FINAL AWARD DENYING COMPENSATION

Injury No.: 03-042139

Employee: Michael Hutson

Employer: Ultimate Electronics, Inc. (Settled)

Insurer: Liberty Mutual Fire Insurance Co. (Settled)

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.[1] Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award of the ALJ dated January 21, 2011, by issuing a separate opinion denying compensation in the above-captioned case.

Preliminaries

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

The ALJ found that employee's claim against the Second Injury Fund is denied because employee's alleged preexisting disabilities do not meet the appropriate threshold for Second Injury Fund liability.

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

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

Findings of Fact

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

Employee was deposed in February 2006. During said deposition, employee apparently provided testimony regarding his prior right shoulder injury. This February 2006 deposition was not admitted as evidence in this case.

Conclusions of Law

The ALJ's conclusion that employee's preexisting right shoulder disability does not meet the appropriate threshold for Second Injury Fund liability was based primarily on a

[1] Statutory references are to the Revised Statutes of Missouri 2002 unless otherwise indicated.

finding that employee is not credible. However, the only basis the ALJ had for finding employee incredible were alleged discrepancies between employee's trial testimony and his testimony from the February 2006 deposition.

We find that the ALJ erred in relying on employee's February 2006 deposition testimony because it was not made part of the record. Evidence not admitted or made part of the record cannot be considered or relied upon.

Despite the aforementioned, we still agree with the ALJ's ultimate conclusion that employee's claim against the Second Injury Fund should be denied. However, we find that employee's failure to prove all material elements of his claim is the proper basis for denial.

To establish a claim for enhanced permanent partial disability against the Second Injury Fund an employee must show that a preexisting partial disability combined with a disability from the primary injury to result in a greater disability than that which would have resulted from the last injury by itself. See *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo.App. W.D. 2004).

In this case, employee provided no evidence establishing that primary disabilities and the disability from his preexisting shoulder injury combine to produce substantially greater overall disability than the simple sum.

Because the burden is on employee to prove all material elements of his claim, including Second Injury Fund liability, and because there is no evidence of how the primary injury combines with the alleged preexisting conditions, we find that employee has not met his burden of proving Second Injury Fund liability.

Award

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

The award and decision of Administrative Law Judge John K. Ottenad, issued January 21, 2011, is attached and incorporated to the extent it is not inconsistent with this final award.

Given at Jefferson City, State of Missouri, this 18th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Member

_____
Alice A. Bartlett, Member

_____
Curtis E. Chick, Jr., Member

Attest:

_____
Secretary

AWARD

Employee: Michael Hutson

Injury No.: 03-042139

Dependents: N/A

Employer: Ultimate Electronics, Inc. (Settled)

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Fire Insurance Co. (Settled)

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

Hearing Date: October 19, 2010

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No

2. Was the injury or occupational disease compensable under Chapter 287? Yes

3. Was there an accident or incident of occupational disease under the Law? Yes

4. Date of accident or onset of occupational disease: April 18, 2003

5. State location where accident occurred or occupational disease was contracted: St. Louis County

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: Claimant worked as a delivery and warehouse employee for Employer, when he fell down stairs while delivering a big screen television and injured his neck, low back and body as a whole.

12. Did accident or occupational disease cause death? No Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Body as a Whole—Neck, Low Back and Psychiatric Disability

14. Nature and extent of any permanent disability: 20% of the Body as a Whole—Cervical Spine, 20% of the Body as a Whole—Lumbar Spine and 26% of the Body as a Whole—Psychological Disability

15. Compensation paid to-date for temporary disability: $3,246.36

16. Value necessary medical aid paid to date by employer/insurer? $9,173.81

Employee: Michael Hutson Injury No.: 03-042139

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: Sufficient to result in the applicable rates of compensation

19. Weekly compensation rate: $282.14 for TTD/ $282.14 for PPD

20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer previously settled its risk of liability

22. Second Injury Fund liability:

Claim denied $0.00

TOTAL: $0.00

23. Future requirements awarded: None

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Michael Hutson

Injury No.: 03-042139

Dependents: N/A

Employer: Ultimate Electronics, Inc. (Settled)

