discharged veteran. I thought looking at the restrictions from Dr. Emanuel, the treating doctor for the primary injury, assuming those restrictions, I thought Mr. Hulsey could still perform a variety of work.

Things that made the most sense to me for somebody with this particular gentleman's work background would be selling roofing products to people that are involved in that type of industry, in other words, on behalf of a roofing products manufacturer, calling on particular contractors. That would make sense to me, I think also obviously roofing sales, you know, to a variety of people. He could certainly be at an answer desk in a home remodeling center talking with people that had questions about roofing.

That would be the kind of thing I think that would be the most – the best way to use the kind of knowledge and skill that he's acquired in the past. Other than that, obviously there are also some entry-level unskilled kinds of work that he could do. But those would be the best type of – the best way to utilize the skill and knowledge that he acquired in the past." (England Dp. pp. 11-12) (Ruling: Employee's objection is overruled. England Dp. pg. 12)

England testified as to his conclusions with consideration of Dr. Volarich's restrictions for Hulsey:

"Well, I think it depends on what all – I think up to the point where he says that the man would have to rest periodically during the day, that might very well negate his ability to perform work. Other than that, I think with most of the other restrictions, with the restrictions on the shoulder, with the need to change positions, sitting, standing, walking, I think the person could still work and do these kinds of jobs within those restrictions, but I think obviously if he actually had to take extra rest periods or something during the day that might negate his ability to work." (England Dp. pp. 12-13)

England was asked his opinion of what level Hulsey was functioning from his review of Hulsey's deposition: "I think from his description of his day-to-day activity, I would say it was in the sedentary to light range. He was doing activities that would fall within that range." (England Dp. pg. 13) England agreed that somebody functioning within the sedentary to light range would be able to perform the job duties he had just described that in his opinion Hulsey would be qualified for.

On cross examination by the claimant, England was queried if Hulsey was working in one the suggested jobs of a roofing materials company was he saying that he would never have to do any loading of lifting of material to load trucks. England answered:

"I wouldn't think as doing the kind of job that I'm really talking about, no. And I'm not talking about having him working at the warehouse where trucks pull up and you have to load shingles on and things like that. I'm talking about a sales representative who would go out and call on roofing companies just trying to sell the product that that particular company is selling or being at an answer desk or at a phone, you know, they also have inside salespeople, that kind of thing. No somebody that actually has to load the materials on the truck or anything like that." (England Dp. pg. 15)

England added: "...I don't think he could do cost estimations of roofing, because you do have to actually get up on the

roof at times. I don't think he could do that, no" (England Dp. pg. 16) When queried, wouldn't it be necessary for Hulsey to be familiar with the computer to work at a help desk as a person with some knowledge about roofing, England responded – "I think he would have to learn some basic keyboarding, yeah. I think that's true." (England Dp. pg. 17) England stated that he did not think it was too late in life for someone Hulsey's age and education background to be picking up computer skills, "only because I see so many different people in here that that's something that they do just for the heck of it as they do retire or are getting older, that there's so much going on that uses computers that they're interested in learning, and a lot of them do." (England Dp. pg. 18) England stated that he didn't mean to a point where Hulsey would be a computer programmer, "but just basic stuff that I think any of us in the room could do some basic data entry or retrieval." (England Dp. pg. 18) It was noted that England had suggested a job for Hulsey of answering questions at a help desk and over the phone, and England agreed that if someone with regularity was unable to talk or at some point in the work day their voice became very weak and hoarse, it would be difficult for this person to communicate with people in this capacity. England admitted that if Hulsey could not hear and was not able to use a device that raises the voice, this would be an impediment to performing a job where he had to communicate consistently with people. England agreed that he was aware Hulsey suffers from intermittent vertigo and dizziness, and stated that if he was employed in a job that regularly required him to change positions and bend down to do his work the dizziness and nausea would be an impediment to his employment. England admitted that he did not know how high Hulsey can lift his arm or when he has pain when he lifts his arm.

