

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

Injury No. 05-117507

Employee: Charles Kelting
Employer: D & D Distributors, LLLP (Settled)
Insurer: Commerce & Industry Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to determine the following issues: (1) attainment of maximum medical improvement; and (2) liability of the Second Injury Fund.

The administrative law judge determined that employee is entitled to 65.135 weeks of enhanced permanent partial disability benefits from the Second Injury Fund. The administrative law judge did not resolve the issue whether and when employee reached maximum medical improvement.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred in finding employee is not entitled to permanent total disability benefits from the Second Injury Fund.

For the reasons stated below, we modify the award of the administrative law judge referable to the issue of Second Injury Fund liability.

Discussion

Permanent partial vs. permanent total disability benefit analysis

The administrative law judge determined that employee's claim against the Second Injury Fund for permanent total disability benefits is not well-supported by the evidence. In reaching this determination, the administrative law judge relied, in part; on a finding that employee did not persuasively establish "the suggestion of permanent total disability resulting from synergistic combination." *Award*, page 8. The administrative law judge implies that an award of permanent total disability benefits from the Second Injury Fund must be supported by a finding of synergistic interaction between the effects of the primary injury and employee's preexisting conditions. We disagree.

Employee: Charles Kelting

- 2 -

As the Missouri courts have recently clarified, there is a “vast distinction” between the analyses referable to Second Injury Fund liability for permanent partial as opposed to permanent total disability benefits. *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144, 156 (Mo. App. 2014). A careful reading of § 287.220 RSMo reveals that while the statute does require a showing of synergy to support an award of permanent *partial* disability benefits, there is no such requirement for purposes of proving entitlement to permanent *total* disability benefits. Instead, the employee is required only to show that the primary injury and preexisting conditions of ill-being “together result” in permanent total disability:

If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury **together result** in total and permanent 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.

§287.220.1 RSMo (emphasis added).

In denying employee’s claim for permanent total disability benefits from the Second Injury Fund, the administrative law judge also relied, in part, on a finding that “actual preexisting hindrances and obstacles to employment are not demonstrated.” *Award*, page 8. It is difficult to reconcile this finding with the administrative law judge’s subsequent award of permanent partial disability benefits from the Second Injury Fund, which, of course, required an (implicit) finding that employee’s preexisting disabling conditions *were* sufficiently serious to constitute hindrances or obstacles to employment or reemployment, and with the administrative law judge’s express finding that employee’s preexisting conditions of ill-being together totaled 244.075 weeks of permanent partial disability.¹

Finally, we note that the administrative law judge relied on assertions from the Second Injury Fund’s vocational expert, J. Stephen Dolan, as to purported admissions regarding preexisting disability contained in a deposition of the employee. That deposition was not offered into the record at the hearing in this matter, and thus we are unable to review it. Nor was employee confronted at the hearing with the relevant deposition testimony, or offered an opportunity to explain any (purported) contradiction between his hearing testimony and the testimony offered at that deposition. Ultimately, where Mr. Dolan substantially relied upon purported admissions by the employee that we are not able to review for ourselves, it is difficult for us to find his opinions persuasive, however credible his analysis may otherwise be.

¹ The administrative law judge suggested § 287.190.6(1) RSMo required him to find, as a matter of law, that employee suffered preexisting permanent partial disability consistent with employee’s prior workers’ compensation settlements. But the conclusive presumption of continuing disability under that section only applies where there is “a subsequent injury to the same member or same part of the body [which] also results in permanent partial disability[.]” Thus, in this case, § 287.190.6(1) would only apply with respect to the prior left knee settlement.

Employee: Charles Kelting

- 3 -

For the foregoing reasons, although we agree that the evidence in this matter could reasonably support an award of permanent partial as opposed to permanent total disability benefits from the Second Injury Fund, we are unable to adopt the administrative law judge's analysis with respect to the issue of Second Injury Fund liability; instead, we must, and do hereby, disclaim it. Our own analysis follows immediately below.

Maximum medical improvement

The parties dispute, in their briefs, whether employee's left total knee replacement surgery of November 2007 flowed from the effects of the work injury of September 2005, or whether the need for that surgery resulted instead from subsequent worsening of osteoarthritis unrelated to the work injury.² Employee advances the expert medical opinion of Dr. David Volarich, who believes that the September 2005 accident was the prevailing factor causing significant progression of a preexisting minimally symptomatic arthritic condition in the left knee to the point that it required significant medical care, including the total left knee replacement.