Additional Party: Second Injury Fund

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

Insurer: Liberty Mutual Fire Insurance Co. (Settled)

Checked by: JKO

On October 19, 2010, the employee, Michael Hutson, appeared in person and by his attorney, Mr. Evan J. Beatty, for a hearing for a final award on his claim against the Second Injury Fund. The employer, Ultimate Electronics, Inc., and its insurer, Liberty Mutual Fire Insurance Company, were not present or represented at the hearing since they had previously settled their risk of liability in this case. The Second Injury Fund was represented at the hearing by Assistant Attorney General Karin Schute. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

1) On or about April 18, 2003, Michael Hutson (Claimant) sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant.

2) Claimant was an employee of Ultimate Electronics, Inc. (Employer).

3) Venue is proper in the City of St. Louis.

4) Employer received proper notice.

5) The Claim was filed within the time prescribed by the law.

6) At the relevant time, Claimant earned an average weekly wage sufficient to result in the applicable rates of compensation of $282.14 for total disability benefits and $282.14 for permanent partial disability (PPD) benefits.

7) Employer paid temporary total disability (TTD) benefits in the amount of $3,246.36, representing a period of time of 11 4/7 weeks.

8) Employer paid medical benefits totaling $9,173.81.

9) Claimant agrees not to pursue permanent total disability (PTD) benefits against the Second Injury Fund and in exchange, the Second Injury Fund agrees not to contest the synergistic combination of the injuries.

ISSUES:

1) What is the nature and extent of Claimant's permanent partial disability attributable to this injury?

2) What is the liability of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

A. Stipulation for Compromise Settlement in Injury No. 03-042139 between Claimant and Employer
B. Medical report of Dr. David Volarich dated October 27, 2004
C. Medical/Psychiatric report of Dr. Richard Anderson dated August 29, 2006
D. Records of the Division of Workers' Compensation including medical reports and the Stipulation for Compromise Settlement between Claimant, employer and the Second Injury Fund in Injury Number 91-057531

Second Injury Fund Exhibits:

Nothing admitted at the time of trial

Note: *Any stray marks or handwritten comments contained on any of the exhibits were present on those exhibits at the time they were admitted into evidence, and no other marks have been made since their admission into evidence on October 19, 2010.*

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical and psychological opinions, the medical records, and the Stipulations for Compromise Settlement, as well as based on my personal observations of Claimant at hearing, I find:

1) **Claimant** is a 44-year-old, currently unemployed individual, who last worked for Ultimate Electronics, Inc. (Employer) in 2003 as a home delivery and warehouse employee. Claimant was terminated by Employer in July 2003.

2) Claimant testified that his highest level of education was eighth grade. He began working for Employer in April or May of 2001.

3) Prior to working for Employer, in 1991, Claimant testified that he injured his right shoulder while working for Vess Soda Company. Claimant testified at trial that he was working on the line and a bottler machine grabbed hold of his shirt and pulled him over the machine, resulting in right shoulder pain and problems. Claimant testified that he received a cortisone shot and physical therapy from Dr. Farley.

4) Claimant testified that after the shoulder injury he suffered from stiffness, swelling and limited reaching overhead because of his right shoulder injury. He said that he would have to take over-the-counter medications to take the edge off the right shoulder pain. Claimant said that he did not have to perform any overhead work for Employer, but if he would have had to work overhead, he could not have done it, because of the right shoulder problems. Claimant agreed that he received a settlement of 15% of the right shoulder in connection with the 1991 injury. Claimant testified that his right shoulder complaints and problems from this 1991 injury continued up until the time of the 2003 accident.

5) The **records of the Division of Workers' Compensation, including some medical reports on the 1991 right shoulder injury,** (Exhibit D) document the treatment Claimant received and the settlement he reached with his employer regarding that injury. The Report of Injury dated May 7, 1991, includes a description of the right shoulder injury from pulling cases off a pallet, when he felt something pop in the shoulder. A medical report from **Healthcare Place** (Exhibit D) dated May 8, 1991 indicates that Claimant injured his right shoulder when he reached for bottles on the conveyor belt and felt something pop in his right shoulder. He was apparently given medication and an X-ray and eventually was referred to Dr. Gary Farley for treatment. A physical therapy note from **HEALTHSOUTH Rehabilitation** (Exhibit D) dated May 24, 1991 indicates Claimant injured his right shoulder when he was pulling off a box of empty soda bottles and heard a snap in his shoulder. Dr. Farley was diagnosing acute bursitis and teres minor tendonitis of the right shoulder for which he was prescribing the physical therapy. In addition to the physical therapy, the records indicate that he also provided injections in the shoulder joint.