On cross examination by the Second Injury Fund, England stated that from his review of the records he did not see any permanent restrictions for Hulsey in regards to his hands and low back by the treating physicians and Dr. Volarich's report was the first time he saw this. England agreed that it was his understanding Hulsey was working full time full duty up until the October 19, 2000 accident, and the work Hulsey was doing was heavy in nature. When queried if Hulsey was lifting up to 150 pounds, England agreed and further stated – "Which would actually put it into the very heavy range." (England Dp. pg. 24)

FINDINGS OF FACTS AND RULINGS OF LAW

ISSUES: Nature and extent of permanent disability - whether partial or total; Liability of the Second Injury Fund

The claimant, Hulsey, who was found to be a credible witness, testified that he has been unable to work since the October 19, 2000 work related injury. Section 287.020.7 RSMo sets forth the parameters for total disability: "The term 'total disability' as used in this chapter shall mean 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 claimant testified about injuries he sustained in the October 19, 2000 work related injury herein and injuries he had sustained prior to this injury; medical records and opinions were in evidence indicating that the claimant had some disability prior to the October 19, 2000 work injury as well as a result of the October 19, 2000 work related injuries. Consequently, the liability of the Second Injury Fund as well as the employer/insurer is in issue. Section 287.220.1 RSMo sets forth the parameters for Second Injury Fund liability, and states, in part:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. 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 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, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund"....

Section 287.220.1 mandates that the liability of the employer/insurer be determined first before consideration of any Second Injury Fund liability.

“The extent of liability of the fund being fixed by the legislature as the balance or remainder, if any, of the disability after determination of the extent of liability of the employer, it was necessary that it fix and limit the latter's liability. For total and permanent disability resulting from a previous disability and the last injury together, it fixed and limited the employer's liability to that portion of the disability 'resulting from *the last injury considered alone and of itself*.' For such permanent total disability, the legislature further fixed the liability, if any, of the fund and the time when payments were to be made therefrom by providing 'that if the compensation for which the employer at the time of the last injury is liable, *is less than* the compensation provided in this chapter for permanent total disability then in addition to the compensation for which the employer is liable *and after* the completion of payment of the compensation by the employer, the employee shall be paid *the remainder* of the compensation * * * [due for such disability] out of * * * the second injury fund * * *.' (Emphasis supplied.) The quoted and italicized words have meaning in the overall scheme of the law and must be given effect to accomplish its object.

In determining the liability of the employer in this case, we should first consider only the disability resulting from the last injury; otherwise the words 'considered alone and of itself' are meaningless. Until that disability is determined, it is not known whether the second injury fund has any liability, for the statute contemplates that the employer's liability for compensation may be at least equal to that provided for permanent total disability in Section 287.200; otherwise, it would be meaningless to provide that the fund pay 'the remainder' if compensation due from employer for the last injury 'is less than' that to be paid for permanent total disability.” *Stewart v. Johnson*, 398 S.W.2d 850, 854 (Mo. 1966).

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“As explained in *Stewart, id.* at 854, § 287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury ‘may be at least equal to that provided for permanent total disability.’ Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id.* The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is *less* than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1.” *Vaugh v. Vaughns, Inc.*, 938 S.W.2d 931, 939 (Mo.App. S.D. 1997).

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“The Second Injury Fund's liability is fixed by the statute for the ‘balance, if any’ resulting from the employer's liability compared with permanent total liability. When there is no difference, the employer is responsible for the entire amount. The method of calculation of respective liability for permanent total disability takes into account the possibility of overlap between preexisting injuries and the new injury. As noted in *Stewart*, ‘the statute contemplates that the employer's liability for compensation may be at least equal to that provided for permanent total disability in § 287.200; otherwise, it would be meaningless to provide that the fund pay 'the remainder' if compensation due from employer for the last injury 'is less than' that to be paid for permanent total disability.’ *Stewart*, 398 S.W.2d at 854.” *Kizor v. Trans*

In this case, the evidence reveals that the claimant suffered numerous injuries as a result of the October 19, 2000 work related accident in which he fell from a ladder approximately 10 feet to the concrete ground landing on the back of his head and the right side of his body including the right shoulder, right arm, and right ribs. The medical evidence reveals and is in agreement, it is found, that as a result of the work related accident the claimant sustained the injuries of: 1. right posterior parietal epidural hematoma; 2. comminuted intra-articular fracture of the medial sternoclavicular joint 1.5 cm of the right clavicle with 1 cm anterior dislocation of the clavicle in relation to the right sternoclavicular joint; 3. nondisplaced fracture of the posterior right first rib; 4. right elbow laceration; 5. rib fractures of 7, 8, and 9 on the right side; 6. pulmonary contusion and right pulmonary effusion. Additional injuries discovered during treatment were: a. due to the head injury -- post-traumatic benign positional vertigo/disequilibrium, tinnitus; b. due to the clavicular fracture -- degenerative arthritis in the sternoclavicular joint, dysphagia (difficulty swallowing), and minor speech incoordination.