The Second Injury Fund, on the other hand, advances the expert medical opinion of Dr. Bernard Randolph, who believes the prevailing and primary factor necessitating the total knee replacement procedure, was employee's preexisting osteoarthritis of the knee. Dr. Randolph reasoned that although it is possible the September 2005 accident "triggered" increased symptoms in employee's left knee, that accident did not "aggravate" or otherwise alter the "natural history" of a preexisting arthritic disease process in employee's left knee. *Transcript*, page 508. We note that this explanation is somewhat at odds with Dr. Randolph's ultimate rating of an increased 4% permanent partial disability of the left knee as resulting from the effects of the September 2005 accident.

In light of Dr. Randolph's ultimate concession that the pathology resulting from the September 2005 accident involved new and increased permanent partial disability, the uncontested expert medical evidence before us compels, at the very least, a determination that the accident of September 2005 caused a "resulting medical condition" in employee's left knee, along with a permanent increase in "disability" referable thereto, or in other words, a compensable injury under § 287.020.3(1) RSMo.³

Consequently, it appears to us that the appropriate question is not whether the accident was the *prevailing factor* causing the need for total left knee replacement surgery; instead, we must determine whether such treatment was *reasonably required* to cure and relieve the effects of employee's compensable injury for purposes of § 287.140 RSMo. See *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511 (Mo. App. 2011). In the

² Although the parties did not specifically place in dispute, at the hearing, any issue whether a particular medical treatment was reasonably required to cure and relieve the effects of the work injury, we deem the parties' arguments regarding the total knee replacement to reasonably fall within the scope of their dispute as to whether and when employee reached maximum medical improvement.

³ Indeed, the parties did not place in dispute any issue of medical causation. Instead, they unanimously acceded to the administrative law judge's recitation of their stipulation that "[employee] sustained an accident and injury arising out of and in the course of employment on September 28, 2005." *Transcript*, page 1.

Employee: Charles Kelting

- 4 -

Tillotson case, the court made clear that the “prevailing factor” test has no place in our analysis under § 287.140, and provided the following guidance with regard to preexisting conditions:

[I]n determining whether medical treatment is "reasonably required" to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant.

Id. at 519.

Following *Tillotson*, we must conclude that Dr. Randolph’s emphasis on employee’s preexisting osteoarthritis is not particularly relevant. On the other hand, it likewise appears that Dr. Volarich failed to apply the appropriate test. However, if the accident was, as Dr. Volarich asserts, the *prevailing* factor causing the need for treatment in the form of a total left knee replacement, it follows by necessary implication that such treatment *flows* from the accident.

Turning to the medical records, we note that the total knee replacement surgery arose in the context of employee seeking ongoing treatment for the continuing complaints of pain and limitations he suffered as a result of the accident. It is apparent to us from the records and from employee’s credible testimony (and we so find) that more conservative approaches in the form of physical therapy, injections, medications, and work restrictions provided only short-term or limited relief from the new and increased symptoms and limitations employee experienced as a result of the stipulated work injury. Thus, after careful consideration, we are persuaded (and we so conclude) that the total knee replacement surgery was reasonably required to cure and relieve the effects of employee’s left knee injury on September 2005, despite the fact that surgery also benefitted employee’s preexisting degenerative condition of osteoarthritis.

We find that employee reached maximum medical improvement on February 27, 2008, the date upon which he completed and was released from the post-surgery physical therapy program ordered by Dr. John McAllister, the treating surgeon who performed the left total knee replacement.

Permanent total disability

As of February 27, 2008, employee was 58 years of age, with no high school diploma, GED,⁴ or other formal education or vocational training, and a work history entirely

⁴ We note that there appears to have been some confusion among the experts regarding whether employee completed high school. Employee unequivocally testified that he did not complete high school and did not obtain a GED. We find employee’s hearing testimony the most persuasive evidence on this issue.