6) A medical report from **Dr. Raymond Cohen** (Exhibit D) dated November 27, 1991 includes a history of right shoulder pain that developed during May of 1991 when Claimant was repetitively flexing and extending his arms while working with empty cases of soda bottles. Claimant continued to complain of shoulder pain, but he denied weakness and denied taking any medications for the pain. The physical examination of the shoulder revealed tenderness and some crepitus, but full range of motion and no edema. Dr. Cohen diagnosed right shoulder bursitis and osteoarthritis of the right acromioclavicular joint that he related to overuse syndrome of the shoulder caused by Claimant's work. He rated Claimant as having 25% permanent partial disability of the right shoulder due to this 1991 injury. He also rated Claimant as having 20%

permanent partial disability of the body as a whole referable to the low back related to an automobile accident from 1987.

7) Claimant filed a Claim for Compensation for the right shoulder injury that was assigned Injury Number 91-057531 (Exhibit D) by the Division of Workers' Compensation. Claimant, his employer and the Second Injury Fund ultimately reached a resolution of this case with the employer paying $5,000.00, or approximately 15% of the right shoulder, and the Second Injury Fund paying $1,095.96, based on the combination of the right shoulder injury and pre-existing disability of 10% of the body as a whole referable to the back.

8) Claimant testified that on April 18, 2003, he was delivering a big-screen television for Employer. As a part of the delivery, he had to carry the television down some steps. As he was going down the steps carrying the television, he fell down the steps with the television and ended up pinned against the wall by the television at the bottom of the stairs.

9) Claimant testified that he received medical treatment following the injury and was diagnosed with a herniated disc, but he decided not to have surgery.

10) In terms of his continued complaints following this injury, Claimant testified that he has stiffness in the neck and low back, as well as chronic pain. He described pain and numbness that consistently runs down both upper extremities when trying even to perform normal chores. He said that he feels better when he is lying flat. He said that he is unable to do any heavy lifting because of his low back complaints, and he does experience pain and numbness into the right leg down to the kneecap, which is not constant. Claimant estimated his average pain level in the neck and low back to be a 6 on a scale of 1 to 10 on a daily basis, but he noted that it has gone as high as a 10, which necessitated a trip to the emergency room. Claimant testified that he continues to do home therapy, stretching, soaking and takes over-the-counter medications (Aleve) on a daily basis.

11) Claimant testified that he is only able to walk 10-15 minutes on a good day, 5-10 minutes on an okay day, and zero minutes on a bad day. He said that he is only able to sit for perhaps 15-30 minutes at a time, and he can only stand for perhaps 15 minutes on a good day. He noted that he lies down flat more than half the day to relieve his pain. Claimant testified that he lives with his mother and so she does all of the chores. He only drives less than half an hour per week.

12) Claimant testified regarding the psychological problems he has had and the care he has received since his injury for them. Claimant said that he spent one week as an inpatient at the Hyland Center at St. Anthony's. He was also given anti-depressants and anti-anxiety medications for approximately a month but then he could not afford them anymore. Claimant testified that he has panic attacks, suicidal thoughts, lack of interest, depression and racing thoughts.

13) Claimant saw **Dr. David Volarich** (Exhibit B) for an independent medical examination at his attorney's request on October 27, 2004. Dr. Volarich examined Claimant on that one occasion and provided no medical treatment. He took an extensive history from Claimant of the work injury on April 18, 2003 and his pre-existing injuries and conditions. Dr. Volarich also reviewed Claimant's medical treatment records, recorded his continuing complaints and performed a physical examination. Although Claimant reported pre-existing injuries to his neck from an automobile accident in 1989 and to his low back in 2002, Dr. Volarich's report is completely devoid of any reference to the 1991 right shoulder injury. Not only is there no mention of the right shoulder injury in the history section, but there is no description of any right shoulder problems or complaints, nor any reference to limitations Claimant may have had regarding the right shoulder leading up to the time of the April 18, 2003 injury at work. In short, it is as if the right shoulder injury never occurred, or at least was not problematic enough for Claimant to remember any ongoing problems he was having from it between 1991 and 2003.