Medical opinions on the extent of any continuing problems as to the above-mentioned work related injuries each concentrated on a different injured part of the claimant's body, it is found. Dr. James Emanuel, who on March 6, 2002 performed on Hulsey the surgical procedure of - excision of sternoclavicular joint, medial clavicle of the right sternoclavicular joint, noted in a rating report after examining Hulsey on July 2, 2002 that there was a resultant loss of motion of the right upper extremity and there was a prominence in the medial clavicular region. Dr. Emanuel assessed 25% permanent partial disability of the right upper extremity as it relates to the shoulder, and listed work restrictions for the claimant which included: limited to light to medium work demand level, lifting restrictions, no climbing ladders and no work on a roof. Dr. Emanuel acknowledged that Hulsey had sustained vertigo as a result of the work related injury, and, at his deposition, the doctor testified that his recommended restrictions for Hulsey of no climbing of ladders and no working on a roof were because Hulsey was still complaining of the vertigo, and because "when you climb a ladder, you have to pull and push getting it up, and I just felt that after removing the medial aspect of the clavicle, that I thought it would be a good idea to restrict him from that type of activity when they're above the ground." Dr. Emanuel stated that he was not offering any opinions on permanent partial disability for Hulsey's subdural hematoma, vertigo, difficulty with swallowing or with speaking; the doctor agreed that he is not a vocational rehabilitation expert. Another authorized treating/evaluating doctor, Dr. John McKinney, testified that his evaluation of Hulsey concerned his specialty of ear, nose and throat. It was written by a Dr. Benecke in a September 25, 2001 narrative report that Hulsey suffered from tinnitus and hearing loss; Dr. McKinney's records, however, contained audio testing reports, and this doctor noted that Hulsey had a fairly normal audiometric evaluation with normal hearing loss for an individual his age, and that this hearing loss did not fall within the compensable range under Missouri Workers' Compensation Law. Dr. McKinney wrote in a November 12, 2001 report that Hulsey reported that he was no longer bothered by the symptoms of tinnitus, and the doctor assessed zero percent permanent partial disability due to a lack of complaint of tinnitus. Dr. McKinney stated that it was his opinion Hulsey's vertigo was a result of the work related fall injury, and assessed 10% permanent partial disability. I felt that the presence of vertigo every day was an indication that Hulsey would not be able to work as a roofer and would not be able to work on ladders or roofs or in areas involving heights where he would have to look up and work at the same time, Dr. McKinney said, however, he would not be disabled from work activities not involving the above mentioned particular motion, and testified that Hulsey could still work as a ground roofer such as picking up discarded roofing tiles, loading shingles on a conveyor belt and driving the trucks with the discarded shingles to the dump, you know, moving products from here and there. When queried if he knew of Hulsey's disability in his right arm, Dr. McKinney answered: "No, I'm specifically working on the vertigo, so I would defer any other shoulder, arm, leg, so forth, injuries to someone in that area." Dr. McKinney admitted that he is not a vocational rehabilitation expert, and further stated that he "would defer to a disability expert for the arms and legs and other areas not involving the ear, nose and throat". With regard to Hulsey's speech/swallowing difficulties, Dr. McKinney's record contained an August 28, 2001 report by a Dr. McMorrow of St. John's Mercy Medical Center outpatient Speech Therapy services which reflected: a. that the Cookie Swallow does not demonstrate frank aspiration but certainly does show that thin liquids seem to be the most difficult problem for him; and b. I still am of the impression that he very likely has some minor incoordination secondary to his fall and trauma although the cookie swallow does not definitely demonstrate that. When queried about Dr. McMorrow's opinions, Dr. McKinney's only response was - "That's what I said, the cookie swallow does not demonstrate any abnormality". Dr. McKinney testified, though - I gave Mr. Hulsey a 2% permanent partial disability of the whole person due to the Class I defect in his speech audibility and intelligibility. Dr. Volarich evaluated the claimant on the claimant's behalf and testified as to his opinion of permanent partial disability as a result of injuries sustained in the October 19, 2000 work related accident: a. 25 % permanent partial disability of the body as a whole at the central nervous system due to the closed head trauma; b. 40 % permanent partial disability of the right upper extremity at the shoulder girdle due to the fracture of the medial head of the clavicle; c. 15 % permanent partial disability of the right upper extremity at the elbow due to the aggravation of his right elbow syndrome; d. 20 % permanent partial disability of the body as a whole rated at the cervical spine due to a strain/sprain syndrome and aggravation of his degenerative arthritis at C4-5, C5-, and C6-7. Dr. Volarich further assessed an additional 20 % permanent partial disability as a multiplicity