Employee: Charles Kelting

- 5 -

devoted to driving beer trucks. Prior to the last injury of September 2005, employee suffered permanent partial disability affecting his bilateral wrists, dominant right shoulder, left knee, and low back.⁵ Employee suffers new limitations referable to the primary left knee injury including an inability to kneel, stoop, squat, crawl, or run, increased pain with prolonged standing, and left leg fatigue. Employee tried to continue working following the last injury, but ultimately left his job with employer on March 1, 2006, because he felt unable to continue because of the combination of the pain and limitations in his hands, back, shoulder, and knee.

The question before us is whether, in light of all of the foregoing circumstances, employee was capable as of February 27, 2008, of competing for and securing a job in the open labor market:

The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

Molder v. Mo. State Treasurer, 342 S.W.3d 406, 411 (Mo. App. 2011).

As noted by the administrative law judge, the parties presented conflicting expert medical and vocational testimony on the question whether employee is permanently and totally disabled as a result of the work injury in combination with his preexisting disabling conditions.

Dr. Volarich initially indicated, in his report, that he is uncertain whether employee would be able to return to the open labor market in any capacity in the future, and recommended a vocational assessment to determine whether employee would be able to return to work. In his report, Dr. Volarich noted that employee is approaching advanced age, has a limited education, has worked as a beer truck driver his entire career, and has been unable to return to that work owing to his physical limitations. Dr. Volarich indicated that if vocational assessment were able to identify a job for which employee is suited, he would have no objection with employee attempting to return to work consistent with the physical restrictions assigned; but if not, it would be his opinion that employee is permanently and totally disabled as a result of the work injury in combination with employee's preexisting disabling conditions.

Employee secured a vocational assessment from James England, who believes that employee would not be able to sustain even sedentary work in the long run considering employee's pain in his back and knee, and the difficulty employee has using his hands for repetitive activity. Mr. England explained at his deposition that the last injury

⁵ The Second Injury Fund correctly points out that employee was not working under any permanent medical restrictions from a treating doctor prior to suffering the primary injury—at least none that are reflected in the records we have been provided. However, in its brief, the Second Injury Fund effectively concedes the preexisting permanent partial disability found and rated by the administrative law judge, when it requests, in its prayer for relief, that we only (1) modify the administrative law judge's use of a 20% loading factor, and (2) reduce his rating of 51% permanent partial disability as resulting from the last injury.

Employee: Charles Kelting

- 6 -

considered alone would not prevent employee from doing some kinds of less physically demanding work, and that there are some entry level positions such as security or cashiering jobs that would still be possible if employee's only problems were those referable to the left knee. However, when employee's limitations referable to the last injury are combined with his preexisting difficulties, employee wouldn't be able to sustain such jobs over time. Mr. England's dominant impression of employee was that of an individual who worked as long as he possibly could but who finally just couldn't handle the combination of his physical problems anymore.

At his deposition, Dr. Volarich testified that, based on Mr. England's ruling out of sedentary work, it is his opinion that employee is permanently and totally disabled as a result of the work injury in combination with his preexisting disabling conditions.

Dr. Randolph, on the other hand, believes employee is not permanently and totally disabled. In his report, Dr. Randolph indicated that employee has retained (unspecified) physical abilities which would allow him to seek employment in the open labor market; at his deposition, Dr. Randolph clarified that he believes employee generally has good strength in his extremities. He did not, however, identify on direct examination what type of job he believes employee is capable of performing or what type of positions for which he believes employee capable of successfully competing in the open labor market. On cross-examination, Dr. Randolph suggested employee could do some sedentary or light jobs, but declined to give an opinion as to whether an employer would be likely to hire employee to perform such jobs given employee's age, education, and physical limitations.

The Second Injury Fund also provides, as we have noted above, the expert vocational testimony of J. Stephen Dolan, who believes employee is not permanently and totally disabled. We have already discussed Mr. Dolan's substantial reliance on purported admissions from employee during a deposition, the transcript of which was not made a part of the record before us. Again, we do not find Mr. Dolan's ultimate opinions persuasive in light of this circumstance.

After a careful consideration of the entire record, we find the opinions from Mr. England and Dr. Volarich to be the most persuasive evidence with regard to the issue. We credit their opinions and find that employee is unable to compete for work in the open labor market owing to the effects of the primary injury combined with employee's preexisting disabling conditions.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "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..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

Employee: Charles Kelting

- 7 -

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We deem reasonable and hereby adopt the administrative law judge's findings that employee suffered from preexisting permanent partially disabling conditions referable to the left knee, right shoulder, bilateral carpal tunnel syndrome, and low back. After careful consideration, we are convinced that these conditions were serious enough to constitute hindrances or obstacles to employment. This is because we are convinced employee's preexisting conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of these preexisting conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Fund liability for PTD under Section 287.220.1 occurs when [the employee] establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. For [the employee] to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.