14) On physical examination, Dr. Volarich found symmetric bulk in the upper and lower extremities, but some weakness. Sensory examination was normal. Reflexes were unobtainable in the upper extremities, and symmetric, yet weak, in the lower extremities. Cervical spine range of motion was markedly restricted (almost non-existent) with pain and trigger points, but no spasm. Lumbar spine range of motion was also markedly restricted (almost non-existent) with pain and trigger points, but no spasm. On straight leg raise testing, Claimant resisted any efforts to elevate his legs above 30 degrees because of increased low back pain. However, radicular symptoms in Claimant's legs were not elicited. Arm circumference measurements were symmetric, but otherwise the upper extremity examination was deferred, so there are no physical findings regarding the right shoulder contained in this report.

15) Referable to the April 18, 2003 injury, Dr. Volarich diagnosed cervical syndrome secondary to aggravation of degenerative disc disease and degenerative joint disease most severely at C4-5 and C5-6 causing bilateral upper extremity radiculopathy, not surgically repaired for which he rated Claimant as having 25% permanent partial disability of the body as a whole referable to the cervical spine. He also diagnosed lumbar syndrome secondary to disc herniation at L2-3 centrally, disc protrusion at L3-4 centrally, and disc bulging at L4-5 centrally, causing bilateral lower extremity radiculopathy, not surgically repaired for which he rated Claimant as having 35% permanent partial disability of the body as a whole referable to the lumbosacral spine. For Claimant's pre-existing conditions, Dr. Volarich rated 7.5% of the body as a whole referable to the lumbosacral spine for a mild lumbar strain syndrome. He rated no disability for the prior cervical strain syndrome, which he found had resolved. Dr. Volarich also diagnosed depression, and believed that disability existed as a result of that depression, but he deferred to a psychiatric evaluation for that assessment. Dr. Volarich opined that the combination of these various disabilities creates a substantially greater disability than the simple sum, and so a loading factor should be added. Dr. Volarich recommended a vocational evaluation to determine if Claimant would be able to go back to some type of work in the open labor market. If no such employment was able to be found, he opined that Claimant would be permanently and

totally disabled as a result of the work-related injuries of April 18, 2003 standing alone. He did place a significant number of restrictions referable to the spine on Claimant's ability to work. He also opined that Claimant was at maximum medical improvement based on the treatment provided to date.

16) Claimant met with **Dr. Richard Anderson** (Exhibit C) for a psychiatric evaluation at the request of Claimant's attorney on August 29, 2006. The purpose of the evaluation was to determine if the injuries sustained in the work-related accident on April 18, 2003 included any psychiatric or psychological impairment. Dr. Anderson reviewed medical treatment records, administered tests, took a history from Claimant, performed a mental status examination and then issued his report dated August 29, 2006. On Axis I, he diagnosed major depressive disorder due to a general medical condition, generalized anxiety disorder due to a general medical condition, and panic disorder without agoraphobia due to a general medical condition. On Axis III, he diagnosed chronic pain syndrome with lower back and neck pain prominent. He opined that Claimant had a GAF (Global Assessment of Functioning) score of 45-50. Dr. Anderson found no history of emotional problems prior to the April 2003 injury. He opined that Claimant's major depression and anxiety disorders are the direct result of the April 2003 injury and its sequelae. He recommended treatment, but further noted that Claimant was 100% psychiatrically disabled as to the body as a whole as a direct result of the 2003 work injury, and he was not able to return to meaningful employment in the open labor market as a result of his condition.