factor due to the combination of injuries in the central nervous system, cervical spine and right upper extremity. Dr. Volarich, the only doctor to do so, offered an opinion on permanent partial disability for preexisting injuries of Hulsey's. Notwithstanding, Dr. Volarich testified that the severity of the injuries Hulsey had sustained in the October 19, 2000 work related accident rendered him totally disabled. It was noted that in his report he had indicated that Hulsey is permanently and totally disabled as a result of the 10/19/2000 work accident in combination with his pre-existing injuries, and Dr. Volarich responded:

"I think, though, the question you asked me is a pertinent question as well. If you take the 10/19/2000 work accident by itself would have rendered him disabled, absolutely. The head injury would keep him from any work on heights. He's got vertigo. There's no way he could be on scaffolding, roofs or ladders. That puts him out of his lifelong work right there. What I'm trying to suggest is that he did have some pre-existing problems as I noted with the right elbow, the left wrist and the back, but he was still able to work full-time – full duty as a roofer prior to 10/19/2000."

Dr. Volarich agreed that at arriving at his conclusions, he took into consideration Hulsey's age, education and work experience.

Vocational rehabilitation expert opinion was offered by both the claimant and the employer/insurer. Dr. Samuel Bernstein, who evaluated the claimant on the claimant's behalf, testified that it was his conclusion Hulsey is definitely unemployable in the open competitive labor market. Assuming Hulsey did not have any of the preexisting problems and injuries he had noted, it was his opinion Hulsey's injuries as a result of the October 19, 2000 accident alone rendered Hulsey unable to secure employment in the open competitive market. Dr. Bernstein testified: "It would have rendered him unemployable, yes, because – added to that, of course, is some other factors such as his education and his work history, but that injury alone would have rendered him unemployable." Dr. Bernstein agreed that Hulsey's preexisting problems make it even worse. The doctor stated that Hulsey's hoarseness and difficulty speaking was a factor, but was not as important as some other factors. Dr. Bernstein agreed that he had reviewed the medical records concerning treatment of Hulsey's prior injuries to the right elbow, low back and carpal tunnel, and that none of the doctors had placed permanent restrictions on Hulsey as a result of these injuries; Dr. Bernstein agreed that Hulsey continued working as a roofer after each of these injuries, and stated that roofing work is "definitely heavy" work. James England evaluated Hulsey's case on behalf of the employer/insurer and testified as to his conclusions looking at the restrictions from Dr. Emanuel, that he thought Hulsey could still perform a variety of work such as selling roofing products and calling on particular roofing contractors, and also be at an answer desk in a home remodeling center talking with people that had questions about roofing. When considering Dr. Volarich's restrictions for Hulsey, England testified - "I think up to the point where he says that the man would have to rest periodically during the day, that might very well negate his ability to perform work. Other than that, I think with most of the other restrictions, with the restrictions on the shoulder, with the need to change positions, sitting, standing, walking, I think the person could still work and do these kinds of jobs within those restrictions..." On cross examination, England agreed that if someone with regularity was unable to talk or at some point in the work day their voice became very weak and hoarse, it would be difficult for this person to communicate with people in the capacity of answering questions at a help desk over the phone, a job he had suggested for Hulsey. England admitted that if Hulsey could not hear and was not able to use a device that raises the voice, this would be an impediment to performing a job where he had to communicate consistently with people. England agreed that he was aware Hulsey suffers from intermittent vertigo and dizziness, and admitted that if Hulsey was employed in a job that regularly required him to change positions and bend down to do his work the dizziness and nausea would be an impediment to his employment. England admitted that he did not know how high Hulsey could lift his arm. England stated, during cross examination, that from his review of the records of prior injuries he did not see any permanent restrictions for Hulsey in regards to his hands and low back by the treating physicians and Dr. Volarich's report was the first time he saw this. England agreed that it was his understanding Hulsey was working full time full duty up until the October 19, 2000 accident and the work Hulsey was doing was in the very heavy range.