Lewis v. Treasurer of Mo., 435 S.W.3d 144, 157 (Mo. App. 2014).

Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Id.*

We deem reasonable and hereby adopt the administrative law judge's finding that the last injury resulted in a 51% permanent partial disability of employee's left knee; we find that this injury did not render employee permanently and totally disabled in isolation. We have credited the expert medical and vocational opinions from Dr. Volarich and Mr. England that employee is unable to compete for work in the open labor market as a result of his primary injury in combination with his preexisting disabling conditions. We conclude, therefore, that the Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

Employee: Charles Kelting

- 8 -

The Second Injury Fund is liable for weekly permanent total disability benefits beginning on the date of maximum medical improvement, February 27, 2008, at the differential rate of \$331.89 for 81.6 weeks, and thereafter at the weekly permanent total disability rate of \$696.97. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued December 21, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 27th day of July 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Charles H. Kelting	Injury No.:	05-117507
Dependents:	N/A		Before the
Employer:	D & D Distributors, LLLP (settled)		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	Commerce & Industry Ins. Co. (settled)		Department of Labor and Industrial
Hearing Date:	September 16, 2015		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	JED

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 28, 2005 (stipulated)
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was a truck driver performing delivery of beer.
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: left knee
14. Nature and extent of any permanent disability: 51% PPD of left knee; 65.135 weeks from SIF.
15. Compensation paid to-date for temporary disability: \$1,493.51
16. Value necessary medical aid paid to date by employer/insurer? \$3,147.57

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1,045.45
- 19. Weekly compensation rate: \$696.97/\$365.08
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

81.6 weeks of PPD from Employer (Settled)

22. Second Injury Fund liability: Yes

65.135 weeks PPD \$23,779.49

TOTAL: \$23,779.49

23. Future requirements awarded: Unknown

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

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

James S. Haupt

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Charles H. Kelting	Injury No.:	05-117507
Dependents:	N/A	Before the	
Employer:	D & D Distributors, LLLP (settled)	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Commerce & Industry Ins. Co. (settled)	Department of Labor and Industrial	
Hearing Date:	September 16, 2015	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JED

This case involves a left knee injury resulting to Claimant on the reported accident date of September 28, 2005. Employer/Insurer previously settled its risk of liability. The Second Injury Fund (“SIF”) remains a party to this Claim. Both parties are represented by counsel. The single issue for trial is the liability of the SIF. Claimant seeks permanent total disability benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a truck driver and warehouseman for Employer for 27 years. Claimant delivered cases of beer to retail outlets throughout the area.
2. Claimant worked as a delivery driver all his life. He did not graduate high school and has no other training.
3. Claimant injured his left knee when he fell off a delivery truck on the reported accident date. He finished his shift with the aid of a helper.
4. Claimant was off work for 2 1/7th weeks and was never referred to an orthopedist. He settled his case for 51 percent PPD of the left knee. (See Stipulations and Exhibits 1, 4.)
5. Claimant terminated his employment on March 1, 2006 having returned to work October 24, 2005. He was 56 years old. He stated he was unable to complete his work on time, including his helper, because of the “combination of all my injuries.” He stated he had pain in his hands, low back, neck, right shoulder and left knee. He stated he had planned to work several more years before retiring.
6. Claimant admitted he worked from October 24, 2005 until March 1, 2006 but stated his routes took longer to complete because of his slower pace due to pain.
7. Claimant began treating with Dr. John McAllister on December 29, 2005 and underwent total knee replacement on November 6, 2007. Physical therapy continued through February 27, 2008.