17) Claimant and Employer entered into an agreement to resolve the April 18, 2003 Claim (Injury No. 03-042139) by **Stipulation for Compromise Settlement** (Exhibit A) for $75,000.00, or 20% permanent partial disability of the body as a whole referable to the cervical spine, 20% permanent partial disability of the body as a whole referable to the lumbar spine and 26% permanent partial disability of the body as a whole referable to psychological impairment. The Stipulation indicates that Employer paid $3,246.36 in temporary total disability benefits for a period of 11 4/7ths weeks and $9,173.81 in medical benefits. The Second Injury Fund Claim was left open and pending by the terms of this settlement. The Stipulation for Compromise Settlement between Claimant and Employer was approved by me on October 8, 2008.

18) On cross-examination by the Second Injury Fund at trial, Claimant testified that he reported all of his complaints to Dr. Volarich at the time he was examined. He believed he told Dr. Volarich about the right shoulder injury. Claimant was also cross-examined regarding his prior sworn deposition testimony from February 2006. Apparently in his deposition, Claimant testified that he did not remember his prior shoulder injury. At trial, when Claimant was presented with that prior testimony, he said that he did not remember saying that in his deposition. He explained that his other injuries hurt worse, so he may not have remembered the prior shoulder. He also testified that he may have been "on a defensive mode of thinking" that someone was trying to railroad him or relate the shoulder problems to his work injury from 2003. He admitted that his testimony at trial was different than the testimony he provided in 2006. Further, Claimant apparently testified in his 2006 deposition that he had minimal problems with everything, just normal soreness from his job, but he was fine

before 2003. Even though at trial he now testified that he was in consistent pain before the 2003 injury, he refused to agree that his trial testimony was different from his deposition testimony. Additionally, in his 2006 deposition, when he was asked specifically about the right shoulder problems leading up to the 2003 injury, he apparently responded, that he was not having any particular problems and that, "it's been pretty good to me." Claimant testified that he did not remember that answer and he did not believe his trial testimony was any different than what he had said in his deposition in 2006.

RULINGS OF LAW:

Based on a comprehensive review of the evidence described above, including Claimant's testimony, the expert medical and psychological opinions, the medical records, and the Stipulations for Compromise Settlement, as well as my personal observations of Claimant at hearing, and based on the applicable statutes of the State of Missouri, I find:

Claimant sustained a compensable injury to his cervical spine, lumbar spine and body as a whole referable to psychological disability, medically causally related to his accident at work in the course and scope of his employment for Employer on April 18, 2003, when he slipped as he was carrying a big-screen television down some steps, he fell down the steps with the television and ended up pinned against the wall by the television at the bottom of the stairs. Claimant was diagnosed with: Cervical syndrome secondary to aggravation of degenerative disc disease and degenerative joint disease most severely at C4-5 and C5-6 causing bilateral upper extremity radiculopathy, not surgically repaired; lumbar syndrome secondary to disc herniation at L2-3 centrally, disc protrusion at L3-4 centrally, and disc bulging at L4-5 centrally, causing bilateral lower extremity radiculopathy, not surgically repaired; and major depression and anxiety disorders. This finding on Claimant's condition, and the medical causation of it, is supported by the reports of Drs. Volarich and Anderson.

Given the nature of this Claim and the evidence submitted, both issues in this case can be effectively addressed at the same time.

Issue 1: What is the nature and extent of Claimant's permanent partial disability attributable to this injury?

Issue 2: What is the liability of the Second Injury Fund?

Under **Mo. Rev. Stat. § 287.190.6 (2000)**, "'permanent partial disability' means a disability that is permanent in nature and partial in degree…" The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. ***Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund***, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. ***Griggs v. A.B. Chance Co.***, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert

testimony may be required when there are complicated medical issues. ***Id***. at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. ***Fogelsong v. Banquet Foods Corp.***, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Pursuant to **Mo. Rev. Stat. § 287.220.1 (2000)**, if an employee has a pre-existing disability of such seriousness to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and if the pre-existing disability and the subsequent compensable injury each result in a minimum of 50 weeks of compensation for a body as a whole injury or 15% permanent partial disability to a major extremity, and if the combined disability is substantially greater than that which would have resulted from the last injury alone, then Employer is only responsible for payment for the disability from the last injury, that disability and any amount of pre-existing disability is subtracted from the total, and the Second Injury Fund shall pay Claimant compensation based on the balance left (or greater combination).