In *Hines v. Conston of Missouri No. 852*, 857 S.W.2d 857 (Mo.app. E.D 1993), the Court stated the proper test to determine permanent total disability:

"...the proper legal test for permanent total disability is set forth in *Brown v. Treasurer of Missouri*, 795 S.W.2d 479 (Mo.App. 1990). In *Brown*, we said:

The test for permanent total disability is whether, given the claimant's situation and condition, he is competent to compete in the open labor market. *Lturno v. Carnahan*, 640 S.W.2d 470, 472 (Mo.App. 1982).. This test measures the worker's prospects for returning to employment. *Patchin v. National Supermarkets Inc.*, 738 S.W.2d 166, 167 (Mo.App. 1987). Total disability means the inability to return to any reasonable or normal employment, it does not require that the employee be completely inactive or inert. The central question is whether in the ordinary course of business, an employer would reasonably be expected to hire the claimant in his present physical condition reasonably expecting him

to perform the work for which he is hired. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1982). *Brown* 795 S.W.2d at 483.

This is the approved legal test for determining permanent total disability.” *Hines* at 574.

The claimant in this case testified about the continuing problems he has as a result of injuries from the October 19, 2000 work related accident. He talked about the limitations in the use of his right upper extremity; he noted that he had numbness in the right ring and little fingers of his dominant hand, and he demonstrated the loss of motion in his shoulder. Hulsey stated that he must take medication because the shoulder is painful and becomes more painful with any activity; he testified about the limited use he has of the right upper extremity, including an inability get his right arm to a position where he can do such things as put deodorant in his left armpit with his right hand or comb his hair with his right hand; he testified about a lack of strength in the right shoulder and the difficulty with lifting anything above shoulder height or sustained holding of things for any period of time such as a jug of milk; he stated that he could not paint a wall for any period of time, maybe five or six minutes but then his shoulder would start hurting, and that with normal walking he puts his hand in his pocket to prevent his arm from swinging and his shoulder from popping, both of which causes increased pain in the shoulder. Hulsey and his wife, who was found to be a credible witness, talked about the dizziness or vertigo he experiences because of the work related head injury upon getting up real fast, sitting down for any amount of time, and looking or staring up at anything. Mrs. Hulsey noted an incident in a store where she directed her husband to look at an item that was above head in height and having to kind of catch her husband. Hulsey testified about his present ability to work, stating that he has been a roofer all of his life and is no longer able to do the work he was doing before the October 19, 2000 work related accident because he cannot climb ladders and cannot lift anything. He stated that he would not be able to do the ancillary position that might have something to do with his roofing skills because a lot of the time you must load the materials onto the customer's truck. He stated that he could not stand all day as he has tremendous pain in his back and shoulder. He stated that he cannot put his right arm up on the steering wheel and try to drive all day or drive a lot; I usually use my left hand because it's a numbness sensation I get in my shoulder when it's up a certain amount of time, and with standing I have the same problem, the claimant said. Hulsey stated that he would not be able to work as a manufacturer's representative selling or arranging to sell product to contractors who are going to put on a roof because he would have to be able to read a blueprint to take get the scale for the roofing material to know how much material to deliver, and he does not read blueprints; I have no idea about blueprints whatsoever, the claimant said. Hulsey noted, as did vocational rehabilitation specialist Dr. Bernstein, that nowadays, a salesman will have to refer to a computer from time to time to get pricing and research product availability and so on; Hulsey stated that he does not know how to do any of that, he'd have to learn. I have no idea about computers, period, Hulsey stated. The claimant, who has an eighth grade education, admitted that his reading skills aren't that great. Hulsey testified that when he was in business for himself, he hired a secretary who did most of the work as far as doing the blueprints, and he and wife testified that she wrote up all of the contracts, did the books, and did all of the administrative duties of the business. Mrs. Hulsey testified that her husband is not illiterate, he can read a paper, but he skips over words that he doesn't understand and there are quite a few. So I more less -- we kind of go over things together when it's something important; I help him with it, she said. I don't think he could understand real involved instructions or anything like that, she stated. Mrs. Hulsey testified that they have a computer in the house and she has tried to get her husband to use it. He won't get on it; he gets upset with himself, she said, I try to teach him how and then he gets upset with himself, he gets upset with me and so I just say, forget it.