Pre-Existing Disabilities

8. In 1986, Claimant sustained left knee injury and surgery by Dr. Ronald Hertel. Claimant settled this WC claim for 25 percent PPD of the left knee. Claimant stated he had pain that slowed his productivity and caused him to seek assistance at work.
9. In 1990, Claimant sustained a right shoulder injury resulting in surgery by Dr. Strickland. Claimant settled this WC claim for 28.75 percent PPD of the right shoulder. Claimant stated he had pain that slowed his productivity and he experienced difficulty reaching loads and caused him to seek assistance at work. This was his dominant arm.
10. In 1992, Claimant sustained a low back and neck injury. Claimant received a WC award by hearing for 15 percent PPD of the body referable to the low back and another 2.5 percent PPD for the neck. Claimant stated he had low back pain flare-ups that slowed his productivity and caused him to seek assistance at work.
11. In 2004, Claimant sustained repetitive trauma injuries to his hands resulting in bilateral CTS. Claimant settled this WC claim for 17.5 percent PPD of each wrist. Claimant stated he had pain that diminished his grip strength and caused him to seek assistance at work.
12. Claimant's osteoarthritis was found by Dr. Bernard Randolph to pre-exist the reported injury and to be the prevailing factor in Claimant's left knee replacement. Dr. Randolph assigned the pre-existing osteoarthritis and subsequent left knee replacement at 35 percent PPD; he assigned 4 percent PPD to the primary injury.
13. In contrast, the SIF vocational expert found, upon review of Claimant's *deposition*, that in the time preceding the reported injury, Claimant performed his work without medical restrictions, without accommodations, without missing work and without complaint from Employer. (Exhibit *Roman Numeral II*.) This contrast undercuts Claimant's credibility regarding his pre-existing disabilities.
14. Claimant testified at trial that he had planned to work longer and that he sought work at a golf course. Mr. Dolan's review of Claimant's deposition indicates Claimant had not sought employment since his voluntary retirement. (Exhibit *Roman Numeral II*, p. 15.)

Opinion Evidence

Medical Opinion

Claimant offered the 2010 deposition testimony and 2008 narrative report of Dr. David Volarich as Exhibit 4. Dr. Volarich reviewed the record and examined Claimant. Dr. Volarich stated the reported injury was the prevailing factor in causing the left knee replacement surgery (p. 25). He assigned numerous PPD percentages to the primary injury and the four alleged pre-existing disabilities (25 percent pre-existing PPD of the left knee, 30 percent pre-existing PPD of

the right shoulder, 20 percent PPD of the low back, 20 percent PPD of each wrist). He assigned 50 percent additional PPD after the knee replacement for the primary injury.

He opined the primary injury combined with the pre-existing disabilities to create an increased overall disability. Dr. Volarich assigned myriad restrictions on activity for both the pre-existing disability and the current disability. None of the restrictions are traced to actual treatment records or physician recommendations contemporaneous to the pre-existing conditions that he rated. He separately delineated restrictions for each body part he rated. In no instance did he relate his stated restrictions to pre-accident status; indeed, in his discussion of knee restrictions he characterized Claimant's pre-accident work status as "able to work full unrestricted duty." He stated:

With regard to work and other activities referable to the lower extremities prior to 9/28/05, limitations were not required since he was able to work full unrestricted duty with only minimal symptomatology prior to 9/28/05. [Bold face in original. Underline added.]

Dr. Volarich opined that he was uncertain whether Claimant was able to return to the open labor market. He noted his age and limited education. In his May 26, 2011 report, Dr. Volarich found Claimant at maximum medical improvement, "[b]ased on the treatment provided to date." (Exhibit 4, *Deposition Exhibit B*, p. 10.)

Dr. Volarich said he would find Claimant permanently and totally disable if vocational services proved unsuccessful in identifying suitable employment. Dr. Volarich was asked about the fact that Claimant had neither re-treated, nor lost time, for the alleged pre-existing disabilities (after having had returned to work for each) which facts Dr. Volarich simply acknowledged. Separately, Dr. Volarich did not find Claimant permanently and totally disabled but deferred to vocational assessment.

The SIF offered the deposition of Dr. Bernard Randolph as Exhibit Roman Numeral I. He diagnosed a knee strain and placed Claimant at maximum medical improvement on October 31, 2005, or two months post-accident. (This is consistent with the *de minimis* interim benefits paid on the primary injury.) He rated the injuries and opined that the reported injury resulted in 4 percent PPD and that the knee replacement was related to the longstanding, pre-accident, osteoarthritis which condition he rated at 35 percent PPD. He stated the osteoarthritis was the prevailing factor in necessitating the knee replacement.