Specifically, Claimant must prove that there was a pre-existing permanent partial disability whether from a compensable injury or otherwise and also prove that the pre-existing disability was of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed. ***Karoutzos v. Treasurer of the State of Missouri***, 55 S.W.3d 493 (Mo. App. W.D. 2001) *overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003)*. In determining liability for the Second Injury Fund, the nature and extent of the permanent partial pre-existing condition has to be proven by a reasonable degree of certainty. ***Messex v. Sachs Electric Co.***, 989 S.W.2d 206 (Mo. App. E.D. 1999) *overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003)*. Expert opinion evidence is necessary to prove the extent of the pre-existing disability. ***Id***. at 215. Additionally, Claimant must prove that the primary compensable injury combines with the pre-existing disability to create a substantially greater overall disability than the sum of the disabilities considered independently. ***Searcy v. McDonnell Douglas Aircraft Co.***, 894 S.W.2d 173 (Mo. App. E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003)*.

The first step in the process is determining the amount of permanent partial disability Claimant sustained in connection with the primary neck, low back and psychological injury. Dr. Volarich, Claimant's rating physician, was the only doctor to provide an opinion on permanent partial disability for the neck and low back injury. He opined that Claimant had permanent partial disabilities of 25% of the body as a whole referable to the cervical spine and 35% of the body as a whole referable to the lumbosacral spine related to the April 18, 2003 accident. Dr. Richard Anderson was the only physician in the record to provide an opinion on Claimant's permanent partial disability related to the psychological injury. He opined that Claimant was 100% psychiatrically disabled as to the body as a whole as a direct result of the 2003 work injury. Claimant then settled his Claim against Employer by Stipulation for Compromise Settlement for $75,000.00, or 20% permanent partial disability of the body as a whole referable to the cervical spine, 20% permanent partial disability of the body as a whole referable to the lumbar spine and 26% permanent partial disability of the body as a whole referable to psychological impairment.

Accordingly, based on the competent and credible evidence in the record, I find Claimant has 20% permanent partial disability of the body as a whole referable to the cervical spine, 20% permanent partial disability of the body as a whole referable to the lumbar spine and 26% permanent partial disability of the body as a whole referable to psychological impairment, medically causally related to the April 18, 2003 injury at work for Employer.

Since this is a permanent partial disability claim against the Second Injury Fund, and not a permanent total disability claim, the thresholds referenced above are applicable. Accordingly, I find that the body as a whole disability at the level of the cervical spine, lumbar spine and referable to the psychological disability meets the applicable threshold for Second Injury Fund benefits. The issue then becomes whether the alleged pre-existing right shoulder and low back injuries/conditions resulted in disability that meets the applicable threshold to trigger Second Injury Fund liability, and whether the disability is of such seriousness so as to constitute a hindrance or obstacle to employment, or to obtaining re-employment, if the employee becomes unemployed.

Having thoroughly considered all of the evidence in the record, I find that Claimant has failed to meet his burden of proof to show an entitlement to a permanent partial disability award against the Second Injury Fund for the combination of the primary body as a whole disabilities and the alleged pre-existing right shoulder and low back disabilities. I further find that while Claimant had pre-existing disabilities to the right shoulder and low back, those disabilities cannot be included in any Second Injury Fund calculation because they do not meet the appropriate threshold of at least 12.5% of the body as a whole (50 weeks) or 15% of a major extremity, and they were not of such seriousness so as to constitute a hindrance or obstacle to employment, or to obtaining re-employment, if the employee becomes unemployed.

First, regarding the alleged pre-existing low back disability, I find that Dr. Volarich provided a credible opinion in his report of October 27, 2004 that Claimant only had 7.5% permanent partial disability of the body as a whole referable to the lumbosacral spine leading up to the injury of April 18, 2003. Claimant provided no credible testimony at trial regarding any problems or complaints he had with his low back pre-existing the April 18, 2003 accident. Therefore, I find Claimant's pre-existing low back disability, 7.5% of the body as a whole referable to the low back, does not meet the threshold of 12.5% of the body as a whole (50 weeks), and cannot be included in any calculation of Second Injury Fund liability in this case.

