

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

Injury No.: 04-054935

Employee: Jimmie Kinsey
Employer: Buchheit Enterprises, Inc. (Settled)
Insurer: Liberty Mutual Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 4, 2008. The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued November 4, 2008, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 12th day of August 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed and permanent total disability benefits should be awarded.

First, there is no question regarding whether employee's May 26, 2004, accident is compensable. In fact, employee has even settled his claim against employer for this primary accident. The issue currently concerning this case centers on the nature and extent of employee's permanent disability. It is my opinion, based on the expert medical and vocational opinions that employee should be awarded permanent total disability benefits instead of the mere permanent partial disability benefits awarded by the administrative law judge.

Permanent and total disability is defined by section 287.020.7 RSMo. Cum. Supp. 2004, as the "inability to return to any employment"

The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Gordon v. Tri-State Motor Transit Company, 908 S.W.2d 849, 853 (Mo.App. 1995) (citations omitted).

There is no questioning the fact that employee suffered from substantial permanent disability prior to the primary injury. In October 1997, employee injured his right shoulder while pulling a tarp over bales of hay loaded on a trailer. The claim for compensation regarding this accident was settled for 20% permanent partial disability of the right shoulder. Employee re-injured his right shoulder in April 1999. The claim for compensation regarding this re-injury was settled for 30% permanent partial disability of the right shoulder. Dr. McGinty rated employee's right shoulder overall at 50% permanent partial disability.

On August 19, 2001, employee was in a motor vehicle accident which resulted in injuries to his ring and little fingers on his left hand. No surgical relief was offered and employee remains immobile in the two fingers on the left hand. This case was settled for 20% permanent partial disability of the left hand.

The primary injury occurred on May 26, 2004, when employee attempted to step down from his trailer and his foot slipped. Employee held onto the trailer with his left hand causing a jerking motion in the left upper extremity. Employee had multiple procedures performed on the shoulder and his claim was eventually settled for 62.5% permanent partial disability of the left upper extremity.

Dr. Levy examined employee on November 17, 2005, and opined that employee had an 80% permanent partial disability of the left upper extremity at the shoulder due to the May 2004 accident, 40% permanent partial disability of the right upper extremity at the shoulder, and 15% permanent partial disability of the left upper extremity at the wrist. Dr. Levy further opined that the combination of the impairments created a greater disability than the simple sum of each and a loading factor should be added. Dr. Levy is of the opinion that employee is permanently and totally disabled and unable to compete in the open labor market.

On December 20, 2005, employee met with Susan Shea for a vocational assessment. Ms. Shea's report provided numerous restrictions for employee. Ms. Shea ultimately opined that employee is not employable in the national economy or that any typical employer would consider hiring him. Ms. Shea took into consideration the pre-existing conditions and problems to the right shoulder and to the fingers of his left hand.

The Second Injury Fund did not provide testimony from a medical expert. The only medical evidence offered by the Second Injury Fund is that taken from the records of Dr. Hulseley. Dr. Hulseley released employee to return to work, but did not believe that employee could return to his previous occupation. Dr. Hulseley rated employee's right shoulder at 25% permanent partial disability and put the employee on restrictions of no overhead lifting of more than 15-20 pounds and no commercial driving.

On September 6, 2005, employee was seen by Victor Zuccarello for a functional capacity evaluation. Mr. Zuccarello stated that employee was able to function in a medium work or physical demand level which was from twenty-one to fifty pounds on an occasional basis. Mr. Zuccarello noted that there were very high pain levels despite employee's improved function. Mr. Zuccarello is of the opinion that employee failed to perform the tasks that would be required of an over the road truck driver.

In September 2005, employee was seen by James England for a functional capacity evaluation. Mr. England stated that it did not appear that employee could go back to driving a truck or operation of heavy equipment, but that his knowledge of trucking could potentially be used in a dispatching job provided he had some basic keyboarding skills. Mr. England further opined that there is not anything in the medical records that would lead him to believe that employee was totally disabled from all types of work activity.

The administrative law judge indicated that he found the opinions of Dr. Hulseley, Mr. Zuccarello, and Mr. England more credible than the opinions of Dr. Levy, Ms. Shea, and Mr. Crites (a third party employer that testified for employee). However, in reviewing the evidence, it is obvious that all of the doctors and vocational experts agree that employee has numerous restrictions and is not able to return to work as an over the road truck driver.

The administrative law judge relied heavily on the testimony from Mr. England suggesting that employee was well-equipped to return to work in a dispatching job for a trucking company. This opinion relies on the assumption, for which no evidence was presented, that employee either had or could acquire keyboarding skills. In other words, Mr. England's opinion is based upon speculation, whereas Ms. Shea's opinion that employee was not employable in the national economy was based upon facts in the record.

The administrative law judge also relied heavily upon the opinions of Dr. Hulseley. However, Dr. Hulseley never even evaluated all of employee's impairments. Dr. Hulseley only provided a 25% permanent partial disability rating of employee's left upper extremity at the level of the shoulder. Dr. Hulseley never measured the range of motion of the right shoulder, never mentioned the left hand, never rated the right shoulder, never even examined the right shoulder, and never offered any restrictions for the right shoulder. Employee is not claiming that he is permanently and totally disabled due to his injuries solely to his left shoulder. Employee is claiming that it is a combination of all of his injuries that has rendered him permanently and totally disabled. Dr. Hulseley's records do not even address employee's claim and it is therefore, illogical for the administrative law judge to rely upon Dr. Hulseley's opinion in denying employee permanent total disability benefits.

Dr. Levy, on the other hand, issued a report wherein he conducted a physical examination and arrived at the conclusion that employee was permanently and totally disabled based upon a combination of his injuries. Dr. Levy is the only physician to review the records of all of employee's treating physicians. For that reason, I find Dr. Levy's opinion much more persuasive on the issue of the nature and extent of employee's disability.

Furthermore, Dr. Hulsey never even addressed the issue of employability except to indicate that because of the left shoulder injury, employee could not return to his prior employment as a commercial truck driver. Therefore, it does not make any sense to suggest, as the administrative law judge did, that Dr. Hulsey's records are more credible than Dr. Levy's sworn testimony on an issue that Dr. Hulsey never even addressed.

For the foregoing reasons, I find Dr. Levy's records and testimony to be the most credible with regard to the issue of employee's nature and extent of disability. In addition, I further find that the administrative law judge's determination to deny employee permanent and total disability benefits is not supported by competent and substantial evidence.

Based on the above, I believe that employee has carried his burden of establishing that he is permanently and totally disabled as a result of a combination of his injuries. Dr. Levy and Ms. Shea provided expert medical and vocational evidence that employee does not have the functional capacity to perform any work on a regular and continuing basis and that employee is unemployable in the open labor market. Therefore, employee is permanently and totally disabled. As such, I would reverse the award of the administrative law judge merely awarding employee permanent partial disability benefits and award employee permanent total disability benefits.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Jimmie Kinsey

Injury No. 04-054935

Dependents: N/A

Employer: Buchheit Enterprises, Inc.

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance Company

Appearances: Joe Rice for the employee
Frank Rodman for the Second Injury Fund

Hearing Date: August 6, 2008

Checked by: LCK/kh

SUMMARY OF FINDINGS

- Are any benefits awarded herein? Yes.
- Was the injury or occupational disease compensable under Chapter 287? Yes.
- Was there an accident or incident of occupational disease under the Law? Yes.
- Date of accident or onset of occupational disease? May 26, 2004.
- State location where accident occurred or occupational disease contracted: Indiana.
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
- Did employer receive proper notice? Yes.
- Did accident or occupational disease arise out of and in the course of the employment? Yes.
- Was claim for compensation filed within time required by law? Yes.
- Was employer insured by above insurer? Yes.
- Describe work employee was doing and how accident happened or occupational disease contracted: The employee was closing a trailer door and injured his left shoulder.
- Did accident or occupational disease cause death? No.
- Parts of body injured by accident or occupational disease: Left shoulder.
- Nature and extent of any permanent disability: 62.5% of the left shoulder.

- Compensation paid to date for temporary total disability: \$34,254.37
- Value necessary medical aid paid to date by employer-insurer: \$56,965.11
- Value necessary medical aid not furnished by employer-insurer: N/A.
- Employee's average weekly wage: \$818.28.
- Weekly compensation rate: \$545.52 for permanent total/\$347.05 for permanent partial.
- Method wages computation: By agreement.
- Amount of compensation payable: \$17,324.74 against the Second Injury Fund.
- Second Injury Fund liability: \$17,324.74.
- Future requirements awarded: N/A.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Joe Rice.

FINDINGS OF FACT AND RULINGS OF LAW

On August 6, 2008, the employee, Jimmie Kinsey appeared in person and by his attorney, Joe Rice, for a hearing for a final award in the employee's claim against the Second Injury Fund. The Second Injury Fund was represented at the hearing by Assistant Attorney General Frank Rodman. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issue that was in dispute. These undisputed facts and issue, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

- On May 26, 2004, Buchheit Enterprises, Inc. was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was fully insured by Liberty Mutual Insurance Company.
- On May 26, 2004, Jimmie Kinsey was an employee of Buchheit Enterprises, Inc. and was working under the provisions of the Missouri Workers' Compensation Act.
- On May 26, 2004 the employee sustained an accident arising out of and in the course of his employment.
- The employer had notice of the employee's accident.
- The employee's claim was filed within the time allowed by law.
- The employee's average weekly wage was \$818.28. The rate of compensation for permanent total disability is \$545.52 per week and for permanent partial disability is \$347.05 per week.
- The employee's injury was medically causally related to the accident.
- The employer has paid \$56,965.11 in medical aid.
- The employer-insurer has paid a total of \$34,254.37 in temporary disability. The last temporary total disability paid was on October 5, 2005.

Judicial notice of the contents of all of the Division's files for the employee was taken.

On November 20, 2006, the employee settled his claim against the employer-insurer for \$50,322.26 based upon a 62.5% permanent partial disability to the left upper extremity.

ISSUE

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

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A-1. Medical records of Dr. Whistler
- A-2. Medical records of Dr. Whistler
- B. Medical records of Dr. Thorpe
- C. Medical records of Dr. Lehman
- D. Records of HealthSouth Rehabilitation
- E. Withdrawn prior to being offered
- F. Southeast Missouri Hospital medical records
- G. Medical report of Dr. Stahle
- H. Medical records of Dr. Emanuel
- I. (Withdrawn prior to being offered)
- J. Medical records of Southeast Missouri Hospital
- K. Records of HealthSouth Rehabilitation
- L. Medical records of Dr. Lents
- M-1. Report of Dr. McGinty dated October 19, 2001. (This exhibit was admitted only for the chronological medical treatment contained in the report.)
- M-2. Report of Dr. McGinty dated April 18, 2002. (This exhibit was admitted only for the

chronological medical treatment listed in his report.)

- N. Medical records of Orthopedic Associates
- O. (Withdrawn prior to being offered)
- P. Medical records of Columbia Orthopaedic Group
- Q. Medical records of Orthopedic Associates
- R. Medical records of Mid-America Rehab
- S. Prior workers' compensation settlements
- T. Vocational report of Susan Shea
- U-1. Medical records of Cape Family Practice
- U-2. Medical records of Cape Family Practice
- V. (Withdrawn prior to being offered)
- W. Report of Dr. Levy
- X. Deposition of Dr. Levy
- Y. Deposition of Susan Shea (The employee's attorney objected to the cross examination of Ms. Shea and requested that parts of the deposition be stricken. The objection was taken under advisement and is overruled.)

Second Injury Fund Exhibits

- Deposition of James M. England Jr., which includes his CV, his November 8, 2007 vocational rehabilitation report, and a list of the records that he reviewed.
- Deposition of Victor Zuccarello which includes his CV, the work hardening evaluation, and the two functional capacity evaluations. (The employee's attorney objected to the admission of this exhibit. The objection was taken under advisement. The objection is overruled and the exhibit is admitted into evidence.)

WITNESSES: Jimmie Kinsey, the employee and William Crites for the employee

BRIEFS: Both the employee and the Second Injury Fund filed their briefs on the day of the hearing. The parties were given an opportunity to file supplemental briefs but neither party did.

FINDINGS OF FACT:

The employee was born on November 16, 1952 and lives in Chaffee Missouri. He graduated from high school in 1971. His occupation since high school has been driving over the road trucks and operating heavy equipment.

Prior Right Shoulder Injury:

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In 1997, the employee was a truck driver for Dannie Gilder. He injured his right shoulder while loading bales of hay. Dr. Thorpe diagnosed a partial tear of the rotator cuff with impingement and instability. A subacromial injection was done and therapy was ordered. Dr. Thorpe noted that an arthrogram showed a complete rotator cuff tear and performed an open rotator cuff repair. In March of 1998, Dr. Thorpe noted the employee could not lift above his head and had some loss of strength. He prescribed work hardening.

The employee was sent to Dr. Lehman who ordered an MRI and then performed an arthroscopic surgery. He released the employee to full duty in August. In September of 1998, Dr. Lehman rated the employee's right shoulder at 8% permanent partial disability. The employee testified that his shoulder healed up and he went back to work. In 1999, he injured his right shoulder again while opening a trailer door. Dr. Lehman ordered an arthrogram which showed a complete tear of his rotator cuff. He recommended a rotator cuff repair. The employee testified that Dr. Lehman operated on his shoulder which was his third surgery.

In October, Dr. Stahle, who is in Dr. Lehman's office, performed a shoulder injection and assessed rotator cuff tendonitis and impingement. In November Dr. Lehman recommended an aggressive stretching and strengthening program. In February of 2000, Dr. Lehman stated the employee was at maximum medical improvement. The employee was seen by Dr. Stahle on April 19. The employee stated that his shoulder was quite sore and felt like a knife was stabbing him. Dr. Stahle stated that the employee was very sensitive to even light palpation over the skin, which was concerning for symptom magnification. The employee had pain with almost any movement which was mostly subjective in nature. Dr. Stahle gave the employee an injection in his shoulder and stated that there was nothing further he could offer him.

The employee testified that after the surgery by Dr. Lehman his right shoulder never got well and did not stop hurting. He went to Dr. Emanuel who performed a fourth shoulder operation.

On May 16, 2000, Dr. Emanuel noted that the employee had done poorly with his shoulder. An x-ray revealed some retained bone in the area of the distal clavicle. Dr. Emanuel recommended surgery with an evaluation of the cuff, and to perform an open cuff repair, if it was torn; and an open distal clavicle resection due to retained bone. On October 11 Dr. Emanuel performed an arthroscopic subacromial decompression, and distal clavicle resection. In the operative report, it is noted there was no evidence of a re-tear of the rotator cuff. Dr. Emanuel removed a large retained spur and completed the distal clavicle resection and removed the bone back to the coracoclavicular ligament.

Dr. Emanuel stated on January 11, 2001 the employee was ready to return to work. The employee had 170 degrees of flexion/abduction, 90 degrees of external rotation, and 60 degrees of internal rotation. Dr. Emanuel discharged him and stated he was at maximum medical improvement. Based on the surgeries performed and some residual loss of motion; he rated the employee at 10% permanent partial disability of the upper extremity.

In March of 2003, Dr. Whistler referred the employee to Dr. Adams at Columbia Orthopedic Group. The employee had returned to work in January of 2001 and had increasing levels of pain and tenderness and decreased motion. Dr. Adams' impression was right shoulder rotator cuff dysfunction and probable re-tear. An MRI showed a very thinned rotator cuff interval which may be a post operative appearance, and possible bursal surface abrasion or partial tearing at the supraspinatous junction. Dr. Adams stated the employee continued to have great difficulties in working and was having pain whether driving, sleeping, and lifting or anything else. The MRI showed extensive post operative changes and a question of a tear at the musculotendinous junction and the supraspinatous tendon.

In February of 2004, the employee in injury number 99-173912 settled his claim for 30% of the right shoulder.

The employee testified that he has loss of motion in his right shoulder. Out to the side he can get his arm just past shoulder high but cannot get it over his head. He is right handed and to comb his hair he has to duck his head. He has shoulder pain when he uses his right arm and has no strength. He has trouble lifting things up. After the right shoulder surgeries, he learned to use his left arm as his dominant arm even learning to cook with it. His employer gave him a new truck which drove and shifted a lot easier and had an arm rest.

- Pre-Existing Left Hand:

- The employee hurt his left ring and little fingers in a motor vehicle accident in August of 2001. Dr. Trueblood noted that the employee was having a great deal of difficulty extending his fourth and fifth finger fully. Dr. Lents immobilized the left little and ring fingers due to radial collateral ligament tears and ordered physical therapy. In February of 2002, Dr. Lents stated that the employee was stiff at the MP joints but did not feel there was any operative procedure that would make that appreciably better. On May 10, Dr. Lents noted the employee tolerated his job well and did not think that the employee could be measurably improved

with any surgery and would see him back as needed. In injury number 01-119798, the employee settled his claim for 20% of the left hand in October of 2002.

The employee testified that he went back to work at Bucheit's and had some problems with his left hand in driving. He held the steering wheel with his thumb, index and middle fingers. He has trouble straightening the ring and small fingers. He cannot curl up his small finger and cannot make a good fist due to the loss of range of motion in the ring and small fingers. He has trouble holding anything and uses his thumb, index and middle fingers.

The employee testified that leading up to May 26, 2004, he was driving over the road. He averaged 2,600 miles a week but sometimes would drive 3,000 miles a week. He did all routes and trips that his employer asked him to do. The dispatchers knew that his right shoulder was bad and he was given the newest truck to drive.

Primary Left Shoulder Injury:

On May 26, 2004, the employee was unloading a truck. His feet slipped and he injured his left shoulder; and went to the emergency room. On May 28 and June 10 the employee went to Cape Family Practice for left shoulder pain.

The employee started treating with Dr. Lents in June for his left shoulder. An MRI showed a tear of the supraspinatous tendon and a very large subacromial spur. Dr. Lents performed a rotator cuff repair and excision of the distal clavicle. There was a tear in the rotator cuff with detachment from the supraspinatous tendon. In October the employee stated that his pain was worse than before surgery and he had limited motion. The employee received twenty-five therapy visits at Mid America Rehab.

The employee was sent to Dr. Hulsey for his left shoulder in October. Dr. Hulsey stated that most of the pain was consistent with rotator cuff irritation and he was concerned that he may have return the rotator cuff post operatively. He ordered an MRI to evaluate the rotator cuff and the labrum. The MRI was consistent with a small recurrent tear of the supraspinatous tendon and Dr. Hulsey recommended a second arthroscopy. The post operative diagnosis was a recurrent rotator cuff tear of the left shoulder and Type I labral tear. The procedure performed was an arthroscopy with subacromial decompression and mini open rotator cuff repair.

The employee had 30 physical therapy treatments starting at the end of November of 2004 and concluding in early February of 2005. The employee's range of motion was limited due to guarding. The therapist stated that the employee appeared to have demonstrated the ability to perform essential job functions of driving a truck but did not demonstrate the ability to load and unload freight. In March of 2005, due to a flare up of inflammation in the subacromial and rotator cuff area Dr. Hulsey prescribed a Medrol-dose pack and Darvocet. On March 18, the employee had an evaluation at Mid-America Rehab. He had sharp stabbing pains and a severe ache at rest. The employee appeared to have an exacerbation of pain and range of motion loss. The employee had subjective complaints of pain and was guarded with range of motion.

In April the employee still had a great deal of discomfort and could not elevate his arm in an abducted position without pain. Dr. Hulsey injected the subacromial space. There was a questionable recurrent rotator cuff tear and an arthrogram was ordered. Dr. Hulsey stated that the arthrogram showed what appeared to be a significant retearing of the tendon and recommended a third surgical repair. He performed an arthroscopic and open exploration with biceps tenodesis. The employee had moderate fraying of the biceps tendon with frayed but intact rotator cuff.

Physical therapy was begun in June of 2005. In July the employee continued to be limited with functional range of motion and strength. In August, after twenty-three visits, the employee appeared to be limited in range of motion and strength due to subjective complaints of pain and guarding.

The employee had persistent rotator cuff irritation and had not progressed as anticipated. Dr. Hulsey stated that his subjective complaints seemed to be greater than the pathology at the last surgery.

Mr. Zuccarello performed work hardening on the employee beginning on August 22. In the initial evaluation, there was consistent effort but over guarding which may have limited progress during physical therapy and may limit progress in work hardening. On August 26, the employee had severe over guarding which was limiting the employee's progress.

Mr. Zuccarello performed a functional capacity evaluation on September 6, 2005. There was inconsistent active range of motion with over guarding. The employee's pain level was inconsistent with the level of function. There were global subjective complaints of the shoulders. Although the employee demonstrated the inability to meet the lifting requirements, truck drivers commonly pay labor to unload their trucks which eliminates lifting. It was Mr. Zuccarello's opinion that the employee should be able to perform his full duty job.

On September 8, 2005, Dr. Hulsey noted that the employee stated he had difficulty in doing many things especially driving. The functional capacity evaluator thought he could return back to driving but not heavier lifting. Dr. Hulsey stated his subjective complaints have been persistent despite the last surgery in which the rotator cuff was found to be intact. Dr. Hulsey thought that the employee would have difficulty in driving commercially and he released him to return to work with no lifting overhead, no driving no more than an hour at a time, and to avoid climbing ladders.

On November 29, the employee reported no change in his pain. With his arm close to his side, he can function fairly well but cannot reach out shoulder level or above. Dr. Hulsey noted that the employee could actively elevate only to about 90 degrees but with some assistance up to 120 degrees. External rotation was almost fifty degrees. Dr. Hulsey thought the employee had reached maximum medical improvement and he was released from care. Dr. Hulsey did not feel that he could return back to his previous occupation. Based on the subjective symptoms as well as clinical findings, Dr. Hulsey stated that the employee should avoid overhead lifting of more than 15-20 pounds and avoid commercial driving.

In December of 2005 and March of 2006, the employee went to Cape Family Practice due to left shoulder pain. The employee settled his claim for 62.5% of the left upper extremity at the shoulder on November 20, 2006.

Testimony of the employee:

The employee testified that he has a loss of motion in his left shoulder. With regard to the front, his arm goes up but does not go over shoulder level. With regard to the side, his arm goes a little higher. He has constant pain and no strength. He can lift 3 or 4 cans in a sack. He has been on Lorcet since the surgery by Dr. Hulsey and takes ½ Lorcet four times a day. After hurting his left shoulder, he no longer did lawn work or rode 4 wheelers. He sold his horses because he could not take care of them or ride them. He cannot operate heavy equipment because he is unable to move his arms and control the levers. He has trouble driving due to problems holding his arms and operating the steering wheel. He does not put his arms on the top of the steering wheel and is able to drive for short trips. He had someone else drive him to St. Louis. His neighbor mows his yard and his sister does the weed eating. He is able to use a microwave but uses paper plates because he has trouble doing the dishes with his shoulders. He eats out quit a bit. His girlfriend, Teresa, cleans his house and does his laundry. His sister does 90% of his shopping; He has gone back to

using his right arm due to the pain in his left shoulder.

The employee testified that he has never operated a computer. He took typing in high school for one quarter but did not do very well. He has no typing skills. He was in the trucking industry for about twenty years and is familiar with the job of a dispatcher but he does not know how to use computers and has no idea how to do the job. He can read and write. He kept track of his log book when he was an over the road truck driver.

The employee testified that his primary problems are in the shoulders. If he stand ups and lets his arm hang then his shoulder hurts. His shoulder does not hurt if he sits and props it up on an arm rest or table. His elbow and wrists are fine. He can move his arms below the shoulder level. The employee has had no injuries or surgeries to his legs, back or neck. He has no problems walking long distances and it does not bother his shoulders. He can sit without problems.

Testimony of William Crites:

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At the hearing, the Second Injury Fund objected to the testimony of Mr. Crites concerning the employability of the employee. The objection was sustained. An offer of proof was made by the employee. I am now overruling the objection and allowing all of the testimony of Mr. Crites into evidence.

Mr. Crites lives in Chaffee and owns Larry's Quick Mart. He has known the employee for about 18 months. The employee comes into his store on a regular basis and he has observed him sitting at a coffee table. He has heard what the employee said about his shoulders but has not seen him move his shoulders. Mr. Crites testified that the way the employee's shoulders are he would not hire him but he has not had the employee do any work at his store. The employee has not applied for a job. Based on what he has said, he would not hire the employee because he would not want him to injure his shoulders again.

Mr. Crites testified that a clerk at his store would do chest high and overhead work including filling an ice machine twice a day with a bucket of ice which weighs about 20 pounds. A bag of mix that weighs about twenty-five pounds has to be put into an ice cream machine. With regard to stocking, there is one shelf that is chest high or above that an employee would be expected to fill. Mr. Crites testified that operating a cash register machine requires dexterity but it was possible that a one armed person could be a cashier. Mr. Crites stated that based on his knowledge of the employee, he would not hire him because of his shoulder condition and because he does not believe that the employee is computer literate. Mr. Crites has not physically examined the employee and has not asked the employee to do anything physically to see if he would be able to do the requirements of the job.

Report and Deposition of Susan Shea:

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The employee met with Susan Shea on December 20, 2005 for a vocational assessment. The employee graduated from high school in 1971 and was a fair student. The employee has performed physical labor for all of his vocational life. It was Ms. Shea's opinion that the employee was incapable of obtaining or sustaining substantial work as typically performed in the national economy and it was highly unlikely that any typical employer would consider the employee as a potential employee.

The factors she used in her opinion include but are not limited to:

- The restriction of a maximum lift of thirty-five pounds from floor to waist, which places the employee at a lifting level between light and medium work.
- The limitation from waist to shoulder level lift of twenty pounds limits the employee to light work.
- The restriction of needing to avoid overhead lifting and commercial driving restricts the full performance of light

work.

- The inability to stand for a prolonged period of time limits him to sedentary work.
- The limitation of fine motor skills eliminates the majority of light work. There is no indication whether the employee is able to perform work requiring fine motor skills.
- The employee is fifty-three years old. After age fifty, it is a standard that it becomes more difficult for an individual to adjust to new types of work.
- Post testing pain level of six to eight out of ten eliminates all work.
- The employee takes a narcotic medication which can affect the cognitive processes and can cause increase mistakes and inability to maintain acceptable pace of work.
- The employee stated that he compensated with his left arm after the right arm injury and experienced re-injuries to both shoulders. The employee has shown determination to remain working as long as possible.
- The physicians noted the employee's residual pain.
- The physicians indicated that there were residual problems after treatment of the injuries to his left fingers and right shoulder.
- The employee has had numerous surgeries including multiple surgeries to the same body parts, which increases the chance of injury to those body parts and acts as a deterrent to potential employers.

The deposition of Susan Shea was taken on July 31, 2007. Ms. Shea did not believe that the employee was employable in the national economy or that any typical employer would consider hiring Mr. Kinsey. She took into consideration the pre-existing conditions and problems to the right shoulder and to the fingers of his left hand. The limitation of fine motor skills was on the left hand. Ms. Shea did not perform any transferable skills analysis.

Ms. Shea stated the employee had an inability to stand for long periods of time which is not taken from medical records but from talking to the employee. She reviewed no treatment records relating to the back problem but stated that the shoulder and upper body tension affects the ability to stay in any fixed position for prolonged periods. Ms. Shea said that there are a number of people taking pain medication while working. The employee could be excluded from jobs because he was taking Darvocet, but it depends on the policies of the employers.

Ms. Shea stated that she would not employ the employee and it was her opinion she did not think that anybody was going to hire him. Ms. Shea stated if the medical restrictions that have been prescribed by Dr. Hulsey and Mr. Zuccarello were his only restrictions, there would be work which the employee could perform which would include sedentary unskilled jobs.

Report and Deposition of Dr. Levy:

Dr. Levy examined the employee on November 17, 2005. The employee had almost no active or passive movement in the left shoulder which is commonly referred to as a total frozen shoulder. The employee has passive but no active motion of the left ring and little fingers. With regard to the right shoulder, he had a 25% loss of forward elevation, 15% loss of abduction, 50% loss of internal rotation and 33% loss of external rotation.

It was Dr. Levy's opinion that the employee had an 80% permanent partial disability of the left upper extremity at the left shoulder due to the May 2004 accident. It was Dr. Levy's opinion the employee had a pre-existing 40% permanent partial disability of the right upper extremity at the shoulder and a pre-existing 15% permanent partial disability of the left upper extremity at the wrist which were a hindrance or obstacle to employment and to re-employment should the employee become unemployed. It was further Dr. Levy's opinion that the combination of the impairments created a greater disability than the simple sum of each and a loading factor should be added. Considering these disabilities, he was permanently and totally disabled and unable to compete in the open labor market.

The deposition of Dr. Levy was taken on February 13, 2007. Dr. Levy stated that the employee has two terrible shoulders, one worse than the other. The two combined are a greater disability than the simple total of each. It was his opinion that employee was permanently and totally disabled and unable to compete in the open labor market as a result of all of those injuries.

Dr. Levy determined that the employee could not be retrained for lighter duty work and thought the employee was not employable in the open labor market due to the employee being fifty-three years of age. The employee could not perform driving in a safe manner or lift. Even if the employee had transferable skills, it would be very difficult to find a line of work that he could do because of his arms.

Dr. Levy did not note any limitations of walking, standing, sitting, bending, squatting or kneeling; did not examine the employee's back or lower extremities; and was not aware of any problems with those areas.

On September 29, 2005 Dr. Hulsey found that the employee could elevate his left shoulder to 90 degrees and 120 degrees with assistance and external rotation to 50 degrees. Dr. Levy stated that it was not common to achieve that type of motion with a totally frozen shoulder and he could not explain why there was a frozen shoulder two months after seeing Dr. Hulsey.

Dr. Levy stated that the employee could use his hands and could do some fine motor skills but he did not do any testing to determine what type of fine motor skills he could do. Dr. Levy did not list any permanent restrictions.

Deposition of Victor Zuccarello:

The deposition of Mr. Zuccarello was taken on October 26, 2007. He first evaluated the employee for a work conditioning program on August 22, 2005. He assessed the employee's ability for standing, walking, climbing, squatting, bending, kneeling, sitting, reaching and grasping. With the exception of reaching and grasping, all the activities were unrestricted. Reaching and grasping was done on an occasional basis on the left. The employee demonstrated the ability to perform light work activities. There was some over guarding which can occur for a number of reasons and it means that there was not full participation. Mr. Zuccarello then performed work conditioning.

On September 6, 2005, he performed a functional capacity evaluation. The employee's ability to handle materials improved and he was able to handle thirty-five pounds on an occasional basis. He could perform waist to shoulder and shoulder to overhead lifting up to twenty pounds with both arms. Mr. Zuccarello did not see any restrictions in standing, walking, climbing, squatting, bending, kneeling or sitting. He was able to reach frequently with the involved side. With regard to the non-material handling, he could reach and grasp frequently. The material and non-material handling improved since August 22. Mr. Zuccarello stated that the employee was able to function in a medium work or physical demand level which was from twenty-one to fifty pounds on an occasional basis. The employee's active range of motion and strength in the left upper extremity had improved. The employee's effort was consistent and there was some over guarding and several significant organic signs. There were very high pain levels despite the improved function.

It was Mr. Zuccarello's opinion that the employee failed to perform the tasks that would be required of an over the road truck driver but thought that the employee demonstrated the physical abilities to perform medium duty work. He stated that he saw improved range of motion of his shoulder especially passive range of motion which was pretty much near normal.

Deposition and Report of James England:

The deposition of James England Jr. was taken on February 28, 2008. Mr. England stated that Dr. Hulsey's restrictions of no lifting overhead of more than fifteen to twenty pounds and no commercial driving effectively removed him from doing his regular career work. In his deposition, the employee indicated that he was not able to lift above chest level and didn't feel he could lift more than about twenty pounds.

Mr. England reviewed the functional capacity evaluation done in September of 2005. The therapist felt that the employee should be able to lift thirty-five pounds from the floor to waist, twenty pounds from waist to shoulder and could carry thirty-five pounds. Dr. Hulsey recommended no overhead lifting of more than fifteen to twenty pounds, no driving more than an hour at a time and avoiding climbing ladders. Mr. England stated that it did not appear to that the employee could go back to driving a truck or operating heavy equipment.

Mr. England stated that Ms. Shea did not perform any vocational testing and there was no indication that the employee was not able to be trained. Mr. England stated that with the knowledge that the employee has of the trucking industry, if he had some basic keyboarding ability dispatching would be a logical use of his knowledge. The physical restrictions from Dr. Hulsey and the functional capacity evaluation would allow at least sedentary to light work without much restriction. The kinds of entry level employment that the employee could do without any additional training or skill development would be things like retail sales, cashiering, security work, and maybe a courier delivering small packages. There is a variety of available entry level service jobs. If the employee wanted to acquire additional knowledge or skills, State Vocational Rehabilitation in Cape Girardeau can provide career counseling and additional skill development at no cost to him.

Mr. England agreed that the employee would be disqualified from some types of work activity. He has physical impairment of the right shoulder which would affect his ability to perform certain kinds of work. Mr. England agreed that if the employee had loss of motion or strength in his left hand that could affect his ability to keyboard. The employee would not be able to get a dispatching type of job without additional training or basic keyboarding skills. Mr. England was not aware of any indication that the employee would not be able to learn basic keyboarding so that he could possibly be a dispatcher.

Mr. England thought the employee could do sedentary to light work but not in an assembly line or something else that involves rapid movement of the hands and shoulders. General retail sales are normally a light job, which is learned pretty quickly and does not require established skill or knowledge. Mr. England listed being a cashier at a supermarket, Wal-Mart or convenience store. Security work such as a guard is a position where employees typically sit, stand and move around with not a lot of physical activity.

In his November 8, 2007 evaluation, Mr. England stated that it did not appear that the employee could return to truck driving or operation of heavy equipment but his knowledge of trucking could potentially be used in a dispatching job provided he had some basic keyboarding skills. The results of the FCE and the opinion of his treating doctor certainly backed up the idea that the employee could at least do sedentary to light forms of employment which would include retail sales, cashiering, and security work. If he wanted to acquire additional skills and further widen the range of possibilities and raise his wage earning potential, he is eligible for a complete range of assistance, including career counseling, skill development, tuition, books and transportation as well as job placement and follow-up at no cost through the state agency in Cape Girardeau. Mr. England stated there not anything in the medical that would lead him to believe that the employee was totally disabled from all types of work activity.

RULINGS OF LAW:

Issue 1. Liability of the Second Injury Fund for either Permanent Total Disability or Permanent Partial Disability

Permanent Total Disability:

The employee has alleged that he is permanently and totally disabled as a result of a combination of his pre-existing conditions to his right shoulder and left hand and his last injury to his left shoulder. Under Section 287.220.1 RSMo. the Second Injury Fund is liable for permanent and total disability benefits only if the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability.

Section 287.020.7 RSMo. provides as follows:

The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

The phrase "the inability to return to any employment" has been interpreted as the inability of the employee 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. Kowalski v M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. Reiner v Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". Brown v Treasurer of the State of Missouri, 795 S.W.2d 479, 483(Mo.App.1990). The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's physical condition, reasonably expecting the employee to perform the work for which he or she is hired. Reiner at 365. See also Thornton v Haas Bakery, 858 S.W.2d 831, 834 (Mo.App.1993).

Mr. Crites testified that he would not hire the employee at his convenience store because of what he has heard the employee tell him about his shoulders. However Mr. Crites has not seen the employee move his shoulders, has not physically examined him and has not asked the employee to do anything physically to see if he would be able to do the requirements of the job.

Ms. Shea did not believe that the employee was employable in the national economy or that any typical employer would consider hiring him. Ms. Shea stated that she would not employ the employee. However, Ms. Shea did not perform a transferable skills analysis and did not perform any vocational testing. Ms. Shea stated if the only restrictions were the ones prescribed by Dr. Hulsey and Mr. Zuccarello, there would be work the employee could perform which includes sedentary unskilled jobs.

It was Dr. Levy's opinion that the employee was permanently and totally disabled and unable to compete in the open labor market as a result of the combination of his injuries to his upper extremities. It was his opinion that the employee could not be retrained for a lighter duty work. Even if the employee had transferable skills, it would be very difficult to find a line of work that he could do because of his arms. Dr. Levy was not aware of any problems to the employee's back or lower extremities and did not note any limitations in walking, standing, sitting, bending, squatting or kneeling. Dr. Levy stated that the employee could use his hands and could do some fine motor skills

It was Mr. Zuccarello's opinion that the employee could not perform that tasks that would be required to be an over the road truck driver. Mr. Zuccarello thought that the employee demonstrated the physical abilities to perform medium duty work and did not find any restrictions in sitting, standing, walking, climbing, squatting, bending, and kneeling.

Dr. Hulsey released the employee to return to work but did not believe that he could return to his

previous occupation. He put the employee on restrictions of no overhead lifting of more than 15-20 pounds and no commercial driving.

Mr. England stated that the employee would be disqualified from some types of work activity and it did not appear that the employee could go back to driving a truck or operating heavy equipment. Mr. England stated that the physical restrictions from Dr. Hulsey and from the functional capacity evaluation would allow the employee to perform at least sedentary to light work without much restriction. He thought the employee could do sedentary to light work. Mr. England stated that with the knowledge that the employee has of the trucking industry, if he had some basic keyboarding ability then he thought dispatching would be a logical use of his knowledge. Mr. England stated that there was no indication that the employee was not able to be trained or learn basic keyboarding so that he could possibly be a dispatcher. Mr. England stated there was not anything in the medical that would lead him to believe that the employee was totally disabled from all types of work. Mr. England listed a number of jobs that the employee could perform and which were available in the open labor market.

The employee was observed for approximately an hour and forty-five minutes at the hearing. The employee did not appear to be uncomfortable or in pain. The employee testified that he has no problems with his elbows and wrists; can move his arms below the shoulder level; has no problems with his neck, back or legs; and has no problems walking long distances or sitting.

Based on a review of the evidence, I find that the opinions of Dr. Hulsey, Mr. England and Mr. Zuccarello are more credible than the opinions of Dr. Levy, Ms. Shea, and Mr. Crites on the issue of employability.

Based on the medical and vocational evidence, the employee's testimony and his observed behavior at the time of the hearing, I find that the employee has failed to satisfy his burden of proof on permanent total disability. Although the employee's injuries will likely preclude the employee from being an over the road truck driver or operating heavy equipment, the evidence does not support a finding that he is unemployable in the open labor market. I find that the employee is not permanently and totally disabled as a result of the combination of his pre-existing disabilities and the last injury to his left shoulder. The employee's request for an award of permanent total disability against the Second Injury Fund is denied.

Permanent Partial Disability:

In the alternative, the employee has requested an award of permanent partial disability against the Second Injury Fund. Based on the testimony of the employee and the medical evidence submitted, I make the following rulings:

Primary injury:

Based on the medical and the testimony of the employee, I find that the primary injury to the employee's left shoulder resulted in a 62.5% permanent partial disability of the left shoulder at the 232 week level for a total of 145 weeks of compensation.

Right Shoulder:

Based on the medical and the testimony of the employee, I find that the employee's pre-existing injury to his right shoulder was of such seriousness as to constitute a hindrance or obstacle to employment or obtaining re-employment. I find that the pre-existing right shoulder injury resulted in a 30% permanent partial disability of the right shoulder at the 232 week level for a total of 69.6 weeks of compensation.

Left Hand:

Based on the medical and the testimony of the employee, I find that the employee's pre-existing injury to his left hand was of such seriousness as to constitute a hindrance or obstacle to employment or obtaining re-employment. I find that the pre-existing left hand injury resulted in a 20% permanent partial disability of the right hand at the wrist at the 175 week level for a total of 35 weeks of compensation.

Conclusion:

I find that the employee's pre-existing injuries to the right shoulder and left hand and the last injury to the left shoulder combined synergistically to create a total disability of 299.52 weeks. This total disability is based on a loading factor of 20%. After deducting the percent of disability that existed prior to the last injury (104.6 weeks) and the disability resulting from the last injury considered alone (145 weeks) from the total disability attributable to all injuries or conditions existing at the time of the last injury (299.52 weeks), the remaining balance to be paid by the Second Injury Fund is equal to 49.92 weeks. The Second Injury Fund is therefore directed to pay to the employee the sum of \$347.05 per week for 49.92 weeks for a total award of permanent partial disability equal to \$17,324.74.

ATTORNEY'S FEE:

Joe Rice, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: _____

Made by:

Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Jeff Buker
Division Director
Division of Workers' Compensation