In considering the expert opinions in this case, firstly, it is found that the different treating doctors' opinions and restrictions when considered together have severely limited Hulsey's work activities due to the serious injuries and residuals from the October 19, 2000 work related accident. Both Drs Emanuel and McKinney opined that Hulsey could no longer work as a roofer, (the work the claimant has done for most of his life). Dr. McKinney, who evaluated Hulsey for ear nose and throat problems, suggested that Hulsey could still do jobs such as picking up discarded roofing tiles, loading shingles on a conveyor belt and driving the trucks with the discarded shingles, but stated that he did not know of Hulsey's disability in his right arm, that he would defer any shoulder, arm, leg, so forth, injuries to someone in that area. Dr. Emanuel, who treated and evaluated Hulsey's right upper extremity work related injuries, assessed restrictions for the right upper extremity and noted that Hulsey had difficulties pulling and pushing objects, such as a ladder; the doctor put lifting restrictions on Hulsey due to the right upper extremity of - no lifting greater than 20 pounds from floor to waist on an occasional basis, no lifting of *any* weight from shoulder height above shoulder level (emphasis added), no pushing or pulling greater than 100 pounds on a four wheel cart or 10 pounds without a cart, and no carrying greater than 10 pounds in his right hand. Dr. Volarich was the only medical doctor offering an opinion based on all of Hulsey's injuries – the October 19, 2000 work related injuries as well as any pre-existing injuries; Dr. Volarich's opinion was that the severity of the injuries Hulsey had sustained in the October 19, 2000 work related accident rendered him totally disabled, along with taking into consideration Hulsey's age, education and work experience. Dr. Emanuel admitted that he was not a vocational rehabilitation expert; Dr. McKinney stated that he would defer to a vocational rehabilitation expert's opinion on Hulsey's injuries not involving the ear, nose and throat. The employer/insurer offer the vocational rehabilitation expert

opinion of James England who, it is found, offered an opinion of Hulsey being able to work based only upon Dr. Emanuel's restrictions; England admitted that a voice that became weak and hoarse at some point in the day would be an impediment to performing a job where one had to communicate consistently with people, and admitted that intermittent vertigo/dizziness would be an impediment to Hulsey's employment. Dr. Bernstein offered a vocational rehabilitation expert's opinion on behalf of Hulsey, and testified that the injuries from the October 19, 2000 accident rendered Hulsey unemployable with the added factors of his education and work history. Dr. Volarich, Dr. Bernstein and James England, the only experts addressing the question of Hulsey's physical condition and abilities and injuries prior to the October 19, 2000 work related accident, all noted that notwithstanding his prior injuries, Hulsey was working full time as a roofer and roofing work was definitely heavy work.

Considering all of the evidence, including the claimant's testimony, it is found that the substantial weight of the evidence establishes that given the claimant's situation and his physical condition as a result of the injuries from the October 19, 2000 work related accident, he is not competent to compete in the open labor market; that in the ordinary course of business, no employer would reasonably be expected to hire the claimant in his present physical condition as a result of the work related injuries and residuals/disabilities reasonably expecting him to perform the work for which he is hired. It is found that the substantial weight of the evidence indicates that the claimant is permanently and totally disabled as a result of the disabilities he sustained from the October 19, 2000 work related accident and injuries. Thus, the employer/insurer is found liable for permanent total disability. It is found that the evidence supports a finding that the claimant was at a permanent total disability physical status with no expectation of further healing as of his release from treatment for his right upper extremity by Dr. Emanuel on or about July 2, 2002. The employer/insurer are therefore found, in consideration also of the stipulations between the parties, to be liable for permanent total disability benefits of \$599.96/week beginning on July 2, 2002 through the present and continuing for the life of the claimant.

As it has been determined that the employer/insurer in this case is liable for permanent total disability, no Second Injury Fund liability is found. *See*, Section 287.220.1, *Stewart v. Johnson*, 398 S.W.2d 850, 854 (Mo. 1966); *Vaugh v. Vaughns, Inc.*, 938 S.W.2d 931, 939 (Mo.App. S.D. 1997); and *Kizor v. Trans World Airlines*, 5 S.W.3d 195, 201 (Mo.App. W.D. 1999).

Date: _____

Made by: _____

LESLIE E. H. BROWN

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Renee T. Slusher

Director

Division of Workers' Compensation

[\[1\]](#) Findings of Fact and Rulings of Law begin on page 31.