Vocational Opinion

Claimant offered the deposition of James England, LRC, as Exhibit 5. Mr. England gave his opinion that Claimant cannot return to work in the open labor market. At deposition, he embraced the opinions and restrictions of Dr. Volarich. He stated that Claimant's knee pain and low back pain and hand symptoms prevented Claimant from performing even sedentary work. Mr. England admitted he was unaware of any accommodation having been given Claimant at the time Claimant terminated his employment (p. 46).

Mr. England stated Claimant claimed he simply could not perform in pain any longer; he also agreed that age 60 was a normal retirement age:

Q: Okay. When did he last work?

A: Looks like March, maybe March of 2006. I've got March of 2006.

[...]

Q: And before that time and before he stopped working in March of 2006 he was working full time and full duty; is that correct?

A: Correct.

Q: And so he stopped working almost two years before he finished treating for his work injury based on what we see now; is that right?

A: If that's the case, right. If he actually stopped in March of '06.

Q: At the time before he stopped working in March, 2006, was he given any accommodations in the performance of his job by his employer?

A: Not that I'm aware of, no.

Q: Did you get a chance to review his deposition from June 10, 2010?

A: No.

Q: That was after the date that you evaluated Mr. Kelting; is that right?

A: Correct. About over a year.

Q: And you didn't receive any records after that time, after your evaluation?

A: That's correct.

Q: Did you ask him why he stopped working in March of 2006?

A: Yes.

Q: And what did he say?

A: He said just the combination of the problems that he had, it just, he just couldn't handle the pain anymore.

Q: So he didn't indicate to you that he chose to retire at that time?

A: Well, I mean, he did retire, because he said he just couldn't do it any longer. I mean, He said that between his back, his knee and his hands, it just hurt too much to continue trying to do it.

Q: It wouldn't be unexpected that someone who was over 60 who had worked 30-plus years in one job would retire; that's not unexpected, correct?

A: No. I'd say that happens frequently.

Q: And, in fact, at that time he had worked 40 years in one industry. Someone that works 40 years in one industry might be expected to retire, right?

A: I'd say that's not unusual.

Q: And so he'd been given no restrictions on his ability to sit for periods of time before the last work injury by any doctor except Dr. Volarich; is that correct?

A: Correct.

Q: And Dr. Volarich only said that, you know, he can maintain fixed positions to tolerance; is that right?

A: Right. (Exhibit 5, pp. 45, line 6 to 48, line5.)

Retirement is unmentioned in Mr. England's narrative report (Exhibit 5, *Deposition Exhibit 2*). He believed Claimant was unemployable on the open labor market due to a combination of pain in his knee, low back and upper extremities. He did not distinguish onset dates of disabling symptoms.

The SIF offered the deposition of J. Stephen Dolan, licensed counselor, as Exhibit Roman Numeral II. Mr. Dolan is also board certified. He reviewed the medical record and Claimant's deposition. He characterized Claimant's employment as heavy exertional work. He noted a September 25, 2014 medical note from Claimant's PCP office that he was "doing well" and was "functional." Also, noteworthy, he stated that Claimant deposed that sometimes he delivered up to 1400 cases per day but had a helper on those days and that he had not looked for work since retirement (p. 11, 15).

Mr. Dolan gave insight that Dr. Volarich's restrictions were all "to tolerance" except to avoid stooping, crawling, kneeling, squatting and climbing and that each was imposed in 2008. Mr. Dolan gave a "third opinion" based on "... Dr. Volarich's report that it seemed obvious that [Claimant's] hands, back, right shoulder, etc., have become much more symptomatic in the years since that injury. [...]:

Q: You're just saying all conditions became more symptomatic in the years since that injury?

A: Dr. Volarich – well yes, because [Claimant] was obviously using his hands forcefully. He was doing a lot of lifting. So if he is now that limited regarding the use of his hands and his back and his right shoulder, it has to be after he retired because he was doing a lot of physical work before he retired (pp. 16-17.)

Mr. Dolan described Claimant's work as heavy exertional. He was aware of Claimant's surgeries and, as admitted by Claimant in his deposition, Mr. Dolan verified that Claimant worked, prior to the reported injury, without medical restriction, without accommodation, without missing work, and without complaint from Employer (pp. 15, 26). Further, he stated that the only restriction by Dr. Volarich that would eliminate even sedentary work was "rest when needed," which he agreed, if valid, would render Claimant unemployable. Moreover, the context of these observations was that Dr. Volarich imposed them in September of 2008, three years after the reported injury. He noted both experts proffered by Claimant conducted their examinations three years after Claimant retired. He was unaware of the WC settlements on the several conditions but was fully aware of all significant medical conditions having reviewed Dr. Volarich's report.