With regard to the alleged pre-existing right shoulder injury, I find Claimant failed to provide credible testimony regarding the circumstances surrounding that injury, the effect it had on his ability to work, and any continued problems or complaints he may have been having with that right shoulder, leading up to the time of the April 18, 2003 injury.

I find that Claimant's credibility, with regard to the prior right shoulder disability, was first negatively impacted by his apparent inability to truthfully explain the nature of the injury that caused his right shoulder condition. At trial, Claimant testified that he injured his right shoulder in 1991 when he was working on the line and a bottler machine grabbed hold of his shirt and pulled him over the machine, resulting in right shoulder pain and problems. However, the medical records and reports contained in Exhibit D from the time of the 1991 injury indicate

that Claimant injured his right shoulder when he reached for bottles on the conveyor belt and felt something pop in his right shoulder. This same mechanism of injury is also contained in the Report of Injury for the 1991 injury in Exhibit D. Although a little different from these histories, Claimant's rating physician at the time, Dr. Raymond Cohen, included a history of injury in his report that Claimant's right shoulder pain developed during May of 1991 when Claimant was repetitively flexing and extending his arms while working with empty cases of soda bottles. Nowhere in any of these contemporaneous medical records or reports is there a history of Claimant's sleeve being grabbed by the machine and pulling him over the machine. Since this is a Second Injury Fund case, I acknowledge that having a consistent history of the mechanism of the prior injury is not necessarily dispositive of the outcome. However, this unexplained major discrepancy in the history of the right shoulder injury only served to further magnify other more important discrepancies in other areas of Claimant's testimony regarding the alleged prior right shoulder condition.

In addition to the discrepancy concerning the mechanism of the right shoulder injury, I find that Claimant also failed to provide credible testimony regarding the effect it had on his ability to work, and any continued problems or complaints he may have been having with that right shoulder, leading up to the time of the April 18, 2003 injury. Claimant testified at trial that after the shoulder injury in 1991 he suffered from stiffness, swelling and limited reaching overhead because of his right shoulder injury. He said that he would have to take over-the-counter medications to take the edge off the right shoulder pain. Claimant said that he did not have to perform any overhead work for Employer, but if he would have had to work overhead, he could not have done it, because of the right shoulder problems. Claimant testified that his right shoulder complaints and problems from this 1991 injury continued up until the time of the 2003 accident. I find Claimant's testimony in this regard was impeached by his prior deposition testimony from 2006 and from his failure to report any such shoulder problems, complaints or any impact they had on his work activities to Dr. Volarich at the time of his examination of Claimant in 2004.

On cross-examination by the Second Injury Fund at trial, Claimant testified that he reported all of his complaints to Dr. Volarich at the time he was examined. He believed he told Dr. Volarich about the right shoulder injury. However, after a thorough review of Dr. Volarich's report, I was unable to find any reference at all to a prior right shoulder accident or to any problems or complaints he had with the right shoulder that impacted his ability to work leading up to the 2003 injury. Claimant was clearly able to remember prior injuries to his neck from 1989 and to his low back from 2002, but made no reference to his right shoulder from 1991. Since Claimant never reported his prior right shoulder condition to Dr. Volarich, the report contains no physical examination of the right shoulder, no rating of pre-existing disability to the right shoulder, and no indication that it was a hindrance or obstacle to Claimant's employment leading up to the 2003 accident.

At trial, the Second Injury Fund also cross-examined Claimant regarding his prior sworn deposition testimony from February 2006. Apparently in his deposition, Claimant testified that he did not remember his prior shoulder injury. At trial, when Claimant was presented with that prior testimony, he said that he did not remember saying that in his deposition. He explained that his other injuries hurt worse, so he may not have remembered the prior shoulder. He also testified that he may have been "on a defensive mode of thinking" that someone was trying to

railroad him or relate the shoulder problems to his work injury from 2003. He admitted that his testimony at trial was different than the testimony he provided in 2006. Further, Claimant apparently testified in his 2006 deposition that he had minimal problems with everything, just normal soreness from his job, but he was fine before 2003. Even though at trial he now testified that he was in consistent pain before the 2003 injury, he refused to agree that his trial testimony was different from his deposition testimony. Additionally, in his 2006 deposition, when he was asked specifically about the right shoulder problems leading up to the 2003 injury, he apparently responded, that he was not having any particular problems and that, "it's been pretty good to me." Claimant testified that he did not remember that answer and he did not believe his trial testimony was any different than what he had said in his deposition in 2006.

