

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

Injury No. 07-122890

Employee: Richard D. Johnston
Employer: City of Kansas City (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Second Injury Fund liability

Employee sought permanent partial or permanent total disability benefits from the Second Injury Fund. The administrative law judge denied this claim on a finding that employee failed to meet his burden of proof with respect to the issue of medical causation; the administrative law judge found that the testimony from employee and his evaluating experts was not persuasive. Employee appeals, arguing that the Second Injury Fund's stipulation that employee sustained an injury arising out of and in the course of employment is dispositive of the issue of medical causation. We agree.

The record of the January 14, 2011, hearing before the administrative law judge verifies employee's assertion that counsel for the Second Injury Fund stipulated and admitted that "on or about December 18, 2007, [employee] sustained an injury by accident arising out of and in the course of his employment." *Transcript*, page 7. The record further reveals that counsel for the Second Injury Fund did not place the more specific issue of medical causation in dispute. Section 287.020.2(3) RSMo sets forth the test for medical causation applicable to this claim, and provides in relevant part, as follows:

(1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

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(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The foregoing makes clear that an employee cannot be said to have sustained an "injury by accident arising out of and in the course of the employment" without satisfying the requirement that the accident be shown to be the prevailing factor in causing both the resulting medical condition and disability. In other words, a finding for the employee with respect to the issue of medical causation is a necessary (albeit not always a sufficient) element of a conclusion that the employee's injury arose out of and in the course of the employment. It follows that the issue of medical causation is not properly in dispute in this case.

However, we note that the administrative law judge also identified an alternative reason for denying this claim. Specifically, the administrative law judge determined that employee was permanently and totally disabled as a result of his severe preexisting post-traumatic stress disorder (PTSD) *before* he suffered the work injury of December 18, 2007. The plain language of § 287.220 RSMo makes clear that compensation from the Second Injury Fund is only available where an employee's preexisting disability is *partial*:

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

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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 the second injury fund.

(emphasis added).

As seen above, with respect to a claim for enhanced permanent partial disability benefits from the Second Injury Fund, the preexisting disability must be a "preexisting permanent partial disability." This obviously precludes claims where the employee's preexisting disability is shown to be total. While § 287.220 is somewhat less clear with respect to a claim for permanent total disability benefits, the statute requires that the preexisting disability and the primary injury must be shown to "together result" in total and permanent disability. It follows that the preexisting disability must be partial in this context as well: if the preexisting disability were total, there would be no need to combine the primary injury for a "result" of permanent total disability.

The administrative law judge thoroughly summarized the evidence, weighed the conflicting lay and expert testimony advanced by the parties, and provided several explicit reasons for discounting employee's evidence and finding that, if indeed employee is incapable of work, it is a product of employee's psychiatric condition as it existed prior to December 18, 2007. "Ability to compete in the labor market is a test for permanent total disability in that it measures the worker's prospects for returning to employment." *Laturno v. Carnahan*, 640 S.W.2d 470 (Mo. App. 1982). Ordinarily, we are of the opinion that this "test for probable future employment cannot change the fact of past employment." *Id.* But here, the record reveals that employee's preexisting PTSD was both chronic and exceedingly severe, to the extent that employee's treating psychiatrist with the Veteran's Administration, Dr. Glydene Park, assigned a global assessment of function (GAF) score of 45 as of November 15, 2007, based on employee's psychiatric condition. Employee's vocational expert, Mary Titterington, persuasively opined that a GAF score of 45 would be "too low to support work." *Transcript*, page 914.

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Also, as noted by the administrative law judge, employee's own evaluating psychiatrist, Dr. Todd Hill, originally opined that employee is permanently and totally disabled by reason of his preexisting PTSD considered alone. Employee argued on appeal that this opinion from Dr. Hill was in the nature of a purely clerical mistake or a poor choice of words. We are not persuaded. In his report of January 23, 2009, Dr. Hill provided the following comments with respect to employee's PTSD:

It is my professional opinion, having dealt with many patients with this disorder and having worked at the Kansas City VA Medical Center while a resident at the University of Kansas, that [employee] is permanently and totally disabled secondary to this psychiatric condition. My opinion is also in agreement with [employee's] current treating psychiatrist, Dr. Demark, who, in a note dated August 12, 2008, stated that "based on the patient's PTSD symptoms of depression, sleep disturbance, irritability, anger, rage and history of violence, I feel that the patient is unemployable." ... Any place of employment that requires regular attendance, supervised or unsupervised routines, and completion of a workday and workweek, would set [employee] up for failure and further psychological distress. ... In summary, it is my opinion that [employee] is permanently and totally disabled secondary to his severe post traumatic stress disorder. This level of disability is separate from his physical impairments, as outlined by Dr. Koprivica.

Transcript, pages 886-87.

Ultimately, after our own thorough review of the record in light of the arguments advanced by the parties, we discern no compelling reason to disturb the administrative law judge's findings and analysis with regard to the nature and extent of employee's permanent disability referable to his preexisting PTSD condition. Because we agree that employee cannot logically demonstrate that his preexisting PTSD and the primary injury "together result" in permanent and total disability where it is obvious that the PTSD condition alone renders employee unable to compete for employment, we conclude employee has failed to satisfy the requirements of § 287.220 for demonstrating Second Injury Fund liability. For this reason, we affirm and adopt as our own the administrative law judge's award denying compensation.

Post-award case law

We note that recent appellate decisions have rendered inaccurate certain of the administrative law judge's statements of Missouri law. Although these decisions do not affect the ultimate result in this case, we discern a need to supplement the administrative law judge's award to acknowledge this more recent case law.

Specifically, we note that in the case of *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013), the Supreme Court of Missouri held that an employee is not required to show that a primary injury satisfies the 15% major extremity or 50-week body as a whole thresholds under § 287.220, and instead must only demonstrate the existence of one preexisting condition that satisfies the thresholds

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in order to trigger Second Injury Fund liability for permanent partial disability benefits. *Id.* at 467. This conflicts with the administrative law judge's suggestion, at page 14 of his award, that employee was required to demonstrate that the primary injury satisfies the 15% major extremity or 50-week body as a whole thresholds under § 287.220.

In the case of *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144 (Mo. App. 2014), the Missouri Court of Appeals, Eastern District, clarified that, for purposes of a claim for permanent total disability benefits from the Second Injury Fund, it is not necessary to provide ratings quantifying the extent of any preexisting permanent partially disabling conditions; rather, it is sufficient to show that such conditions and the primary injury together result in permanent total disability. *Id.* at 162. This conflicts with the administrative law judge's suggestion, also on page 14 of his award, that employee was required to provide a permanent partial disability rating for his preexisting PTSD.

Because the above-described comments by the administrative law judge conflict with the holdings in *Witte* and *Lewis*, we hereby disclaim them.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Kenneth J. Cain, issued March 8, 2011, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 23rd day of December 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

As to the Second Injury Fund Only

Employee: Richard D. Johnston Injury No. 07-122890
Dependents: N/A
Employers: City of Kansas City (previously settled)
Additional Party: Missouri Treasurer as Custodian for the Second Injury Fund
Insurers: Self-Insured
Hearing Date: January 14, 2011, briefs filed February 15, 2011 Checked by: KJC/cy

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: December 18, 2007
5. State location where accident occurred or occupational disease was contracted: Kansas City, Clay County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee alleged that he was getting out of a bulldozer and that, when he stepped down, his right heel landed on a hose causing him to develop plantar fasciitis.
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: Alleged right heel
14. Nature and extent of any permanent disability: None

15. Compensation paid to-date for temporary disability: None paid by employer
16. Value necessary medical aid paid to date by employer/insurer? \$2,155.51
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: By agreement
19. Weekly compensation rate: By stipulation of parties, \$527.07/\$389.04 per week
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: N/A
N/A weeks for permanent partial disability
N/A weeks for temporary total disability

22. Second Injury Fund Liability: None

TOTAL: None

Said payments to begin N/A and 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 N/A percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Richard D. Johnston Injury No. 07-122890
Dependents: N/A
Employers: City of Kansas City (previously settled)
Additional Party: Missouri Treasurer as Custodian for the Second Injury Fund
Insurers: Self-Insured
Hearing Date: January 14, 2011; briefs filed February 15, 2011 Checked by: KJC/cy

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issue involved whether the Second Injury Fund was liable for compensation, and if so the extent of any such liability.

At the hearing, Mr. Richard D. Johnston (hereinafter referred to as "Claimant") testified that he was born on October 24, 1950 and that he was 60 years old. He indicated that he had been married for 38 years and that he had two adult sons.

Claimant testified that he dropped out of high school in his junior year. He stated that he was unsuccessful in his attempt to obtain a GED while he was in the military. He stated that English, spelling and reading were difficult for him. He admitted, however, that while working as a union representative in the trucking industry he was required to read contracts and that he was able to do so.

Claimant testified that he had worked on several jobs. He stated that his last job was with the City of Kansas City, Missouri where he worked from January 2003 until February 14, 2008. He stated that his job was maintenance mechanic where he did repair work on heavy equipment. He also stated that he worked in some city owned agricultural fields where bio-solids from the city waste treatment plants were used to fertilize the fields. He stated that his job required him to hook and unhook large hoses. He described the job as "very heavy." He stated that he used earth moving equipment, bulldozers, large tractors and back hoes.

Claimant stated that the job required a lot of plumbing work with large heavy cast iron pipes and a massive sprinkler system. He stated that the job took its toll on him physically and particularly his hands.

Claimant testified that his preceding job was at Consolidated Freightways, where he worked from 1974 to 2003. He stated that he was an over-the road truck driver for 22 or 23 years and a dock worker for the last 7 years. He stated that he left the job when the company shut down.

Claimant testified that his over-the road truck driving duties also took a toll on him physically. He stated that the shaking, vibrating and bouncing in the cab affected his hands, elbows and body. He stated that his job as a dock worker was physical and required brutal strength. He stated that driving the forklifts with poor suspension bounced him around a lot and hurt his back.

Claimant testified that his other jobs were as a warehouseman and laborer. He also stated that he served in the United States Army from October 1968 to June 1971. He stated that he served one year in Germany and one year in Vietnam where he engaged in combat duties.

Claimant alleged that he developed hearing problems and that he injured his back while in Vietnam. He stated that his hearing problems began while he and his unit were engaged in combat and a weapon was fired within 2 or 3 feet of his ears. He stated that he could not hear for 2 or 3 days after the incident. He stated that he had tinnitus.

Claimant testified that his alleged hearing problems had affected him at work. He stated that his hearing problems made it difficult to hear trucks, forklifts and people talking when he worked on the dock. He stated that his boss sometimes became angry when he could not hear his boss talking.

Claimant testified that his back injury occurred when he and another soldier while in Vietnam were attempting to remove a tank from a truck in the salvage yard. He stated that he used a large pipe wrench to try to remove the tank and that the wrench burst loose and "so did my back." He stated that he now had back pain on a daily basis.

Claimant testified that his back became more painful at work as an over-the-road truck driver when the seat bottomed out. He stated that he was not interested in back surgery because he had observed too many friends who did not do well following back surgery. He stated that he sometimes received assistance from his co-workers with heavy lifting due to his back problems.

Claimant testified that in 2006 he was diagnosed with post traumatic stress disorder (PTSD) due to his military experiences. He stated that he began receiving treatment for the condition in 2006. He stated that his mother had told him when he returned from Vietnam that he was not the same son who left and went to war. He stated that his mother described him as an "animal" when he returned from the war.

Claimant testified that he changed after he returned from the war. He stated that he had no tolerance for liars, thieves and lazy people and that his lack of tolerance for such people caused him problems in the workforce. He stated that he had confrontations with his co-workers. He stated that he had a lot of anger issues and anxiety problems. He complained of problems in interacting with his co-workers. He stated that he used to confront people and become angry. He stated that loud noises bothered him. He stated that he had engaged in road rage. He complained of memory problems. He stated that his problems with people were worse when he worked for the City where a lot of the employees were unskilled and unconcerned with how they did their jobs.

Claimant testified that prior to his alleged December 2007 work injury he had injured his eye. He stated that the injury occurred when a radio tube "blew up" and a fragment slit his eye open. He complained of double vision and problems with depth perception. He stated that his visual acuity in his left eye was now minimal. He stated that he could see colors, but not any details. He stated that his most recent glasses had resolved most of the problems, other than some difficulties with night driving.