RULINGS OF LAW

Permanent Disability

Claimant's assertion of permanent total disability as a result of a combination of primary and pre-existing disabilities is not well supported by the evidence. Claimant gave general testimony regarding his alleged pre-existing disabilities that was shown to contrast with his deposition testimony reviewed by the SIF vocational expert. Claimant presented medical opinion

on permanent partial disability, including synergistic combination, and presented vocational expert opinion evidence asserting permanent total disability. The SIF presented opposing forensic evidence. Claimant's medical expert makes no direct statement of synergistic disability and his vocational expert had significant admissions and omissions in his analysis. The SIF vocational expert was more persuasive and rebutted the suggestion of permanent total disability resulting from synergistic combination. Section 287.020.6 RSMo (2005) defines total disability as the "... inability to return to any employment and not merely... [the] inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment" have been construed to mean "that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." See Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919,922 (Mo. App. 1982)(*analyzing the same language*). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet the statutory definition." *Id.* at 922. Also, Claimant's age is a factor in the determination of permanent total disability. Reves v Kindell's Mercantile Co., Inc., 793 S.W.2d 917, 920-921 (Mo.App. 1990).

Claimant's testimony lacked detail about the onset of disabilities and limitations and was unable to reconcile these with his remarkable work record and his own medical expert. His testimony regarding diminished productivity at work was unrebutted but uncorroborated. The forensic evidence contains many instances of admissions, partial admissions, and omissions that make difficult finding one expert opinion is best reconciled with the balance of the record.

Claimant's evidence of permanent disability includes permanent partial disability ratings by Dr. Volarich without a direct statement of permanent total disability. He found synergy between the primary and pre-existing disabilities. He did not explain how Claimant's pre-existing disabilities manifest in Claimant's daily, unrestricted, heavy work. Also, he stated the knee replacement surgery was necessitated by the reported injury (p. 25). In addition, his PPD opinions are not based on medical restrictions from providers or Claimant's work record but are the result of his physical examination and a records review, including knee replacement, three years after the reported accident or two-and-a-half years after Claimant's retirement. Dr. Volarich's severe restrictions cannot be said to be based on Claimant's work record in the days and months preceding the reported injury. Rather, they seemed based on the post-knee replacement and post-retirement status of Claimant. This is contrary to a finding of permanent total disability based upon pre-existing disability.

Claimant also offered an unemployability opinion from Mr. England who embraced Dr. Volarich's post-retirement/post-knee replacement restrictions. Dr. Volarich's restrictions are not traced to the treatment record of any treating physician. Mr. England's opinions on synergistic disability and resulting unemployability are not probative to the extent the restrictions do not predate the reported accident and actual pre-existing hindrances and obstacles to employment are not demonstrated. Again, Dr. Volarich did not give a direct statement of permanent total disability. Separately, Mr. England's report does not address retirement and does not mention Claimant's voluntary termination of employment seven months after the accident (and five months after his return to work at the same job). At deposition, he essentially concedes that Claimant's retirement after 30 years, and at Claimant's age, was quite normal. Again, Dr.

Volarich found Claimant was able to work “full unrestricted duty with only minimal symptomatology prior to 9/28/05.”

Claimant testified several times that he had difficulty completing his routes and quit work because of the combination of all of his injuries. Suggesting any such difficulty or late performance was significant is inconsistent with his medical expert’s statements about working full unrestricted duty before the accident and, apparently, his deposition admissions reviewed by Mr. Dolan. Neither Claimant nor either of his experts quantified how much Claimant’s helper assisted him. Thus, the evidence is unclear how dependent Claimant was on his helper to complete his routes. Claimant offered no detail on route completions and did not claim he was late or otherwise demonstrate significant consequence to his uncorroborated claim of late completion of routes.