In comparing Claimant's trial testimony, which contained his recitation of the significant ongoing complaints and problems he had with the right shoulder, to his prior sworn deposition testimony where he failed to remember the shoulder injury and admitted he was not having any particular problems with it leading up to the 2003 injury, I am left to conclude that Claimant was not honest and forthright with his testimony. Given his failure to mention the shoulder to Dr. Volarich in 2004, and given his deposition testimony in 2006 that mentioned virtually no problems with the right shoulder, I find that Claimant's trial testimony regarding the right shoulder was not credible. Therefore, I find that Claimant has failed to prove that his right shoulder condition was a hindrance or obstacle to employment, or re-employment should Claimant become unemployed. Claimant's belated recollection of significant right shoulder problems from the 1991 injury, just in time for his trial testimony in his Second Injury Fund case, is not competent, credible or reliable testimony, and cannot be used as a basis for an award of compensation in this matter. Further, without such testimony on the prior right shoulder from Dr. Volarich, Claimant also has no medical report or opinion contemporaneous with the last injury to help meet his burden of proof.

I further find, that while there is no doubt Claimant apparently had a right shoulder injury in 1991, I do not believe, based on the evidence in the record, that the prior right shoulder injury reaches the applicable threshold of 15% of a major extremity, thus, providing another independent reason why the Second Injury Fund case must fail. While it is true that Claimant apparently settled that 1991 case for 15% of the right shoulder, I would note that the statute only requires that disability to continue undiminished, if the new injury is to the same body part. We do not have that situation here, since the more recent injuries are to the neck, low back and body as a whole. Therefore, I am not bound by the amount of disability listed in that stipulation as being referable to the right shoulder. After considering the prior shoulder treatment records, the diagnosis of right shoulder bursitis and osteoarthritis of the right acromioclavicular joint, and Claimant's failure to provide credible testimony regarding any ongoing problems or complaints, he may have had with the right shoulder following the 1991 injury, I find that, at most, Claimant sustained 10% permanent partial disability of the right shoulder on account of the 1991 injury. Therefore, I find Claimant's pre-existing right shoulder disability, 10% of the right shoulder, does not meet the threshold of 15% of a major extremity, and cannot be included in any calculation of Second Injury Fund liability in this case.

Having found, for the reasons described in detail above, that Claimant's alleged pre-existing low back and right shoulder disabilities do not meet the appropriate threshold for Second Injury Fund benefits, and were not hindrances or obstacles to employment, or re-employment if

Claimant became unemployed, Claimant's claim for Second Injury Fund benefits in this matter, thus, fails.

Accordingly, the Second Injury Fund Claim in this matter is denied.

CONCLUSION:

Claimant sustained a compensable injury to his cervical spine, lumbar spine and body as a whole referable to psychological disability, medically causally related to his accident at work in the course and scope of his employment for Employer on April 18, 2003, when he slipped as he was carrying a big-screen television down some steps, he fell down the steps with the television and ended up pinned against the wall by the television at the bottom of the stairs. Claimant has 20% permanent partial disability of the body as a whole referable to the cervical spine, 20% permanent partial disability of the body as a whole referable to the lumbar spine and 26% permanent partial disability of the body as a whole referable to psychological impairment, medically causally related to the April 18, 2003 injury at work for Employer. Given Claimant's failure to provide credible testimony regarding his alleged pre-existing disabilities and based on the medical records and reports in evidence, Claimant's alleged pre-existing low back and right shoulder disabilities do not meet the appropriate threshold for Second Injury Fund benefits, and were not hindrances or obstacles to employment, or re-employment if Claimant became unemployed. The Second Injury Fund Claim is denied and no benefits are awarded.

Date: _____ Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____
Naomi Pearson
Division of Workers' Compensation