Claimant testified that in 1993 he had elbow surgery following an injury at work. He stated that on December 18, 2007 he injured his right heel at work when he was stepping out of a bulldozer and his right heel landed on a hard rubber hose. He later indicated that his foot felt like it had exploded when he stepped down on the hose.

Claimant complained of continuing pain in his heel. He stated that his heel still felt numb. He stated that he had problems if he tried to stand for more than a couple of hours. He stated that sometimes his heel hurt while he was just lying in bed. He stated that he worked about two months after his heel

injury. He stated that he quit his job because he did not believe that he was doing what he had been hired to do. He stated that he was hired to be a mechanic and that he could not do that job anymore.

Claimant testified that he was also alleging a February 14, 2008 occupational disease involving his thumbs. He stated that over the years his hands were beaten up pretty badly. He stated that he really "felt it" while coupling the big hoses on his job with the City. He stated that the vibration from the pipes was extremely painful. He complained of a sharp, stabbing pain around the base of his thumbs.

Claimant admitted that he did not seek any medical treatment for his thumbs until after he had quit his job with the City. He stated that he did not believe that he could do any of his prior jobs. He stated that he had previously owned a business where he did mechanical work on brakes and transmissions. He stated that he could no longer do that work. He did admit that on a typical day he loaded about 500 bullets for shooting on the next day.

On cross-examination by the Second Injury Fund, Claimant testified that he went shooting twice per week for about two hours on each occasion. He admitted that he did not have any surgery on his hands. He admitted that he had not been prescribed any permanent restrictions on the use of his hands. He admitted that he was still working on the tractor he had purchased to restore.

Medical Evidence

Claimant offered into evidence two depositions of Todd Hill, D.O., one deposition of P. Brent Koprivica, M.D. and numerous other medical reports and records. Dr. Hill's initial deposition was taken on April 29, 2010. He stated that he was board certified in psychiatry and neurology, but primarily in psychiatry. He stated that he had a clinical practice and that previously he was the chief resident at the Veteran's Administration Medical Center.

Dr. Hill testified that he evaluated Claimant on January 23, 2009. He stated that Claimant provided a history of severe anxiety disorder consistent with PTSD. He stated that Claimant complained of hypervigilance, avoidance, nightmares and flashbacks. He stated that Claimant was able to recall in vivid details events that happened in Vietnam more than 25 years earlier.

Dr. Hill noted that Dr. Teresa Moscovich who had previously diagnosed Claimant with PTSD had assigned Claimant a Global Assessment of Functioning score of 40, which was a subjective number, but indicative of a severe "if not very severe" impairment. He also noted that Claimant's medical records showed that in 2006 Claimant was assigned a 50 percent service connected disability. He admitted that he had never done a service connected disability evaluation.

Dr. Hill testified that during the evaluation Claimant seemed to be preoccupied with Vietnam. He noted that Claimant appeared to be of average intelligence. His diagnosis was chronic and severe PTSD.

Dr. Hill concluded that Claimant could not work due to his PTSD or psychological disorder in combination with his physical problems. He stated that he did not "feel" that Claimant was employable. He stated that he did not assign a numerical value to Claimant's disability for the PTSD although the VA had done so.

On cross-examination by Claimant's employer, Dr. Hill admitted that Claimant was able to work with the PTSD for more than 40 years.¹ On cross-examination by the Second Injury Fund, Dr. Hill admitted that he had stated in his report that Claimant was permanently and totally disabled secondary to

¹ Claimant had not settled his case against his employer at the time Dr. Hill was deposed.

severe PTSD. He admitted on cross-examination that in his opinion based on the PTSD alone it would be very difficult for Claimant to work.

Claimant re-deposed Dr. Hill on October 6, 2010. In the second deposition, Dr. Hill was asked to explain his testimony on cross-examination by the Second Injury Fund that Claimant was permanently and totally disabled secondary to severe PTSD. Dr. Hill then indicated that maybe he could have used a better choice of words. He stated that the phrase, "in addition to" was probably a better a way to describe his opinion.

Dr. Hill clearly appeared to be disingenuous in his second deposition. He did not explain why his conclusion on cross-examination was exactly the same as the conclusion he had reached in his medical report if the cross-examination testimony merely involved a poor choice of words. Dr. Hill concluded his testimony in the second deposition by stating that Claimant's alleged permanent total disability was due to PTSD and the physical injuries as described in detail by Dr. Koprivica.

Dr. Koprivica testified by deposition on June 17, 2010. He stated that he was board certified by the American College of Emergency Physicians and by the American College of Preventive Medicine in the subspecialty of occupational medicine. He estimated that he had performed in excess of 40,000 of what he characterized as independent medical examinations.

Dr. Koprivica testified that Claimant had significant problems with hearing loss, bilateral tinnitus, back pain and PTSD. He noted Claimant's 50 percent service connected disability from the military for PTSD and depression. He stated that he would defer to a psychiatrist on issues involving the PTSD and depression. He admitted that he did not feel competent to rate a psychiatric disability.

Dr. Koprivica also noted that Claimant had settled his prior work-related elbow injury based on a permanent partial disability of 15 percent of the elbow. He stated that he rated the disability at 20 percent of the elbow. He stated that Claimant's hearing impairment involved a high frequency loss above 2,000 hertz per second and was due to tinnitus.

Dr. Koprivica testified that he did not find any disability to Claimant's left eye or any vocational impact. He stated that Claimant had good depth perception in the eye as demonstrated by Claimant's ability to shoot handguns competitively.

Dr. Koprivica testified that Claimant's MRI of his lumbar spine prior to 2007 showed multi-level disk bulging and nerve root compression. He stated that the back impairment limited Claimant in his ability to work as a mechanic. He stated that Claimant accommodated for his PTSD by doing jobs where he could work alone and limit his interaction with the public and coworkers.

Dr. Koprivica concluded that Claimant's alleged 2008 occupational disease involved chronically progressive hand pain over the years. He indicated that Claimant had CMC joint degenerative arthritis at the base of his thumbs. He stated that such arthritic conditions were seen in individuals who used their hands extensively either recreationally or vocationally.

Dr. Koprivica concluded that Claimant's work as a mechanic for the six years preceding September 2008 was the direct, proximate and prevailing factor in causing the development and progression of the degenerative arthritis in the CMC joints of Claimant's thumbs.

Dr. Koprivica diagnosed Claimant's alleged foot injury from the alleged December 18, 2007 accident as plantar fasciitis. He admitted that surgery was employed to correct the condition if it so warranted the surgery. He acknowledged that doctors had not performed surgery on Claimant's heel. He noted that although Dr. Rizzi, a podiatrist, had concluded that the plantar fasciitis was not caused by

Claimant's alleged injury at work, it was his opinion that Claimant's alleged work injury of December 18, 2007 was the prevailing factor in causing the plantar fasciitis.

Dr. Koprivica admitted that Claimant's weight contributed to the plantar fasciitis as well as the structure of Claimant's foot. Dr. Koprivica concluded that Claimant had sustained a 15 percent permanent partial disability of the right foot at the 155 level due to the plantar fasciitis. He stated that he assigned a 10 percent permanent partial disability to the body as a whole due to bilateral tinnitus and hearing loss. He stated that he assigned a 15 percent permanent partial disability to both the right and left hands due to Claimant's degenerative arthritis in both thumbs. He stated that he assigned a 15 percent permanent partial disability to the body as a whole due to Claimant's low back impairment.

Dr. Koprivica related that after he factored in Dr. Hill's opinion and Ms. Titterington's vocational opinion, he concluded that Claimant was permanently and totally disabled due to the combined effect of the psychiatric disability and the physical injuries.

Claimant also offered into evidence numerous medical reports and records. In his social security disability records Claimant stated that he lifted up to 100 pounds on his job with the City. He stated that after he quit his job with the City, he had continued to do repair work, including simple automobile repair work. He stated that he had continued to shoot in a league once or twice per week and that he repaired plumbing, and mowed his lawn and his mother's.

J. Kendall Walker, M.D. of Shoal Creek Family Medicine noted on February 9, 2006 that Claimant was quite healthy. On December 18, 2007 Claimant sought treatment with Dr. Walker with complaints of right heel pain. That was the day of the alleged injury at work when Claimant allegedly stepped on a hose with his right foot while getting out of a bulldozer and complained that his right heel felt as though it had exploded.

Dr. Walker examined Claimant at 3:05 p.m. on December 18, 2007. Dr. Walker's records from that day showed that Claimant complained of right heel pain from "walking a lot in one day while hunting. Started November 12, 2007." The location of the pain was described as primarily the heel which radiated to the Achilles' tendon. Claimant characterized the pain as constant, severe and stabbing. He complained of stiffness.

Claimant did not mention anything about any injury at work when he saw the doctor on December 18, 2007. The record contained no history of any injury while Claimant was getting out of a bulldozer at work on December 18, 2007 and his right heel landing on a hose and feeling as though it had exploded.

Under HPI in the record it stated "The pain initially began 3 weeks ago. No precipitating event or injury is identified. He characterizes the pain as constant, severe and stabbing. Associated symptoms include stiffness. He denies ankle instability or numbness. Nothing seems to relieve the pain. The pain increases with partial weight-bearing."

Claimant's right foot was examined on December 18, 2007. It was noted during the examination of Claimant's right foot that there was no gross edema or evidence of an acute injury. There was no warmth or abnormal coolness of his right foot. X-rays revealed no fractures, dislocations, mass or effusion and no gross abnormalities of the soft tissues or bony structures. He did have a small heel spur.

Claimant returned to Dr. Walker's office on December 27, 2007. Again, the record stated "R heel pain from walking a lot in one day while hunting. Started 11-12-07 follow-up MRI." Under HPI the record again stated no precipitating event or injury is identified. It was noted that the recent MRI showed plantar fasciitis and no stress fractures.

On March 23, 2009, Raymond M. Rizzi, D.P.M. with Drisko, Fee & Parkinson stated that Claimant had plantar fasciitis of the right heel. He stated that he did not believe that the plantar fasciitis was secondary to Claimant's work. He stated that Claimant's plantar fasciitis was caused by Claimant's obesity, gait and a congenital deformity or mechanical problem involving one of the muscles in Claimant's heel which extended into the Achilles. Dr. Rizzi concluded that the alleged injury to Claimant's right heel at work had not resulted in any permanent partial disability.

On August 16, 2007, David Rouse, M.D., of Northland, Ear, Nose & Throat P.C. indicated that Claimant had a mild hearing loss in the low to mid range bilaterally, which progressed at about 2,000 to 8,000 hertz to a severe profound loss, worse on the left than the right.

On August 27, 2008 Claimant complained to Kevin F. Knop, M.D. of Northland Pain Consultants about hand pain. Dr. Knop noted that Claimant had significant wincing and pain behaviors. His impression was chronic hand pain which appeared to be joint-related. He noted that Claimant had degenerative joint disease in other parts of the body. On September 24, 2008, Craig Newland, M.D., of Liberty Orthopedics noted that x-rays revealed that Claimant had osteoarthritis of the thumb basal joints.

On February 2, 2009, Dr. Walker noted that Claimant had been diagnosed with generalized osteoarthritis more than 5 years ago. He noted that subjectively the discomfort was moderately severe. The report stated that, "Primary joints affected include the lumbar spine, wrists, hands and feet." It was noted that Claimant had crepitus in the PIP joints of both hands.

On November 20, 2006, Dr. Walker noted that Claimant was trying to get disability through the VA. On November 29, 2006 Claimant had an MRI of his lumbar spine. The impression was broad-based left lateral disk herniation at L1-L2 with mild to moderate left lateral stenosis and a very slight compression of the left L2 nerve root.

Claimant's VA Hospital records from August 12, 2008 included the following observation, "Based on Pts PTSD sxs of depression, sleep disturbance, irritability, anger, rage and h/o violence, I feel that Pt is unemployable. Pts sxs have fluctuated over the years and are easily triggered by others, which would make it impossible for Pt to work effectively."

Claimant's August 15, 2008 records stated that Claimant had retired due to PTSD. The March 12, 2008 record noted that Claimant had indicated that he felt better and less stressed and less anxious since he retired. On February 11, 2008 Claimant indicated that his stress level had decreased since he retired. The evidence indicated that Claimant retired effective with February 14, 2008. On December 13, 2007 Claimant told the VA that he believed that he would be dead without the treatment he had received for PTSD.

On November 19, 2007 Claimant told the VA that he had worked for the City for five years and that he planned to quit his job in February due to conflicts with people. On November 15, 2007 Claimant indicated that he was looking forward to retiring in February. He indicated that it was too difficult for him to work around others. In September 2007, Claimant indicated that he was looking forward to retiring next year.

On August 2, 2007 Claimant indicated that he found it difficult to deal with others at work and that he was looking forward to retiring. Throughout the sessions Claimant complained of nightmares and flashbacks to Vietnam.

A February 23, 2009 letter from the VA to Claimant set out Claimant's VA disability payments. His original monthly payment amount was \$377 per month effective with February 1, 2006. The payments were increased to \$954 per month effective with April 1, 2006, \$1,193 per month effective with

September 1, 2006, \$1,232 per month effective with December 1, 2006, \$1,260 per month effective with December 1, 2007, and \$2,669 per month effective with May 1, 2008. On December 1, 2008 his benefits were increased to \$2,823 per month based on Claimant's "unemployability." It was noted that Claimant was granted 100 percent entitlement to the benefits due to his inability to work due to his service connected disability/disabilities.

Vocational Evidence

Claimant offered into evidence the deposition testimony and the report of Ms. Mary Titterington, a vocational rehabilitation counselor. Ms. Titterington testified that she had two national certifications in vocational rehabilitation. She stated that she evaluated Claimant on February 19, 2009.

Ms. Titterington testified that Claimant was 58 years old and that he was receiving social security disability income and a disability pension through the VA. She stated that Claimant was very forthright during the evaluation and that she did not observe any anger control problems.

Ms. Titterington testified that Claimant rotated between sitting and standing during the evaluation. She stated that he walked with a very slow gait. She stated that his total functioning level was "very low." She also stated that his Global Assessment of Functioning score of 40 to 45 was highly significant because it was "too low to support work". She stated that Claimant's psychological issues, physical issues and emotional barriers combined to affect him vocationally.

Ms. Titterington concluded that Claimant was not employable. She stated that he was not employable based on a combination of all his impairments.

On cross-examination by the Second Injury Fund, Ms. Titterington admitted that in her opinion there were no jobs that Claimant could do based on just the PTSD and the psychological disability alone if Dr. Hill were correct in his conclusions. She admitted that Claimant's treating physicians had placed very few if any restrictions on him due to the alleged physical injuries. She admitted that in her opinion the alleged PTSD or psychiatric disability was the "biggest" factor in Claimant's alleged inability to work.

Ms. Titterington admitted that her records showed that Claimant provided a history of quitting his job with the City due to anger and fear that he was going to kill his co-workers and not due to any alleged thumb impairments. She stated that it was her understanding that Claimant had left his jobs at Consolidated Freightways, Goodwin Sporting and Lincoln Steel due to anger issues. Claimant testified at the hearing that he worked for 28 years at Consolidated Freightways and that the only reason that he left the company was that it went out of business.

Other Exhibits

Claimant filed a claim for compensation for the alleged December 2007 right heel injury in August 2008. He listed one of the preexisting impairments as an occupational disease involving his thumbs. He filed a claim for compensation alleging a February 2008 occupational disease involving his thumbs in February 2009.

Claimant's Exhibit F was the stipulation for compromise lump sum settlement of the alleged December 2007 right heel injury. The stipulation showed that he settled his case base on a permanent partial disability of 10 percent at the 155 week level. Exhibit P was the stipulation for compromise lump sum settlement of the alleged February 2008 occupational disease. The stipulation showed that he settled his case based on a permanent partial disability of 8 percent of each wrist at the 175 week level due to the alleged thumb impairments.

Law

After considering all the evidence, including the testimony at the hearing, Drs. Hill and Koprivica's deposition testimony and reports, the voluminous medical reports and records, Ms. Titterington's deposition and report, the other exhibits and observing Claimant's appearance and demeanor, I find and believe that Claimant failed to prove that he sustained any disability as a result of the alleged December 18, 2007 accident at work. Thus, he did not prove the Second Injury Fund's liability for any compensation.

Claimant had the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2nd 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3rd 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant, as noted above, did not prove the Second Injury Fund's liability for any compensation.

Credibility

There were numerous conflicts in Claimant's testimony and the other evidence. Claimant alleged that he sustained an injury at work on December 18, 2007 when he stepped down from a bulldozer and his right foot landed on a hard rubber hose causing his right heel to feel like it had exploded. Neither Claimant's employer nor the Second Injury Fund made accident an issue in the case.

Claimant's medical records, however, showed that on December 18, 2007, Claimant went to his family physician, Dr. J. Kendall Walker, with complaints of right heel pain. Neither Claimant nor the Second Injury Fund addressed Dr. Walker's December 18, 2007 report in their post hearing submissions.

Dr. Walker's records showed that Claimant was examined at 3:05 p.m. on December 18, 2007 with complaints of right heel pain. Claimant told the doctor's office that he developed the right heel pain from "walking a lot in one day while hunting. Started November 12, 2007." The record contained no history of any alleged injury on December 18, 2007 at work or that Claimant had even stepped off a bulldozer on that day and landed on a hose and felt pain in his right heel or foot.

The doctor's records showed that Claimant complained that the pain was constant, severe and stabbing. Again, constant pain was an indication that it existed prior to December 18, 2007. Later, in the records it was stated under HPI that "The pain initially began 3 weeks ago. No precipitating event or injury is identified." Claimant clearly failed to tell the doctor's office about any alleged injury on December 18, 2007.

Claimant also told the doctor's office on December 18, 2007 that nothing relieved the pain. Again, that was an indication that the pain existed prior to December 18, 2007. During the examination of Claimant's foot on December 18, 2007 no gross edema (swelling) or evidence of an acute injury was found. There was no warmth or abnormal coolness of the foot. There was no effusion.

Claimant returned to Dr. Walker's office on December 27, 2007. Again, the record stated "R heel pain from walking a lot in one day while hunting. Started November 12, 2007." Again, the records contained no history of any injury while getting out of a bulldozer on December 18, 2007 or that Claimant had even aggravated his prior heel problems on December 18, 2007. The record again stated that no precipitating event or injury was identified.

The medical records clearly showed that Claimant had right heel problems prior to the alleged accident at work on December 18, 2007. The records clearly showed that Claimant had either injured his right heel on November 12, 2007 or began experiencing heel pain on that day while he was hunting.

There was no evidence that Claimant had injured his foot or heel on December 18, 2007, other than Claimant's unsupported testimony which was contradicted by the medical evidence from the day of the accident. That contradiction while not relevant on the substantive issue of accident based on the stipulation by the Second Injury Fund that Claimant had sustained an accident at work on December 18, 2007, was relevant on the issue of Claimant's credibility.

That contradiction was not the only evidence affecting Claimant's credibility. He testified that he did not want to quit working. He testified that he stopped working in February 2008 because his wife told him to quit his job due to his numerous complaints about hand and thumb problems. Again, the medical records clearly indicated that Claimant did not quit his job due to hand and thumb problems. The medical records clearly showed that Claimant was planning to retire long before February 2008. The medical records clearly indicated that Claimant's alleged hand and thumb impairment had no affect on his decision to voluntarily quit his job.

The medical records showed that as early as 2006 Claimant began inquiring about VA disability benefits. In August 2007, Claimant told the VA that he was going to retire from his job in early 2008. He mentioned nothing about any hand or wrist problems. Instead, he told the VA that he was going to retire due to difficulty in dealing with people. He told the VA on several occasions after August 2007 that he was going to retire due to difficulty in dealing with people on the job. He mentioned nothing about any hand or thumb problems on any of those occasions. He told Ms. Titterington, his vocational expert, that he retired from his job in February 2008 because he was afraid that he was going to kill his co-workers. Again, he mentioned nothing about any hand or thumb problems to her as a reason for his decision to quit or retire from his job.

In addition, Claimant did not get any treatment for any hand or thumb problems until August 2008, months after he had already retired from his job and the same month during which he filed a claim for compensation in the December 2007 case alleging that he was permanently and totally disabled. The records contained no evidence showing that Claimant had ever complained to any doctor about any hand or thumb problems prior to when he chose to retire. No doctor told him that he needed to retire due to any alleged hand or thumb problems.

What the medical records clearly showed was that when Claimant was attempting to get VA disability benefits, he complained of severe PTSD and psychiatric problems and indicated that he was going to retire from his job due to such problems. His VA disability benefits were premised on service connected disability. When he was trying to get permanent total workers' compensation disability benefits he needed to prove that an injury or occupational disease from the job combined with his preexisting disability to render him permanently and totally disabled. Thus, he alleged in his workers' compensation case that he quit his job due to hand and thumb problems, even though the medical records showed that he had never even gone to a doctor and complained about any such problems prior to when he quit his job in February 2008.

There were other contradictions in Claimant's complaints and the evidence. Claimant argued that due to PTSD he could not get along with people. He argued that due to his PTSD he preferred jobs where he could work alone and would not have to deal with people. Yet, he admitted that he was a union representative on his job at Consolidated Freightways. As a union representative he had to deal with people. He chose to work as a union representative. He was not required by his job to work as a union representative.

Similarly, Claimant testified that he had difficulty in reading. Yet, again he admitted that as a union representative he had to read union contracts and that he had no difficulty in doing so. The contradictions in Claimant's testimony and the medical records and the other evidence clearly detracted from Claimant's credibility. Claimant's credibility issues made it difficult to ascertain the validity of his subjective complaints, particularly when he complained of back pain, but did not have surgery, heel pain but did not have surgery, bilateral thumb problems but did not have surgery and PTSD, a diagnosis based primarily on subjective complaints.

Second Injury Fund Liability

The statute provides that the Second Injury Fund can only be liable for benefits if the employee had some disability prior to the injury at work and then sustained some additional permanent partial disability due to the later injury on the job. § 287.220 RSMo. 2005. The statute defines "accident" as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

§287.020 RSMo. 1005.

The statute separately defines "injury" as follows:

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable. . . .

§287.020 RSMo. 2005.

Clearly, the statute makes a distinction between accident, causation and injury by accident. Also, as the statute states "prevailing factor" is defined as the primary factor in relation to all others in causing the resulting medical condition and disability.

Thus, while the Second Injury Fund admitted that Claimant had sustained an accident at work on December 18, 2007; it did not admit causation or that Claimant had sustained a compensable injury by accident as that term is defined in the statute or that the accident was the prevailing factor in causing the alleged resulting medical condition, plantar fasciitis, or any permanent disability.

Claimant alleged that he injured his right heel when he stepped down from a bulldozer and his heel landed on a hard rubber hose. His alleged heel impairment was diagnosed as plantar fasciitis. There was no credible evidence offered, however, which showed that plantar fasciitis could be caused by a one-time incident where a person stepped on a hose while getting out of a bulldozer or even on concrete on one specific occasion as Claimant alleged in his claim for compensation.

Dr. Rizzi, a podiatrist and a specialist, concluded that Claimant's plantar fasciitis was not secondary to Claimant's work. He stated that Claimant's obesity was a major contributing factor to the condition and that the other two factors were Claimant's gait and a congenital deformity of one of Claimant's muscles which extended into the Achilles. Dr. Rizzi was credible in his opinion. The evidence supported his opinion.

Dr. Koprivica attempted to relate the plantar fasciitis to the alleged injury at work where Claimant alleged that he stepped on a hose. Dr. Koprivica acknowledged that the specialist, Dr. Rizzi, differed in his opinion as to causation. Dr. Koprivica admitted that Claimant had the foot deformity as diagnosed by Dr. Rizzi. Dr. Koprivica offered no evidence showing that plantar fasciitis could even be caused by such a one-time incident as Claimant alleged in his claim and in his testimony. Dr. Koprivica referred to no medical journals, articles or learned treatises or any evidence to support his conclusory opinion. Dr. Koprivica offered no evidence showing that he had any expertise in diagnosing plantar fasciitis or the causes or effects of the condition.

Dr. Koprivica's opinion was not credible. The evidence did not support Dr. Koprivica's conclusory opinion. Dr. Koprivica's opinion was not entitled to as much weight as the opinion of Dr. Rizzi, a specialist who concluded that Claimant's work had not caused the plantar fasciitis. Claimant clearly failed to prove that the prevailing or primary factor in causing his plantar fasciitis was the alleged accident at work where he allegedly stepped on a hose while getting out of a bulldozer.

In addition, Claimant failed to prove that he had sustained any disability due to the alleged December 18, 2007 injury.² The evidence showed that Claimant sought treatment with his family physician on December 18, 2007, the day of the alleged accident and injury at work. Claimant complained of right heel pain on December 18, 2007. Claimant, however, did not provide his family physician with any history of any injury on December 18, 2007. He did not tell his family physician that he stepped on a hose or on concrete while getting out of a bulldozer on that date or on any other date and injured his right heel. He did not tell the doctor that his heel felt as though it had exploded when he stepped on the hard hose. Instead, he told the doctor's office on the day of the alleged injury that he had injured his heel a month earlier on November 12, 2007 while he was doing a lot of walking while hunting.

Claimant's family physician's records were probative. Dr. Rizzi, the specialist concluded that Claimant had not sustained any disability due to the alleged right heel injury at work on December 18, 2007. Based on the most credible competent evidence, including the medical records from the day of the alleged accident, it cannot be found that Claimant sustained any disability due to an alleged injury on December 18, 2007 when Claimant sought treatment on that date and told the doctor's office that he had injured his heel on November 12, 2007 while hunting and did not mention anything about any alleged injury on December 18, 2007. Claimant clearly failed to prove that his alleged injury on December 18,

² Claimant settled his case against his employer based on a permanent partial disability of 10 percent at the 155 week level. Claimant is bound by the terms of the settlement. Conley v. Treasurer of Missouri, 999 S.W.2d 269 (Mo. App. E.D. 1999). The Second Injury Fund is not bound by the terms of the settlement between Claimant and Claimant's employer where the Second Injury Fund was not a party to the settlement. Gassen v. Leinbengood, 134 S.W.3d 3d (Mo. App. W.D. 2004); Totten v. Treasurer of State of Missouri, 116 S.W. 3d 624 (Mo. App. 2003). Thus, Claimant needed to prove that he had sustained some disability as a result of the admitted accident. See § 287.220 RSMo. 2005.

2007 was the prevailing or primary factor in causing any alleged disability to his right heel. Thus, he did not prove the Second Injury Fund's liability for any compensation.

Permanent Total Disability

As noted above, Claimant failed to prove that the alleged injury at work on December 18, 2007 had resulted in any permanent partial disability, a prerequisite to establishing Second Injury Fund liability. § 287.220 RSMo. 2005. Had he proven, however, that the alleged accident had resulted in some permanent partial disability, the result in the case would have been the same. The Second Injury Fund was not liable for any benefits.

First, Claimant did not meet the threshold disability amounts as set out in the statute for establishing Second Injury Fund liability for permanent partial disability benefits. See § 287.220 which provides that an injury to a major extremity must result in a permanent partial disability of at least 15 percent of the major extremity to establish Second Injury Fund liability for permanent partial disability benefits. Claimant settled his case involving the alleged right heel injury based on a permanent partial disability of 10 percent at the 155 week level. Claimant was bound by the settlement. Conley. Thus, he did prove that his alleged right heel injury had resulted in a permanent partial disability of at least 15 percent of a major extremity.

Claimant also failed to prove that he was rendered permanently and totally disabled due to a minor heel injury settled at 10 percent at the 155 week level combining with his alleged preexisting disability to render him permanently and totally disabled. Claimant admitted that the alleged PTSD was a major factor in his alleged permanent total disability. Claimant, however, did not offer into evidence a workers' compensation permanent partial disability rating for the alleged PTSD.

Thus, to find in Claimant's favor, it would require speculation as to whether he sustained any permanent partial disability due to the PTSD under the Workers' Compensation Act, and if so, the amount of such disability and whether it was sufficient to combine with his other alleged preexisting injuries and an alleged minor heel injury to render him permanently and totally disabled. Proof of permanent total disability cannot be based on speculation.

Also, total disability is defined in the statute as an inability to return to any employment and not merely . . . inability to return to the employment in which the employee was engaged in at the time of the accident. See § 287.020 (6) RSMO.2005; Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. 1995); Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo. App. 1982); Crums v. Sachs Electric, 768 S. W. 2d 131 (Mo. App. 1989).

Missouri Courts have made it clear that the test for permanent total disability is whether any employer in the usual course of business would reasonably be expected to employ the injured worker in his present physical condition. Boyles v. USA Rebar Placement, Inc., 25 S.W.3d 418 (Mo. App. W.D. 2000); Cooper v. Medical Center of Independence, 955 S.W.2d 570 (Mo. App. W.D. 1997); Brookman v. Henry Transportation, 924, S.W.2d 286 (Mo. App. 1996). Claimant admitted at the hearing that he had been offered jobs since he quit his job with the City. He admitted that he was offered a job to drive a dump truck. He admitted that he was offered another job by J.B. Hunt Trucking Company. While, that he had been offered jobs did not prove that he could do the jobs, or that an employer would continue to employ him, it did constitute evidence that an employer would hire him in the usual course of business.

The conundrum for Claimant, however, was that his own evidence regarding his alleged permanent total disability conflicted with the statutory requirements for proving the Second Injury Fund's liability for such benefits. The statute clearly provides that the Second Injury Fund can only be liable for

permanent total disability benefits if the permanent partial disability from the injury on the job combines with the employee's preexisting permanent partial disability to render the employee permanently and totally disabled. Id. Claimant's most credible evidence did not show that a minor heel injury settled at 10 percent at the 155 week level combined with his alleged PTSD and other impairments to render him permanently and totally disabled.

Claimant's own evidence indicated that his alleged PTSD was his most serious preexisting impairment.³ His own evidence also showed that the alleged PTSD did not combine with his alleged minor heel injury and other impairments to render him permanently and totally disabled. Dr. Hill, a psychiatrist, testified on Claimant's behalf. Dr. Hill concluded in his report that Claimant was permanently and totally disabled secondary to severe PTSD. He did not conclude in his report that the alleged permanent total disability was caused by a combination of the alleged severe PTSD and the alleged minor heel injury settled at 10 percent at the 155 week level and the other alleged preexisting impairments.

On cross-examination by the Second Injury Fund, Dr. Hill testified that Claimant was permanently and totally disabled due to the alleged severe PTSD. He stated that based on the PTSD alone it would be very difficult for Claimant to work. Again, he did not conclude that the alleged minor heel injury settled at 10 percent at the 155 week level had anything to do with the alleged permanent total disability. Dr. Hill, as noted above, was Claimant's witness.

After Dr. Hill's testimony on cross-examination, Claimant chose to re-depose Dr. Hill, ostensibly to clarify Dr. Hill's cross-examination testimony. Dr. Hill's attempt to explain his cross-examination testimony at the second deposition was not credible. He stated at the second deposition that maybe he could have used a better choice of words on cross-examination. He stated that the phrase "in addition to" was "probably" a better way to describe his opinion.

Dr. Hill did not explain why if he had used an improper choice of words to explain his opinion on cross-examination; that he had used the exact same words in his written report which was not generated under any pressure or the stress of cross-examination. Dr. Hill was clearly being disingenuous at the second deposition when he attempted to change the opinion he had rendered on two separate occasions.

In addition, however, there was another psychiatrist who offered an opinion on Claimant's alleged permanent total disability. The VA psychiatrist noted on August 12, 2008 that "Based on Pts PTSD sxs of depression, sleep disturbance, irritability, anger, rage and h/o violence, I feel that Pt is unemployable. Pts sxs have fluctuated over the years and are easily triggered by others, which would make it impossible for Pt to work effectively."

³ Claimant did not prove that his alleged preexisting hearing loss and vision impairment had resulted in any permanent partial disability under the Workers' Compensation Act. He offered no evidence showing that his hearing loss was below 2,000 hertz per second as required by the statute and the regulations. See § 287.190 RSMO; 8 CSR 50.5.060. He also offered no evidence showing that he had his hearing tested on three different occasions on three separate days at 500, 1,000 and 2,000 hertz per second as required in the statute and regulations. He did offer evidence that he had some disability due to tinnitus or ringing in the ears.

Claimant's own testifying expert, Dr. Koprivica, also admitted that in his opinion Claimant did not have any disability due to the alleged vision impairment and that it had not resulted in any vocational impact. Dr. Koprivica noted that Claimant was still able to participate in competitive shooting tournaments using a hand gun. He noted that such activities required good depth perception. That contradicted Claimant's allegation.

Thus, two psychiatrists rendered opinions on Claimant's alleged permanent total disability. It was clear that both were of the opinion that Claimant was permanently and totally disabled due to the alleged severe PTSD alone and not in combination with a minor heel injury settled at 10 percent at the 155 week level or any other alleged preexisting disability. No other psychiatrists rendered opinions in the case on Claimant's alleged permanent total disability.

The opinions of the two psychiatrists who rendered opinions were entitled to more weight on the diagnosis and effects of the PTSD than the opinion of Dr. Koprivica, who was board certified in emergency medicine and who admitted that he did not feel competent to rate a psychiatric disability. The uncontroverted psychiatric opinions and the other evidence clearly showed that if Claimant were in fact permanently and totally disabled it was caused by the alleged severe PTSD alone and not a combination of the alleged PTSD and a minor heel injury settled at 10 percent at the 155 week level and Claimant's other alleged preexisting impairments. As such, the Second Injury Fund was not liable for permanent total disability benefits.

Claimant, however, argued in his brief that the opinion by the Missouri Court of Appeals for the Western District in a yet to be published case, Angus v. Second Injury Fund WD 72141 (Mo. App. W.D. 2010) was applicable to his case. Claimant argued that in Angus the employee offered evidence to support his allegations and expert opinions and that the Second Injury Fund offered no evidence to "contradict or impeach" the opinions of the employee's experts. Claimant, thus, argued that the Court found the Second Injury Fund liable for the benefits at issue.

First, Angus does not shift the burden of proof from the employee to the Second Injury Fund. The employee still has the burden of proving all material elements of his claim. Fischer; Griggs; Hall. See also Michael v. Treasurer as Custodian of the Second Injury Fund, SD30365 (Mo. App. S.D. 2011) where the Court specifically stated that the Second Injury Fund had no obligation to present conflicting or contrary evidence on a claim for permanent total disability and cited Dunn v. Treasurer of Missouri, 272 S.W.3d 267, 275 (Mo. App. 2008).

Also, in Claimant's case, contrary to his assertion there was evidence which served to "contradict or impeach" the opinions of Claimant's experts. The opinions of Dr. Rizzi, a podiatrist and a specialist in treating heel and foot injuries, contradicted the opinions of Dr. Koprivica, whose board certification was in emergency medicine on the causation and disability issues regarding Claimant's plantar fasciitis.

Claimant's family physician's records contradicted Claimant's argument that he had even injured his right heel at work on December 18, 2007. Claimant sought treatment with his family physician on December 18, 2007 and told his doctor that he had injured his heel on November 12, 2007 while hunting and he mentioned nothing about any alleged heel injury at work on December 18, 2007. Thus, the family physician's records contradicted Claimant's allegation and Dr. Koprivica's opinion and rating that Claimant had sustained permanent disability as a result of an alleged December 18, 2007 accident at work.

Also, Dr. Hill's opinion in his written report and on cross-examination contradicted Claimant's argument and unsupported testimony that he was rendered permanently and totally disabled due to a combination of an alleged minor right heel injury settled at 10 percent and the alleged PTSD and Claimant's other alleged preexisting disability. The opinion of the VA psychiatrist contradicted Claimant's allegation. The VA psychiatrist concluded that Claimant was rendered permanently and totally disabled due to the PTSD alone. Ms. Titterington, Claimant's vocational expert, admitted that Claimant's Global Assessment of Functioning score as rendered by the VA psychiatrist due to the alleged PTSD was too low to support work. The evidence clearly showed that Claimant did not offer unimpeached and uncontradicted evidence and that he failed to show that the Second Injury Fund was liable for permanent total disability benefits.

Finally, what the evidence showed was that Claimant alleged that he developed PTSD as a result of his experiences in Vietnam during the late 1960s or early 1970s. He was not diagnosed with the condition until 2006. That was the year he told his family physician that he was trying to get disability through the VA.

The diagnosis for PTSD was based on Claimant's subjective complaints of dreams and flashbacks about Vietnam as well as anger problems and difficulty in being around people. The diagnosis was not based on any objective evidence. Claimant's complaints were effective in convincing the psychiatrists that he had a severe case of PTSD.

Due to his complaints about PTSD Claimant was initially awarded \$377 per month in VA disability benefits in 2006. The evidence showed that Claimant continued to complain about PTSD and that he continued to appeal the VA determinations as to the proper amount of his VA disability benefits. Due to his continuing complaints and appeals his VA disability benefits due primarily to the PTSD diagnosis were increased to \$2,823 per month effective with December 1, 2008. That was the year he quit his job with the City. That was also the year he applied for social security disability and permanent total workers' compensation disability benefits.

Claimant's problem was that he was so convincing to his treating psychiatrists that he had a severe case of PTSD, that Dr. Hill and the VA psychiatrist concluded that the severe PTSD alone precluded him from working. That conclusion worked to his benefit for purposes of proving his entitlement to VA disability benefits which were based on his service connected disability and not any disability caused by a work injury or any non service related injury or impairment.

Claimant's success in convincing Dr. Hill and the VA psychiatrist of the severity of his alleged PTSD, however, also worked against his claim for permanent total workers' compensation disability benefits where he needed to prove that his inability to work was due to a combination of the alleged PTSD and an alleged minor heel injury settled at 10 percent at the 155 week level. Claimant clearly failed to do so based on his own evidence and the psychiatric opinions he offered into evidence. He failed to prove the Second Injury Fund's liability for permanent total disability benefits.

Made by: _____

Kenneth J. Cain
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this _____ day of _____, 2011
by:

Naomi Pearson
Division of Workers' Compensation

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

Injury No. 08-119913

Employee: Richard D. Johnston
Employer: City of Kansas City (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Second Injury Fund liability

Employee sought permanent partial or permanent total disability benefits from the Second Injury Fund. The administrative law judge denied this claim on a finding that employee was permanently and totally disabled as a result of severe preexisting post-traumatic stress disorder (PTSD) before he suffered the work injury of December 18, 2007. The plain language of § 287.220 RSMo makes clear that compensation from the Second Injury Fund is only available where an employee's preexisting disability is *partial*:

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

Employee: Richard D. Johnston

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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 the second injury fund.

(emphasis added).

As seen above, with respect to a claim for enhanced permanent partial disability benefits from the Second Injury Fund, the preexisting disability must be a "preexisting permanent partial disability." This obviously precludes claims where the employee's preexisting disability is shown to be total. While § 287.220 is somewhat less clear with respect to a claim for permanent total disability benefits, the statute requires that the preexisting disability and the primary injury must be shown to "together result" in total and permanent disability. It follows that the preexisting disability must be partial in this context as well: if the preexisting disability were total, there would be no need to combine the primary injury for a "result" of permanent total disability.

The administrative law judge thoroughly summarized the evidence, weighed the conflicting lay and expert testimony advanced by the parties, and provided several explicit reasons for discounting employee's evidence and finding that, if indeed employee is incapable of work, it is a product of employee's psychiatric condition as it existed prior to December 18, 2007. "Ability to compete in the labor market is a test for permanent total disability in that it measures the worker's prospects for returning to employment." *Lturno v. Carnahan*, 640 S.W.2d 470 (Mo. App. 1982). Ordinarily, we are of the opinion that this "test for probable future employment cannot change the fact of past employment." *Id.* But here, the record reveals that employee's preexisting PTSD was both chronic and exceedingly severe, to the extent that employee's treating psychiatrist with the Veteran's Administration, Dr. Glydene Park, assigned a global assessment of function (GAF) score

Employee: Richard D. Johnston

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of 45 as of November 15, 2007, based on employee's psychiatric condition. Employee's vocational expert, Mary Titterington, persuasively opined that a GAF score of 45 would be "too low to support work." *Transcript*, page 914.

Also, as noted by the administrative law judge, employee's own evaluating psychiatrist, Dr. Todd Hill, originally opined that employee is permanently and totally disabled by reason of his preexisting PTSD considered alone. Employee argued on appeal that this opinion from Dr. Hill was in the nature of a purely clerical mistake or a poor choice of words. We are not persuaded. In his report of January 23, 2009, Dr. Hill provided the following comments with respect to employee's PTSD:

It is my professional opinion, having dealt with many patients with this disorder and having worked at the Kansas City VA Medical Center while a resident at the University of Kansas, that [employee] is permanently and totally disabled secondary to this psychiatric condition. My opinion is also in agreement with [employee's] current treating psychiatrist, Dr. Demark, who, in a note dated August 12, 2008, stated that "based on the patient's PTSD symptoms of depression, sleep disturbance, irritability, anger, rage and history of violence, I feel that the patient is unemployable." ... Any place of employment that requires regular attendance, supervised or unsupervised routines, and completion of a workday and workweek, would set [employee] up for failure and further psychological distress. ... In summary, it is my opinion that [employee] is permanently and totally disabled secondary to his severe post traumatic stress disorder. This level of disability is separate from his physical impairments, as outlined by Dr. Koprivica.

Transcript, pages 886-87.

Ultimately, after our own thorough review of the record in light of the arguments advanced by the parties, we discern no compelling reason to disturb the administrative law judge's findings and analysis with regard to the nature and extent of employee's permanent disability referable to his preexisting PTSD condition. Because we agree that employee cannot logically demonstrate that his preexisting PTSD and the primary injury "together result" in permanent and total disability where it is obvious that the PTSD condition alone renders employee unable to compete for employment, we conclude employee has failed to satisfy the requirements of § 287.220 for demonstrating Second Injury Fund liability. For this reason, we affirm and adopt as our own the administrative law judge's award denying compensation.

Post-award case law

We note that recent appellate decisions have rendered inaccurate certain of the administrative law judge's statements of Missouri law. Although these decisions do not affect the ultimate result in this case, we discern a need to supplement the administrative law judge's award to acknowledge this more recent case law.

Specifically, we note that in the case of *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013), the Supreme Court of Missouri held

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that an employee is not required to show that a primary injury satisfies the 15% major extremity or 50-week body as a whole thresholds under § 287.220, and instead must only demonstrate the existence of one preexisting condition that satisfies the thresholds in order to trigger Second Injury Fund liability for permanent partial disability benefits. *Id.* at 467. This conflicts with the administrative law judge's suggestion, at page 14 of his award, that employee was required to demonstrate that the primary injury satisfies the 15% major extremity or 50-week body as a whole thresholds under § 287.220.

In the case of *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144 (Mo. App. 2014), the Missouri Court of Appeals, Eastern District, clarified that, for purposes of a claim for permanent total disability benefits from the Second Injury Fund, it is not necessary to provide ratings quantifying the extent of any preexisting permanent partially disabling conditions; rather, it is sufficient to show that such conditions and the primary injury together result in permanent total disability. *Id.* at 162. This holding conflicts with the administrative law judge's suggestion, also on page 14 of his award, that employee was required to provide a permanent partial disability rating for his preexisting PTSD.

Because the above-described comments by the administrative law judge conflict with the holdings in *Witte* and *Lewis*, we hereby disclaim them.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Kenneth J. Cain, issued March 8, 2011, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 23rd day of December 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

As to the Second Injury Fund Only

Employee: Richard D. Johnston Injury No. 08-119913
Dependents: N/A
Employers: City of Kansas City (previously settled)
Additional Party: Missouri Treasurer as Custodian for the Second Injury Fund
Insurers: Self-Insured
Hearing Date: January 14, 2011; briefs filed February 15, 2011 Checked by: KJC/cy

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 (See additional Findings of Fact and Rulings of Law.)
4. Date of accident or onset of occupational disease: February 14, 2008
5. State location where accident occurred or occupational disease was contracted: Kansas City, Clay County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes (See additional Findings of Fact and Rulings of Law.)
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 alleged that he developed an occupational disease involving degenerative arthritis in the CMC joints of both thumbs due to his work with the City.
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: Alleged degenerative arthritis
14. Nature and extent of any permanent disability: 8% of each hand rated at the 175 week level as per the employee's settlement of his claim against his employer.
15. Compensation paid to-date for temporary disability: None paid by employer
16. Value necessary medical aid paid to date by employer/insurer? None paid by the employer
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: By agreement
19. Weekly compensation rate: By stipulation of parties, \$557.02/\$389.04 per week
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: N/A
N/A weeks for permanent partial disability
N/A weeks for temporary total disability

22. Second Injury Fund Liability: None

TOTAL: None

Said payments to begin N/A and 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 N/A percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Richard D. Johnston Injury No. 08-119913
Dependents: N/A
Employers: City of Kansas City
Additional Party: Missouri Treasurer as Custodian for the Second Injury Fund
Insurers: Self-Insured
Hearing Date: January 14, 2011; final briefs filed February 15, 2011 Checked by: KJC/cy

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

1. Whether the Employee sustained an occupational disease arising out of and in the course and scope of his employment; and
2. Whether the Second Injury Fund was liable for compensation, and if so the extent of any such liability.

At the hearing, Mr. Richard D. Johnston (hereinafter referred to as "Claimant") testified that he was born on October 24, 1950 and that he was 60 years old. He indicated that he had been married for 38 years and that he had two adult sons.

Claimant testified that he dropped out of high school in his junior year. He stated that he was unsuccessful in his attempt to obtain a GED while he was in the military. He stated that English, spelling and reading were difficult for him. He admitted, however, that while working as a union representative in the trucking industry he was required to read contracts and that he was able to do so.

Claimant testified that he had worked on several jobs. He stated that his last job was with the City of Kansas City, Missouri where he worked from January 2003 until February 14, 2008. He stated that his job was maintenance mechanic where he did repair work on heavy equipment. He also stated that he worked in some city owned agricultural fields where bio-solids from the city waste treatment plants were used to fertilize the fields. He stated that his job required him to hook and unhook large hoses. He described the job as "very heavy." He stated that he used earth moving equipment, bulldozers, large tractors and back hoes.

Claimant stated that the job required a lot of plumbing work with large heavy cast iron pipes and a massive sprinkler system. He stated that the job took its toll on him physically and particularly his hands.

Claimant testified that his preceding job was at Consolidated Freightways, where he worked from 1974 to 2003. He stated that he was an over-the road truck driver for 22 or 23 years and a dock worker for the last 7 years. He stated that he left the job when the company shut down.

Claimant testified that his over-the road truck driving duties also took a toll on him physically. He stated that the shaking, vibrating and bouncing in the cab affected his hands, elbows and body. He stated that his job as a dock worker was physical and required brutal strength. He stated that driving the forklifts with poor suspension bounced him around a lot and hurt his back.

Claimant testified that his other jobs were as a warehouseman and laborer. He also stated that he served in the United States Army from October 1968 to June 1971. He stated that he served one year in Germany and one year in Vietnam where he engaged in combat duties.

Claimant alleged that he developed hearing problems and that he injured his back while in Vietnam. He stated that his hearing problems began while he and his unit were engaged in combat and a weapon was fired within 2 or 3 feet of his ears. He stated that he could not hear for 2 or 3 days after the incident. He stated that he had tinnitus.

Claimant testified that his alleged hearing problems had affected him at work. He stated that his hearing problems made it difficult to hear trucks, forklifts and people talking when he worked on the dock. He stated that his boss sometimes became angry when he could not hear his boss talking.

Claimant testified that his back injury occurred when he and another soldier while in Vietnam were attempting to remove a tank from a truck in the salvage yard. He stated that he used a large pipe wrench to try to remove the tank and that the wrench burst loose and "so did my back." He stated that he now had back pain on a daily basis.

Claimant testified that his back became more painful at work as an over-the- road truck driver when the seat bottomed out. He stated that he was not interested in back surgery because he had observed too many friends who did not do well following back surgery. He stated that he sometimes received assistance from his co-workers with heavy lifting due to his back problems.

Claimant testified that in 2006 he was diagnosed with post traumatic stress disorder (PTSD) due to his military experiences. He stated that he began receiving treatment for the condition in 2006. He stated that his mother had told him when he returned from Vietnam that he was not the same son who left and went to war. He stated that his mother described him as an "animal" when he returned from the war.

Claimant testified that he changed after he returned from the war. He stated that he had no tolerance for liars, thieves and lazy people and that his lack of tolerance for such people caused him problems in the workforce. He stated that he had confrontations with his co-workers. He stated that he had a lot of anger issues and anxiety problems. He complained of problems in interacting with his co-workers. He stated that he used to confront people and become angry. He stated that loud noises bothered him. He stated that he had engaged in road rage. He complained of memory problems. He stated that his problems with people were worse when he worked for the City where a lot of the employees were unskilled and unconcerned with how they did their jobs.

Claimant testified that prior to his alleged December 2007 work injury he had injured his eye. He stated that the injury occurred when a radio tube "blew up" and a fragment slit his eye open. He complained of double vision and problems with depth perception. He stated that his visual acuity in his left eye was now minimal. He stated that he could see colors, but not any details. He stated that his most recent glasses had resolved most of the problems, other than some difficulties with night driving.

Claimant testified that in 1993 he had elbow surgery following an injury at work. He stated that on December 18, 2007 he injured his right heel at work when he was stepping out of a bulldozer and his right heel landed on a hard rubber hose. He later indicated that his foot felt like it had exploded when he stepped down on the hose.

Claimant complained of continuing pain in his heel. He stated that his heel still felt numb. He stated that he had problems if he tried to stand for more than a couple of hours. He stated that sometimes his heel hurt while he was just lying in bed. He stated that he worked about two months after his heel injury. He stated that he quit his job because he did not believe that he was doing what he had been hired to do. He stated that he was hired to be a mechanic and that he could not do that job anymore.

Claimant testified that he was also alleging a February 14, 2008 occupational disease involving his thumbs. He stated that over the years his hands were beaten up pretty badly. He stated that he really "felt it" while coupling the big hoses on his job with the City. He stated that the vibration from the pipes was extremely painful. He complained of a sharp, stabbing pain around the base of his thumbs.

Claimant admitted that he did not seek any medical treatment for his thumbs until after he had quit his job with the City. He stated that he did not believe that he could do any of his prior jobs. He stated that he had previously owned a business where he did mechanical work on brakes and transmissions. He stated that he could no longer do that work. He did admit that on a typical day he loaded about 500 bullets for shooting on the next day.

On cross-examination by the Second Injury Fund, Claimant testified that he went shooting twice per week for about two hours on each occasion. He admitted that he did not have any surgery on his hands. He admitted that he had not been prescribed any permanent restrictions on the use of his hands. He admitted that he was still working on the tractor he had purchased to restore.

Medical Evidence

Claimant offered into evidence two depositions of Todd Hill, D.O., one deposition of P. Brent Koprivica, M.D. and numerous other medical reports and records. Dr. Hill's initial deposition was taken on April 29, 2010. He stated that he was board certified in psychiatry and neurology, but primarily in psychiatry. He stated that he had a clinical practice and that previously he was the chief resident at the Veteran's Administration Medical Center.

Dr. Hill testified that he evaluated Claimant on January 23, 2009. He stated that Claimant provided a history of severe anxiety disorder consistent with PTSD. He stated that Claimant complained of hypervigilance, avoidance, nightmares and flashbacks. He stated that Claimant was able to recall in vivid details events that happened in Vietnam more than 25 years earlier.

Dr. Hill noted that Dr. Teresa Moscovich who had previously diagnosed Claimant with PTSD had assigned Claimant a Global Assessment of Functioning score of 40, which was a subjective number, but indicative of a severe "if not very severe" impairment. He also noted that Claimant's medical records showed that in 2006 Claimant was assigned a 50 percent service connected disability. He admitted that he had never done a service connected disability evaluation.

Dr. Hill testified that during the evaluation Claimant seemed to be preoccupied with Vietnam. He noted that Claimant appeared to be of average intelligence. His diagnosis was chronic and severe PTSD.

Dr. Hill concluded that Claimant could not work due to his PTSD or psychological disorder in combination with his physical problems. He stated that he did not "feel" that Claimant was employable. He stated that he did not assign a numerical value to Claimant's disability for the PTSD although the VA had done so.

On cross-examination by Claimant's employer, Dr. Hill admitted that Claimant was able to work with the PTSD for more than 40 years.¹ On cross-examination by the Second Injury Fund, Dr. Hill admitted that he had stated in his report that Claimant was permanently and totally disabled secondary to severe PTSD. He admitted on cross-examination that in his opinion based on the PTSD alone it would be very difficult for Claimant to work.

Claimant re-deposed Dr. Hill on October 6, 2010. In the second deposition, Dr. Hill was asked to explain his testimony on cross-examination by the Second Injury Fund that Claimant was permanently and totally disabled secondary to severe PTSD. Dr. Hill then indicated that maybe he could have used a better choice of words. He stated that the phrase, "in addition to" was probably a better a way to describe his opinion.

Dr. Hill clearly appeared to be disingenuous in his second deposition. He did not explain why his conclusion on cross-examination was exactly the same as the conclusion he had reached in his medical report if the cross-examination testimony merely involved a poor choice of words. Dr. Hill concluded his testimony in the second deposition by stating that Claimant's alleged permanent total disability was due to PTSD and the physical injuries as described in detail by Dr. Koprivica.

Dr. Koprivica testified by deposition on June 17, 2010. He stated that he was board certified by the American College of Emergency Physicians and by the American College of Preventive Medicine in the subspecialty of occupational medicine. He estimated that he had performed in excess of 40,000 of what he characterized as independent medical examinations.

Dr. Koprivica testified that Claimant had significant problems with hearing loss, bilateral tinnitus, back pain and PTSD. He noted Claimant's 50 percent service connected disability from the military for PTSD and depression. He stated that he would defer to a psychiatrist on issues involving the PTSD and depression. He admitted that he did not feel competent to rate a psychiatric disability.

Dr. Koprivica also noted that Claimant had settled his prior work-related elbow injury based on a permanent partial disability of 15 percent of the elbow. He stated that he rated the disability at 20 percent of the elbow. He stated that Claimant's hearing impairment involved a high frequency loss above 2,000 hertz per second and was due to tinnitus.

Dr. Koprivica testified that he did not find any disability to Claimant's left eye or any vocational impact. He stated that Claimant had good depth perception in the eye as demonstrated by Claimant's ability to shoot handguns competitively.

Dr. Koprivica testified that Claimant's MRI of his lumbar spine prior to 2007 showed multi-level disk bulging and nerve root compression. He stated that the back impairment limited Claimant in his ability to work as a mechanic. He stated that Claimant accommodated for his PTSD by doing jobs where he could work alone and limit his interaction with the public and coworkers.

Dr. Koprivica concluded that Claimant's alleged 2008 occupational disease involved chronically progressive hand pain over the years. He indicated that Claimant had CMC joint degenerative arthritis at the base of his thumbs. He stated that such arthritic conditions were seen in individuals who used their hands extensively either recreationally or vocationally.

¹ Claimant had not settled his case against his employer at the time Dr. Hill was deposed.

Dr. Koprivica concluded that Claimant's work as a mechanic for the six years preceding September 2008 was the direct, proximate and prevailing factor in causing the development and progression of the degenerative arthritis in the CMC joints of Claimant's thumbs.

Dr. Koprivica diagnosed Claimant's alleged foot injury from the alleged December 18, 2007 accident as plantar fasciitis. He admitted that surgery was employed to correct the condition if it so warranted the surgery. He acknowledged that doctors had not performed surgery on Claimant's heel. He noted that although Dr. Rizzi, a podiatrist, had concluded that the plantar fasciitis was not caused by Claimant's alleged injury at work, it was his opinion that Claimant's alleged work injury of December 18, 2007 was the prevailing factor in causing the plantar fasciitis.

Dr. Koprivica admitted that Claimant's weight contributed to the plantar fasciitis as well as the structure of Claimant's foot. Dr. Koprivica concluded that Claimant had sustained a 15 percent permanent partial disability of the right foot at the 155 level due to the plantar fasciitis. He stated that he assigned a 10 percent permanent partial disability to the body as a whole due to bilateral tinnitus and hearing loss. He stated that he assigned a 15 percent permanent partial disability to both the right and left hands due to Claimant's degenerative arthritis in both thumbs. He stated that he assigned a 15 percent permanent partial disability to the body as a whole due to Claimant's low back impairment.

Dr. Koprivica related that after he factored in Dr. Hill's opinion and Ms. Titterington's vocational opinion, he concluded that Claimant was permanently and totally disabled due to the combined effect of the psychiatric disability and the physical injuries.

Claimant also offered into evidence numerous medical reports and records. In his social security disability records Claimant stated that he lifted up to 100 pounds on his job with the City. He stated that after he quit his job with the City, he had continued to do repair work, including simple automobile repair work. He stated that he had continued to shoot in a league once or twice per week and that he repaired plumbing, and mowed his lawn and his mother's.

J. Kendall Walker, M.D. of Shoal Creek Family Medicine noted on February 9, 2006 that Claimant was quite healthy. On December 18, 2007 Claimant sought treatment with Dr. Walker with complaints of right heel pain. That was the day of the alleged injury at work when Claimant allegedly stepped on a hose with his right foot while getting out of a bulldozer and complained that his right heel felt as though it had exploded.

Dr. Walker examined Claimant at 3:05 p.m. on December 18, 2007. Dr. Walker's records from that day showed that Claimant complained of right heel pain from "walking a lot in one day while hunting. Started November 12, 2007." The location of the pain was described as primarily the heel which radiated to the Achilles' tendon. Claimant characterized the pain as constant, severe and stabbing. He complained of stiffness.

Claimant did not mention anything about any injury at work when he saw the doctor on December 18, 2007. The record contained no history of any injury while Claimant was getting out of a bulldozer at work on December 18, 2007 and his right heel landing on a hose and feeling as though it had exploded.

Under HPI in the record it stated "The pain initially began 3 weeks ago. No precipitating event or injury is identified. He characterizes the pain as constant, severe and stabbing. Associated symptoms include stiffness. He denies ankle instability or numbness. Nothing seems to relieve the pain. The pain increases with partial weight-bearing."

Claimant's right foot was examined on December 18, 2007. It was noted during the examination of Claimant's right foot that there was no gross edema or evidence of an acute injury. There was no warmth or abnormal coolness of his right foot. X-rays revealed no fractures, dislocations, mass or effusion and no gross abnormalities of the soft tissues or bony structures. He did have a small heel spur.

Claimant returned to Dr. Walker's office on December 27, 2007. Again, the record stated "R heel pain from walking a lot in one day while hunting. Started 11-12-07 follow-up MRI." Under HPI the record again stated no precipitating event or injury is identified. It was noted that the recent MRI showed plantar fasciitis and no stress fractures.

On March 23, 2009, Raymond M. Rizzi, D.P.M. with Drisko, Fee & Parkinson stated that Claimant had plantar fasciitis of the right heel. He stated that he did not believe that the plantar fasciitis was secondary to Claimant's work. He stated that Claimant's plantar fasciitis was caused by Claimant's obesity, gait and a congenital deformity or mechanical problem involving one of the muscles in Claimant's heel which extended into the Achilles. Dr. Rizzi concluded that the alleged injury to Claimant's right heel at work had not resulted in any permanent partial disability.

On August 16, 2007, David Rouse, M.D., of Northland, Ear, Nose & Throat P.C. indicated that Claimant had a mild hearing loss in the low to mid range bilaterally, which progressed at about 2,000 to 8,000 hertz to a severe profound loss, worse on the left than the right.

On August 27, 2008 Claimant complained to Kevin F. Knop, M.D. of Northland Pain Consultants about hand pain. Dr. Knop noted that Claimant had significant wincing and pain behaviors. His impression was chronic hand pain which appeared to be joint-related. He noted that Claimant had degenerative joint disease in other parts of the body. On September 24, 2008, Craig Newland, M.D., of Liberty Orthopedics noted that x-rays revealed that Claimant had osteoarthritis of the thumb basal joints.

On February 2, 2009, Dr. Walker noted that Claimant had been diagnosed with generalized osteoarthritis more than 5 years ago. He noted that subjectively the discomfort was moderately severe. The report stated that, "Primary joints affected include the lumbar spine, wrists, hands and feet." It was noted that Claimant had crepitus in the PIP joints of both hands.

On November 20, 2006, Dr. Walker noted that Claimant was trying to get disability through the VA. On November 29, 2006 Claimant had an MRI of his lumbar spine. The impression was broad-based left lateral disk herniation at L1-L2 with mild to moderate left lateral stenosis and a very slight compression of the left L2 nerve root.

Claimant's VA Hospital records from August 12, 2008 included the following observation, "Based on Pts PTSD sxs of depression, sleep disturbance, irritability, anger, rage and h/o violence, I feel that Pt is unemployable. Pts sxs have fluctuated over the years and are easily triggered by others, which would make it impossible for Pt to work effectively."

Claimant's August 15, 2008 records stated that Claimant had retired due to PTSD. The March 12, 2008 record noted that Claimant had indicated that he felt better and less stressed and less anxious since he retired. On February 11, 2008 Claimant indicated that his stress level had decreased since he retired. The evidence indicated that Claimant retired effective with February 14, 2008. On December 13, 2007 Claimant told the VA that he believed that he would be dead without the treatment he had received for PTSD.

On November 19, 2007 Claimant told the VA that he had worked for the City for five years and that he planned to quit his job in February due to conflicts with people. On November 15, 2007 Claimant indicated that he was looking forward to retiring in February. He indicated that it was too difficult for

him to work around others. In September 2007, Claimant indicated that he was looking forward to retiring next year.

On August 2, 2007 Claimant indicated that he found it difficult to deal with others at work and that he was looking forward to retiring. Throughout the sessions Claimant complained of nightmares and flashbacks to Vietnam.

A February 23, 2009 letter from the VA to Claimant set out Claimant's VA disability payments. His original monthly payment amount was \$377 per month effective with February 1, 2006. The payments were increased to \$954 per month effective with April 1, 2006, \$1,193 per month effective with September 1, 2006, \$1,232 per month effective with December 1, 2006, \$1,260 per month effective with December 1, 2007, and \$2,669 per month effective with May 1, 2008. On December 1, 2008 his benefits were increased to \$2,823 per month based on Claimant's "unemployability." It was noted that Claimant was granted 100 percent entitlement to the benefits due to his inability to work due to his service connected disability/disabilities.

Vocational Evidence

Claimant offered into evidence the deposition testimony and the report of Ms. Mary Titterington, a vocational rehabilitation counselor. Ms. Titterington testified that she had two national certifications in vocational rehabilitation. She stated that she evaluated Claimant on February 19, 2009.

Ms. Titterington testified that Claimant was 58 years old and that he was receiving social security disability income and a disability pension through the VA. She stated that Claimant was very forthright during the evaluation and that she did not observe any anger control problems.

Ms. Titterington testified that Claimant rotated between sitting and standing during the evaluation. She stated that he walked with a very slow gait. She stated that his total functioning level was "very low." She also stated that his Global Assessment of Functioning score of 40 to 45 was highly significant because it was "too low to support work". She stated that Claimant's psychological issues, physical issues and emotional barriers combined to affect him vocationally.

Ms. Titterington concluded that Claimant was not employable. She stated that he was not employable based on a combination of all his impairments.

On cross-examination by the Second Injury Fund, Ms. Titterington admitted that in her opinion there were no jobs that Claimant could do based on just the PTSD and the psychological disability alone if Dr. Hill were correct in his conclusions. She admitted that Claimant's treating physicians had placed very few if any restrictions on him due to the alleged physical injuries. She admitted that in her opinion the alleged PTSD or psychiatric disability was the "biggest" factor in Claimant's alleged inability to work.

Ms. Titterington admitted that her records showed that Claimant provided a history of quitting his job with the City due to anger and fear that he was going to kill his co-workers and not due to any alleged thumb impairments. She stated that it was her understanding that Claimant had left his jobs at Consolidated Freightways, Goodwin Sporting and Lincoln Steel due to anger issues. Claimant testified at the hearing that he worked for 28 years at Consolidated Freightways and that the only reason that he left the company was that it went out of business.

Other Exhibits

Claimant filed a claim for compensation for the alleged December 2007 right heel injury in August 2008. He listed one of the preexisting impairments as an occupational disease involving his thumbs. He filed a claim for compensation alleging a February 2008 occupational disease involving his thumbs in February 2009.

Claimant's Exhibit F was the stipulation for compromise lump sum settlement of the alleged December 2007 right heel injury. The stipulation showed that he settled his case base on a permanent partial disability of 10 percent at the 155 week level. Exhibit P was the stipulation for compromise lump sum settlement of the alleged February 2008 occupational disease. The stipulation showed that he settled his case based on a permanent partial disability of 8 percent of each wrist at the 175 week level due to the alleged thumb impairments.

Law

After considering all the evidence, including the testimony at the hearing, Drs. Hill and Koprivica's deposition testimony and reports, the voluminous medical reports and records, Ms. Titterington's deposition and report, the other exhibits and observing Claimant's appearance and demeanor, I find and believe that Claimant did not prove that the disability he sustained as a result of the alleged occupational disease combined with his alleged preexisting disability to result in any Second Injury Fund liability. Thus, he did not prove the Second Injury Fund's liability for any compensation.

Claimant had the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2nd 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3rd 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant, as noted above, did not prove the Second Injury Fund's liability for any compensation.

Credibility

There were numerous conflicts in Claimant's testimony and the other evidence. Claimant had two workers' compensation cases heard on January 14, 2011. In the first case, he alleged that he sustained an injury at work on December 18, 2007 when he stepped down from a bulldozer and his right foot landed on a hard rubber hose causing his right heel to feel like it had exploded.

Claimant's medical records, however, showed that on December 18, 2007, Claimant went to his family physician, Dr. J. Kendall Walker, with complaints of right heel pain. Neither Claimant nor the Second Injury Fund addressed Dr. Walker's December 18, 2007 report in their post hearing submissions.

Dr. Walker's records showed that Claimant was examined at 3:05 p.m. on December 18, 2007 with complaints of right heel pain. Claimant told the doctor's office that he developed the right heel pain from "walking a lot in one day while hunting. Started November 12, 2007." The record contained no history of any alleged injury on December 18, 2007 at work or that Claimant had even stepped off a bulldozer on that day and landed on a hose and felt pain in his right heel or foot.

Claimant returned to the doctor's office nine days later and again he provided no history of an injury to his right heel on December 18, 2007. Again, he told the doctor's office on the December 27, 2007 appointment that he had injured his right heel on November 12, 2007 while hunting. During the examination of Claimant's foot on December 18, 2007, the doctor had noted that there was no gross edema (swelling) or any evidence of an acute injury.

There were other contradictions in the evidence affecting Claimant's credibility. He testified that he did not want to quit working. He testified that he stopped working in February 2008 because his wife told him to quit his job due to his numerous complaints about hand and thumb problems. Again, the medical records clearly indicated that Claimant did not quit his job due to hand and thumb problems. The medical records clearly showed that Claimant was planning to retire long before February 2008. The medical records clearly indicated that Claimant's alleged hand and thumb impairment had no effect on his decision to voluntarily quit his job.

The medical records showed that as early as 2006 Claimant began inquiring about VA disability benefits. In August 2007, Claimant told the VA that he was going to retire from his job in early 2008. He mentioned nothing about any hand or wrist problems. Instead, he told the VA that he was going to retire due to difficulty in dealing with people. He told the VA on several occasions after August 2007 that he was going to retire due to difficulty in dealing with people on the job. He mentioned nothing about any hand or thumb problems on any of those occasions. He told Ms. Titterington, his vocational expert, that he retired from his job in February 2008 because he was afraid that he was going to kill his co-workers. Again, he mentioned nothing about any hand or thumb problems to her as a reason for his decision to quit or retire from his job.

In addition, Claimant did not get any treatment for any hand or thumb problems until August 2008, months after he had already retired from his job and the same month during which he filed a claim for compensation in the December 2007 case alleging that he was permanently and totally disabled. The records contained no evidence showing that Claimant had ever complained to any doctor about any hand or thumb problems prior to when he chose to retire. No doctor told him that he needed to retire due to any alleged hand or thumb problems.

What the medical records clearly showed was that when Claimant was attempting to get VA disability benefits, he complained of severe PTSD and psychiatric problems and indicated that he was going to retire from his job due to such problems. His VA disability benefits were premised on service connected disability. When he was trying to get permanent total workers' compensation disability benefits he needed to prove that an injury or occupational disease from the job combined with his preexisting disability to render him permanently and totally disabled. Thus, he alleged in his workers' compensation case that he quit his job due to hand and thumb problems, even though the medical records showed that he had never even gone to a doctor and complained about any such problems prior to when he quit his job in February 2008.

There were other contradictions in Claimant's complaints and the evidence. Claimant argued that due to PTSD he could not get along with people. He argued that due to his PTSD he preferred jobs where he could work alone and would not have to deal with people. Yet, he admitted that he was a union representative on his job at Consolidated Freightways. As a union representative he had to deal with people. He chose to work as a union representative. He was not required by his job to work as a union representative.

Similarly, Claimant testified that he had difficulty in reading. Yet, again he admitted that as a union representative he had to read union contracts and that he had no difficulty in doing so. The contradictions in Claimant's testimony and the medical records and the other evidence clearly detracted from Claimant's credibility. Claimant's credibility issues made it difficult to ascertain the validity of his subjective complaints, particularly when he complained of back pain, but did not have surgery, heel pain but did not have surgery, bilateral thumb problems but did not have surgery and PTSD, a diagnosis based primarily on subjective complaints.

Occupational Disease

Claimant alleged that he developed an occupational disease due to strenuous activities with his hands and thumbs. Claimant was diagnosed with osteoarthritis at the base of both thumbs in August 2008. Claimant quit his job in February 2008. He had never complained to any doctor about any thumb problems prior to February 2008 when he quit his job.

The evidence showed that Claimant had generalized osteoarthritis in numerous joints of his body, including his lumbar spine, wrists, hands and feet. Dr. Koprivica testified on Claimant's behalf. Dr. Koprivica concluded that Claimant had CMC joint degenerative arthritis at the base of both thumbs. He stated that such arthritic conditions were seen in individuals who used their hands extensively either recreationally or vocationally.

Dr. Koprivica concluded that Claimant's work as a mechanic for the six years preceding his retirement was "the direct, proximate and prevailing factor in causing the development and progression of the degenerative arthritis in the CMC joints" of Claimant's thumbs. The Second Injury Fund chose not to obtain a medical opinion on causation despite the evidence which indicated that there were other possible causes for the development of the degenerative arthritis. As noted above, Claimant had degenerative arthritis in numerous joints of his body. Dr. Koprivica, Claimant's testifying physician, admitted that arthritis in the CMC joints of the thumbs was prevalent in individuals who used their hands extensively on a recreational basis. Claimant admitted that he used his hands extensively on a recreational basis. He admitted that he shot handguns competitively. He admitted that he used his hands to load about 500 bullets in the guns per day.

Thus, because the Second Injury Fund chose not to offer an opinion on causation, the only opinion on that issue was rendered by Dr. Koprivica, who concluded that Claimant's work was the prevailing factor in causing the arthritis at the base of Claimant's thumbs. Based on that opinion, Claimant met his burden of proving that his work with the City was the prevailing factor in causing him to develop the degenerative arthritis in the CMC joints of his thumbs. Based on the evidence offered, Claimant proved that he sustained an occupational disease due to his work for the City.

Permanent Partial Disability Due to the Occupational Disease

Again, the Second Injury Fund chose not to offer a disability rating in the case. The evidence showed that Claimant settled his case against his employer based on a permanent partial disability of 8 percent of each hand. Neither Claimant nor the Second Injury Fund addressed whether the alleged occupational disease should have been rated at the hand or at the thumb level. Clearly, the legislature took into account the importance of the various digits to the hand when it assigned a value to each digit of the hand. § 287.190 RSMo. 2005. It assigned the number of weeks of disability for each digit based on the value of that digit to the use of the hand. The opposable thumb is the most important digit to the hand and as such it was assigned a disability based on 60 weeks of compensation. *Id.* The index finger is the next most important digit and it was assigned a disability value of 45 weeks. *Id.* The little finger, as the least important digit to the hand was assigned a value of 22 weeks. *Id.*

Eight percent of the hand is worth approximately 23.3 percent of the thumb. Based on the settlement and the evidence offered at trial, Claimant proved that the settlement properly reflected the amount of disability he sustained due to the alleged occupational disease. Thus, he proved that he sustained a permanent partial disability of 8 percent of each hand or approximately 23.3 percent of each thumb.

Permanent Total Disability

The Second Injury Fund cannot be liable for permanent partial disability benefits in the case because Claimant did not meet the threshold disability amounts as set out in the statute for establishing Second injury Fund liability for such benefits. See § 287.220 RSMo. 2005. The statute provides that to establish Second Injury Fund liability for such benefits, the injury on the job or occupational disease must result in a permanent partial disability of at least 15 percent of a major extremity or 12.5 percent to the body as a whole depending on whether the injury or occupational disease was to a major extremity or to the body as a whole. *Id.*

Claimant's alleged occupational disease involved a bilateral thumb impairment. Assuming that the alleged occupational disease was to major extremities, the hands, the settlement of 8 percent of each hand did not meet the threshold amount of 15 percent disability to a major extremity.² There are no cases where the term "major extremity" has been defined to include injuries or impairments to a thumb. Thus, the Second Injury Fund cannot be liable to Claimant for permanent partial disability benefits because even if his occupational disease involved major extremities, the disability was not 15 percent of a major extremity as set out in the statute. *Id.*

Claimant also failed to prove that he was rendered permanently and totally disabled due to alleged minor thumb impairments settled at 8 percent at the 175 week level combining with his alleged preexisting disability to render him permanently and totally disabled.³ Claimant admitted that the alleged PTSD was a major factor in his alleged permanent total disability. Claimant, however, did not offer into evidence a workers' compensation permanent partial disability rating for the alleged PTSD.

Thus, to find in Claimant's favor, it would require speculation as to whether he sustained any permanent partial disability due to the PTSD under the Workers' Compensation Act, and if so, the amount of such disability and whether it was sufficient to combine with his other alleged preexisting injuries and the alleged minor thumb impairments to render him permanently and totally disabled. Proof of permanent total disability cannot be based on speculation.

Also, Claimant voluntarily quit or retired from his job in February 2008. As noted above, he told his psychiatrist, and Ms. Titterington, his vocational expert, and his family physician that he either quit his job or was going to retire due to problems with PTSD. He mentioned nothing about any hand or thumb problems as a reason for his decision to quit or retire from his job. He specifically told Ms. Titterington that he quit his job because he was afraid that he was going to kill his co-workers.

The medical records showed that Claimant had never even complained to a doctor about any hand or thumb problems prior to February 2008 when he either quit or retired from his job. He had received no medical treatment for any hand or thumb problems prior to February 2008. No doctor had told him that he needed to either quit working or to find another line of work prior to February 2008. There was no credible evidence showing that he had any problems in doing his job with the City prior to February 2008 when he of his own volition chose to quit or retire from his job. There was simply no credible evidence that Claimant's decision to quit or retire from his job had anything to do with an alleged minor thumb impairments combining with his alleged preexisting disability to render him incapable of doing that job or any other job.

² Claimant settled his case against his employer based on a permanent partial disability of 8 percent of each hand due to the thumb impairments. Claimant is bound by the terms of the settlement. Conley v. Treasurer, 999 S.W. 2d 269 (Mo. App. E.D. 1999).

³ The threshold amounts of disability for establishing Second Injury Fund liability do not apply to permanent total disability. § 287.220 RSMo. 2005.

Total disability is defined in the statute as an inability to return to any employment and not merely . . . inability to return to the employment in which the employee was engaged in at the time of the accident. See § 287.020 (6) RSMO.2005; Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. 1995); Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo. App. 1982); Crums v. Sachs Electric, 768 S. W. 2d 131 (Mo. App. 1989).

Missouri Courts have made it clear that the test for permanent total disability is whether any employer in the usual course of business would reasonably be expected to employ the injured worker in his present physical condition. Boyles v. USA Rebar Placement, Inc., 25 S.W.3d 418 (Mo. App. W.D. 2000); Cooper v. Medical Center of Independence, 955 S.W.2d570 (Mo. App. W.D. 1997); Brookman v. Henry Transportation, 924, S.W.2d 286 (Mo. App. 1996). Claimant admitted at the hearing that he had been offered jobs since he quit his job with the City. He admitted that he was offered a job to drive a dump truck. He admitted that he was offered another job by J.B. Hunt Trucking Company. While, that he had been offered jobs did not prove that he could do the jobs or that an employer would continue to employ him, it did constitute evidence that an employer would hire him in the usual course of business.

The conundrum for Claimant, however, was that his own evidence regarding his alleged permanent total disability conflicted with the statutory requirements for proving the Second Injury Fund's liability for such benefits. The statute clearly provides that the Second Injury Fund can only be liable for permanent total disability benefits if the permanent partial disability from the injury on the job combines with the employee's preexisting permanent partial disability to render the employee permanently and totally disabled. *Id.* Claimant's most credible evidence did not show that alleged minor thumb impairments settled at 8 percent of each hand combined with his alleged PTSD and other impairments to render him permanently and totally disabled.

Claimant's own evidence indicated that his alleged PTSD was his most serious preexisting impairment.⁴ His own evidence also showed that the alleged PTSD did not combine with his alleged minor thumb and other impairments to render him permanently and totally disabled. Dr. Hill, a psychiatrist, testified on Claimant's behalf. Dr. Hill concluded in his report that Claimant was permanently and totally disabled secondary to severe PTSD. He did not conclude in his report that the alleged permanent total disability was caused by a combination of the alleged severe PTSD and the alleged minor thumb impairments settled at 8 percent of each hand and the other alleged preexisting impairments.

On cross-examination by the Second Injury Fund, Dr. Hill testified that Claimant was permanently and totally disabled due to the alleged severe PTSD. He stated that based on the alleged PTSD alone it would be very difficult for Claimant to work. Again, he did not conclude that the alleged minor thumb impairments settled at 8 percent of each hand had anything to do with the alleged permanent total disability. Dr. Hill, as noted above, was Claimant's witness.

⁴ Claimant did not prove that his alleged preexisting hearing loss and vision impairment had resulted in any permanent partial disability under the Workers' Compensation Act. He offered no evidence showing that his hearing loss was below 2,000 hertz per second as required by the statute and the regulations. See § 287.190 RSMO; 8 CSR 50.5.060. He also offered no evidence showing that he had his hearing tested on three different occasions on three separate days at 500, 1,000 and 2,000 hertz per second as required in the statute and regulations. He did offer evidence that he had some disability due to tinnitus or ringing in the ears.

Claimant's own testifying expert, Dr. Koprivica, also admitted that in his opinion Claimant did not have any disability due to the alleged vision impairment and that it had not resulted in any vocational impact. Dr. Koprivica noted that Claimant was still able to participate in competitive shooting tournaments using a hand gun. He noted that such activities required good depth perception. That contradicted Claimant's allegation.

After Dr. Hill's testimony on cross-examination, Claimant chose to re-depose Dr. Hill, ostensibly to clarify Dr. Hill's cross-examination testimony. Dr. Hill's attempt to explain his cross-examination testimony at the second deposition was not credible. He stated at the second deposition that maybe he could have used a better choice of words on cross-examination. He stated that the phrase "in addition to" was "probably" a better way to describe his opinion.

Dr. Hill did not explain why if he had used an improper choice of words to explain his opinion on cross-examination; that he had used the exact same words in his written report which was not generated under any pressure or the stress of cross-examination. Dr. Hill was clearly being disingenuous at the second deposition when he attempted to change the opinions he had rendered on two separate occasions.

In addition, however, there was another psychiatrist who offered an opinion on Claimant's alleged permanent total disability. The VA psychiatrist noted on August 12, 2008 that "Based on Pts PTSD sxs of depression, sleep disturbance, irritability, anger, rage and h/o violence, I feel that Pt is unemployable. Pts sxs have fluctuated over the years and are easily triggered by others, which would make it impossible for Pt to work effectively."

Thus, two psychiatrists rendered opinions on Claimant's alleged permanent total disability. It was clear that both were of the opinion that Claimant was permanently and totally disabled due to the alleged severe PTSD alone and not in combination with minor thumb impairments settled at 8 percent of each hand or any other alleged preexisting disability. No other psychiatrists rendered opinions in the case on Claimant's alleged permanent total disability.

The opinions of the two psychiatrists who rendered opinions were entitled to more weight on the diagnosis and effects of the PTSD than the opinion of Dr. Koprivica, who was board certified in emergency medicine and who admitted that he did not feel competent to rate a psychiatric disability. The uncontroverted psychiatric opinions and the other evidence clearly showed that if Claimant were in fact permanently and totally disabled it was caused by the alleged severe PTSD alone and not a combination of the alleged PTSD and minor thumb impairments settled at 8 percent of each hand and Claimant's other alleged preexisting impairments. As such, the Second Injury Fund was not liable for permanent total disability benefits.

Claimant, however, argued in his brief that the opinion by the Missouri Court of Appeals for the Western District in a yet to be published case, Angus v. Second Injury Fund WD 72141 (Mo. App. W.D. 2010) was applicable to his case. Claimant argued that in Angus the employee offered evidence to support his allegations and expert opinions and that the Second Injury Fund offered no evidence to "contradict or impeach" the opinions of the employee's experts. Claimant, thus, argued that the Court found the Second Injury Fund liable for the benefits at issue.

First, Angus does not shift the burden of proof from the employee to the Second Injury Fund. The employee still has the burden of proving all material elements of his claim. Fischer; Griggs; Hall. See also Michael v. Treasurer as Custodian of the Second Injury Fund, SD30365 (Mo. App. S.D. 2011) where the Court specifically stated that the Second Injury Fund had no obligation to present conflicting or contrary evidence on a claim for permanent total disability and cited Dunn v. Treasurer of Missouri, 272 S.W.3d 267, 275 (Mo. App. 2008).

Also, in Claimant's case, contrary to his assertion there was evidence which served to "contradict or impeach" the opinions of Claimant's experts. Dr. Koprivica, board certified in emergency medicine, was the only medical expert to unequivocally state that Claimant was permanently and totally disabled due to a combination of the PTSD and the alleged bilateral thumb impairment, plantar fasciitis and Claimant's other alleged impairments. His opinion, however, was contradicted by the written report and cross-examination testimony of Dr. Hill, a psychiatrist and a specialist in treating and diagnosing the

effects of PTSD and mental impairments. Dr. Hill stated in his report and on cross-examination that Claimant was permanently and totally disabled due to severe PTSD. He did not conclude that the plantar fasciitis or alleged bilateral thumb impairments had any effect on the alleged permanent total disability.

Dr. Koprivica's opinion was further contradicted by the opinion of the VA psychiatrist, again a specialist, who indicated on August 12, 2008 that Claimant could not work due to the PTSD and not due to a combination of the PTSD and the minor heel and bilateral thumb impairments and other alleged impairments. Ms. Titterington, Claimant's vocational expert, also admitted that Claimant's Global Assessment of Functioning score due to the PTSD was too low to support work.

Thus, not only were there contradictory opinions, the contradictory opinions were more credible than the conclusory opinion rendered by Dr. Koprivica, who has no expertise in diagnosing the effects of PTSD and mental impairments. In addition, Dr. Koprivica's opinions on the causes and effects of Claimant's plantar fasciitis were contradicted by the opinions of Dr. Rizzi, a podiatrist and a specialist in treating foot and heel injuries. Dr. Rizzi concluded that Claimant's plantar fasciitis was not caused by Claimant's work.

Dr. Koprivica's opinion was also contradicted by Claimant's own medical records. Claimant alleged at the hearing that he injured his right heel on December 18, 2007 when he stepped on a hose while getting out of a bulldozer at work. Claimant's medical records showed that when he sought treatment on December 18, 2007 he told the doctor that his right heel pain or injury occurred on November 12, 2007. He told that doctor that the pain or injury occurred while he was hunting on November 12, 2007. He mentioned nothing about any right heel injury at work or as a result of stepping on a hose while getting out of a bulldozer.

Thus, clearly Claimant did not offer "unimpeached and uncontradicted" opinions. What the evidence showed was that Claimant alleged that he developed PTSD as a result of his experiences in Vietnam during the late 1960s or early 1970s. He was not diagnosed with the condition until 2006. That was the year he told his family physician that he was trying to get disability through the VA.

The diagnosis for PTSD was based on Claimant's subjective complaints of dreams and flashbacks about Vietnam as well as anger problems and difficulty in being around people. The diagnosis was not based on any objective evidence. Claimant's complaints were effective in convincing the psychiatrists that he had a severe case of PTSD.

Due to his complaints about PTSD Claimant was initially awarded \$377 per month in VA disability benefits in 2006. The evidence showed that Claimant continued to complain about PTSD and that he continued to appeal the VA determinations as to the proper amount of his VA disability benefits. Due to his continuing complaints and appeals his VA disability benefits due primarily to the PTSD diagnosis were increased to \$2,823 per month effective with December 1, 2008. That was the year he quit his job with the City. That was also the year he applied for social security disability and permanent total workers' compensation disability benefits.

Claimant's problem was that he was so convincing to his treating psychiatrists that he had a severe case of PTSD, that Dr. Hill and the VA psychiatrist concluded that the severe PTSD alone precluded him from working. That conclusion worked to his benefit for purposes of proving his entitlement to VA disability benefits which were based on his service connected disability and not any disability caused by a work injury or any non service related injury or impairment.

Claimant's success in convincing Dr. Hill and the VA psychiatrist of the severity of his alleged PTSD, however, also worked against his claim for permanent total workers' compensation disability benefits where he needed to prove that his inability to work was due to a combination of the alleged

PTSD and the alleged minor thumb impairments settled at 8 percent of each hand. Claimant clearly failed to do so based on his own evidence and the psychiatric opinions he offered into evidence. He failed to prove the Second Injury Fund's liability for permanent total disability benefits.

Made by: _____

Kenneth J. Cain
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this _____ day of _____, 2011
by:

Naomi Pearson
Division of Workers' Compensation