The SIF vocational expert reasonably assumed Claimant’s unrestricted work included lifting 700 cases of beer per day, etc. Mr. Dolan rebutted the idea of post-retirement restrictions being a basis for concluding Claimant was unemployable as a result of his work injuries. This assumption is bolstered by Dr. Volarich’s report that does not purport to place any of his restrictions on Claimant as having predated the reported injury. He correctly noted that Claimant far exceeded any restrictions enunciated by Dr. Volarich in the days preceding the reported injury; indeed, Dr. Volarich expressly stated Claimant worked “full unrestricted duty” prior to the reported injury. Mr. Dolan was more persuasive than Mr. England. The late imposition of restrictions is also consistent with subsequent deterioration. Dr. Randolph opined that the knee replacement was not part of the reported injury which, if correct, renders the 2007 replacement surgery an event due to subsequent deterioration.

* * *

While the medical record does not suggest Claimant had serious pre-accident restrictions or, post-accident or that he needed to avoid all employment, Claimant is, nevertheless, unemployed. Dr. Volarich does not independently suggest Claimant is foreclosed from all employment but his restrictions foreclose regular or heavy lifting or bending or prolonged walking. Preliminary to this is the fact that Claimant voluntarily retired seven months post-accident. Claimant testified he had a union pension and, apparently, deposed that he received social security benefits. The compulsion or motivation issue was considered in Ransburg v. Great Plains Drilling, 22 S.W.3d 726, 732 (Mo.App. 2000). The court held employee’s testimony itself was sufficient to find he had no motivation to return to work. It also held social security and pension benefits are irrelevant for purposes of determining disability but are relevant to determine the compulsion or motivation to return to work. Id.

Here, Claimant retired voluntarily. As stated above, Claimant testified, not at trial, but by deposition, that he had not sought employment since his retirement. The voluntariness of his retirement gains meaning when coupled with Claimant’s lack of active treatment or home confinement. Claimant manages his personal needs, performs domestic chores and drives a car. This is substantial competent evidence that Claimant’s unemployment is voluntary and not the result of synergistic disability.

* * *

Claimant offered evidence of prior settlements, including that of the primary injury herein. Despite Claimant’s ability to return to the same heavy work after the reported injury and each of his WC injuries (and settlement), the law compels a finding that these approved settlements continue undiminished. See Section 287.190.6 RSMo (2005).

Here, the current permanent partial disability (PPD) for Claimant’s primary left knee condition is determined to be 51 percent PPD (or 81.6 weeks). The pre-existing PPD for Claimant’s The pre-existing PPD for Claimant’s 1986 left knee surgery is determined to be 25 percent PPD (or 40 weeks). The pre-existing PPD for Claimant’s right shoulder condition is determined to be 28.75 percent PPD (or 66.7 weeks) The pre-existing PPD for Claimant’s bilateral CTS is (17.5 percent of each wrist, plus 10 percent multiplicity (or 67.375 weeks). The pre-existing PPD for Claimant’s spine condition is 17.5 percent PPD of the body as a whole (or 70 weeks).

Liability of the Second Injury Fund

The liability of the Second Injury Fund is set out in Section 287.220 RSMo (2000). SIF liability is premised on synergistic combination of the primary and pre-existing disabilities. Synergy is the concept in which the current PPD and the pre-existing PPD are found, in combination, to create a “substantially greater” disability, or an increased overall disability, for which the employer should not be held liable. The medical evidence and other evidence suggest Claimant’s disabilities (above) are hindrances and obstacles to reemployment.

While Claimant is ambulatory and no longer actively treating, it is reasonably inferred that Claimant experienced daily pain and fatigue in his hands, low back, right shoulder and left knee but not to a point where he could not perform his work. The opinion evidence and other evidence suggest Claimant’s combined PPD equates to an increased overall disability. Here, Claimant’s primary injury and his listed pre-existing disabilities, combine to create lifting and carrying deficits that belie any strength or endurance for manual work. These deficits comprise common *upper body/lower body* and *opposing extremity* synergies which prevent compensatory body mechanics that might permit normal work stresses.

The medical evidence and other evidence suggest Claimant’s synergistic PPD is expressed by a 20 percent loading factor of the combined weeks (or 325.675). The synergistic affect results in an additional 65.135 weeks of PPD from the SIF. No greater amount of PPD may be awarded on the record at hand.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained an additional 65.135 weeks PPD from the SIF as a result of the combination between the primary injury and the synergistic pre-existing PPD.

Date: _____

Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge