

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

Injury No.: 06-006481

Employee: Anthony Ladd

Employer: Residential Sewage Treatment Company, Inc. (Settled)

Insurer: Secura Insurance Company (Settled)

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

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge (ALJ), dated August 24, 2010, referable solely to Injury No. 06-006481, as supplemented herein.

**Preliminaries**

Employee settled his claim against employer and proceeded to final hearing against the Second Injury Fund. The ALJ heard this matter to consider, among other issues, the nature and extent of any Second Injury Fund liability with respect to employee's 2006, accident.

The ALJ found that employee failed to prove any enhanced permanent partial disability as a result of his alleged preexisting disabilities combining with his 2006 injury. Therefore, employee's claim against the Second Injury Fund for the 2006, injury was denied.

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

Therefore, the primary issue currently before the Commission is the nature and extent of any Second Injury Fund liability.

**Findings of Fact and Conclusions of Law**

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

On January 25, 2006, employee injured his left knee when he stepped into a hole at work and his left leg sank into the ground up to his waist. On March 14, 2006, Dr. Rhoades performed arthroscopic surgery on employee's left knee. Dr. Rhoades released employee on May 17, 2006, to return to work full duty. Employee filed a Claim for Compensation with regard to this injury and later settled with employer. As part of the settlement, employer agreed to pay for employee's medical expenses of \$11,168.12 and \$367.80 in

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2005 unless otherwise indicated.

Employee: Anthony Ladd

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temporary total disability benefits. All other issues were settled for the lump sum of \$500.00.

We find, as did the ALJ, that employee failed to prove any enhanced permanent partial disability resulting from a combination of the 2006, injury with any alleged preexisting disabilities.

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." The employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Section 287.220.1 provides certain thresholds that both the primary injury and the preexisting disabilities must meet before the Second Injury Fund is found liable. Before analyzing any synergistic effect of the primary injury and preexisting disabilities, it must be determined that both the primary injury, by itself, and the preexisting disabilities, by themselves, result in a minimum of 12.5% permanent partial disability of the body as a whole, or if the injury is to a major extremity, 15% permanent partial disability to said extremity. If the primary injury and preexisting disabilities do not both satisfy either of these disability minimums, the analysis stops there and the claim against the Second Injury Fund is denied.

In this case, employee was treated by Dr. Rhoades for approximately four months and then released to full duty work. Employee returned to his same job and duties. Employee testified that when he returned to his job he would use a bucket to sit on instead of getting down on his knees. Dr. Poppa evaluated employee on July 24, 2009, and opined that as a result of employee's 2006, injury he sustained 20% permanent partial disability of the lower left extremity rated at the knee. Dr. Poppa also opined that employee's 1998, head injury resulted in 15% permanent partial disability of the body as a whole and his 2001, right elbow injury resulted in 20% permanent partial disability of the right upper extremity rated at the elbow.

Employee settled his 2006, injury claim against employer for \$500.00 at the 160 week level.

We find, as did the ALJ, that Dr. Poppa's opinions are not credible. Regardless of the fact that Dr. Poppa issued two separate reports with different conclusions both dated July 24, 2009, his opinions do not accurately reflect employee's conditions with regard to the 2006, injury or his alleged preexisting disabilities.

We find that the weight of the evidence shows that employee's 2006, injury did not come close to resulting in 15% permanent partial disability to employee's lower left extremity. Employee treated with Dr. Rhoades for four months and returned to full duty work. In addition, he settled his claim against employer for a mere \$500.00. For the foregoing reasons, we find that employee's claim against the Second Injury fund for his

Employee: Anthony Ladd

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2006, injury is denied because the primary injury did not meet the 15% permanent partial disability threshold required for Second Injury Fund liability in § 287.220.1.

**Award**

We affirm, as supplemented herein, the ALJ's denial of Second Injury Fund liability with respect to employee's 2006, injury.

The award and decision of Administrative Law Judge Carl Mueller, issued August 24, 2010, is attached and incorporated to the extent it is not inconsistent with this final award.

Given at Jefferson City, State of Missouri, this 31<sup>st</sup> day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

**DISSENTING OPINION FILED**

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

Employee: Anthony Ladd

**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 ALJ should be reversed and employee should be awarded enhanced permanent partial disability benefits against the Second Injury Fund.

Dr. Poppa, the only doctor to perform an independent medical evaluation of employee, concluded that as a result of the 2006, injury employee sustained 20% permanent partial disability of his lower left extremity rated at the knee. Dr. Poppa also opined that employee's 1998, head injury resulted in 15% permanent partial disability of the body as a whole and his 2001, right elbow injury resulted in 20% permanent partial disability of the right upper extremity rated at the elbow.

Despite Dr. Poppa's ratings and no contradictory ratings presented by the Second Injury Fund, the ALJ and the majority found that employee's resulting permanent partial disability from the 2006, injury did not meet the threshold provided in § 287.220.1. I find this in error.

Although employee settled his claim against employer for the lump sum of \$500.00, this settlement is not binding with regard to his claim against the Second Injury Fund. See *Totten v. Treasurer of the State of Missouri*, 116 S.W.3d 624, 628 (Mo. App. 2003).

I find that the ALJ and the majority erroneously disregarded the opinions of Dr. Poppa in finding that employee's 2006, injury did not meet the 15% permanent partial disability threshold. I further find that employee's 2006, injury combined with his preexisting disabilities to result in enhanced permanent partial disability and that the Second Injury Fund is liable for this enhanced amount.

I find that the ALJ and the majority arbitrarily disregarded employee's undisputed evidence and, therefore, the ALJ's award should be reversed. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member

## FINAL AWARD

Employee: Anthony Ladd Injury Nos: 06-006481  
07-029181  
08-079188

Dependents: N/A

Employer: Residential Sewage Treatment Company, Inc. (settled)

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Insurer: Secura Insurance Company

Hearing Date: July 19, 2010 Checked by: RCM/rm

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein?  
06-006481: No  
07-029181: No  
08-079188: No
2. Was the injury or occupational disease compensable under Chapter 287?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
3. Was there an accident or incident of occupational disease under the Law?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
4. Date of accident or onset of occupational disease:  
06-006481: January 25, 2006  
07-029181: March 27, 2007  
08-079188: August 11, 2008
5. State location where accident occurred or occupational disease was contracted:  
06-006481: Holden, Johnson County, Missouri  
07-029181: Leavenworth, Kansas  
08-079188: Smithville, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
7. Did employer receive proper notice?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes

8. Did accident or occupational disease arise out of and in the course of the employment?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
9. Was claim for compensation filed within time required by Law?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
10. Was employer insured by above insurer?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
06-006481: employee stepped in a hole and injured his left knee.  
07-029181: employee injured his back when lifting a 125 pound pump out of a septic system lift station.  
08-079188: employee injured his back when lifting a 25 pound aeration motor out of a septic tank.
12. Did accident or occupational disease cause death? Date of death? N/A  
06-006481: No  
07-029181: No  
08-079188: No
13. Part(s) of body injured by accident or occupational disease:  
06-006481: left knee (settled with employer for \$500.00)  
07-029181: neck, body as a whole (settled with employer for 20% PPD)  
08-079188: low back, body as a whole (settled with employer for 22.5% PPD)
14. Nature and extent of any permanent disability: See Award
15. Compensation paid to-date for temporary disability:  
06-006481: \$367.80  
07-029181: \$1,035.31  
08-079188: \$9,126.38
16. Value necessary medical aid paid to date by employer/insurer? \$5,169.21  
06-006481: \$11,168.12  
07-029181: \$75,297.56  
08-079188: \$42,606.64
17. Value necessary medical aid not furnished by employer/insurer?  
06-006481: none  
07-029181: none  
08-079188: none
18. Employee's average weekly wages:  
06-006481: \$538.00  
07-029181: \$566.00  
08-079188: \$617.20

19. Weekly compensation rate:

06-006481: \$358.67/\$358.67

07-029181: \$376.55/\$376.55

08-079188: \$411.47/\$404.66

20. Method wages computation: MO.REV.STAT. §287.250

21. Amount of compensation payable from Employer: Not applicable; claimant settled with the employer.

22. Second Injury Fund liability: None.

23. Future requirements awarded: None

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Anthony Ladd Injury Nos: 06-006481  
07-029181  
08-079188

Dependents: N/A

Employer: Residential Sewage Treatment Company, Inc. (settled)

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Insurer: Residential Sewage Treatment Company, Inc. (settled)

Hearing Date: July 19, 2010 Checked by: RCM/rm

On July 19, 2010, the employee and the State Treasurer as Custodian of the Second Injury Fund (“Second Injury Fund” and “Fund”) appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Anthony Ladd, appeared in person and with counsel, Thomas G. Munsell. The Fund appeared through Assistant Attorney General Benita Seliga. The issues presented were whether Mr. Ladd is permanently and totally disabled and whether the Fund is liable for such disability. For the reasons noted below, I find Mr. Ladd failed to prove that the disability from his August 11, 2008 combined with his alleged disabilities that pre-existed his accident to result in any additional disability, partial or total.

### STIPULATIONS

The parties stipulated that:

1. January 25, 2006, March 27, 2007 and August 11, 2008 (“the injury dates”), the Residential Sewage Treatment Company, Inc. (“RST”) was an employer operating subject to Missouri’s Workers’ Compensation law with its liability fully insured by Secura Insurance Company;
2. Mr. Ladd was RST’s employee working subject to the law in Holden, Missouri for the January 25, 2006 injury, Leavenworth, Kansas for the March 27, 2007 injury, and Smithville, Missouri for the August 11, 2008 injury;
3. Mr. Ladd sustained an accident arising out of and in the course of employment with RST on January 25, 2006, March 27, 2007 and August 11, 2008;

4. Mr. Ladd notified RST of his injuries and filed his claim for the August 11, 2008 injury within the time allowed by law;
5. RST provided Mr. Ladd with medical care costing \$11,168.12 for the January 25, 2006 injury, \$75,297.56 for the March 27, 2007 injury, and \$42,606.64 for the August 11, 2008 injury; and,
6. RST paid Mr. Ladd temporary total disability compensation totaling \$367.80 for the January 25, 2006 injury, \$1,035.31 for the March 27, 2007 injury, and \$9,126.38 for the August 11, 2008 injury.

## **ISSUES**

The parties requested the Division to determine:

1. Whether Mr. Ladd suffered any disability and, if so, the nature and extent of his disability and whether he is permanently and totally disabled?
2. Whether the SIF is liable to Mr. Ladd for any disability compensation?
3. Determining the employee's average weekly wage and compensation rates?
4. Whether Mr. Ladd's claim was filed within the time allowed by law and 06-006481 and 07-029181?
5. Whether the accidents caused the disability the employee claims?

## **FINDINGS OF FACT**

Mr. Ladd testified on his own behalf and presented three exhibits, all of which were admitted into evidence without objection:

- A - Records, David Ebelke, MD
- B - Stateline Imaging Records
- C - Records, Dr. Pang (Rockhill Orthopaedics)
- D - Paincare Records
- E - Records, Dr. Adrian Jackson
- F - Records, Dr. Charles Rhoades
- G - Records, Dr. Gary Baker

- H - Records, Research Medical Center
- I - Withdrawn
- J - Records, Concentra
- K - Certified copies of Settlements
- L - Deposition, Michael Poppa, DO, 4/22/2010 and 5/10/201
- M - Deposition, Michael Dreiling, May 18, 2010

In addition, Monica Ladd, the Claimant's wife, testified on his behalf. Although the Fund did not call any witnesses, it presented Exhibit 1, the May 22, 2010 deposition testimony of Mr. Ladd that was admitted into evidence without objection.

Based on the above exhibits and the testimony of Mr. Ladd, I make the following findings:

Mr. Ladd is thirty-four (34) years old and lives in Lee's Summit, Missouri with his wife of eleven (11) months, Monica Ladd, two of her children from a previous marriage (Brenden Meyerkorth, age 6, and Connor Meyerkorth, age 2) and another child from his second marriage (Aliyah, age 8); Mr. Ladd has another child from his first marriage (Alyson, age 13) but she does not reside with him. Mr. Ladd graduated from high school in Clinton, Missouri in 1994. He took some classes in computers after high school but did not earn any credits. He played football and basketball in high school. Mr. Ladd enjoys watching sports, including the Chiefs, Braves, Royals, and Lakers. He is no longer able to participate in sports, but does enjoy fantasy sports online. He does not have any computer knowledge other than basic use of the Internet.

Mr. Ladd has had several injuries, both in the course and scope of employment and outside of employment. His first noteworthy injury happened when he was nine or ten years old when he fell from a second-story balcony. He hit his head on landscaping and was in a coma for three days. He missed a month of school. He has scar on his head from this injury.

Mr. Ladd next injured his right hand while fighting with his brother. He was sixteen or seventeen years old at the time. He was diagnosed with a "boxer's fracture" and his right hand was in a cast for eight weeks. His hand still aches occasionally from this injury. Mr. Ladd next injured his left ankle while playing football in high school. He heard a pop in his ankle when he was tackled on the football field. He wore a brace. His ankle is still sometimes sore as a result of this injury.

Mr. Ladd's next noteworthy, non-work related injury was a motor vehicle accident in 1998. He was twenty-two years old at the time. Mr. Ladd was a passenger in a vehicle involved in a single-car accident that hit a telephone pole at ninety (90) miles an hour. *See*, Second Injury Fund Exhibit 1 at 36:6-10. Mr. Ladd was ejected from the car and crashed through the windshield. He was unconscious following the accident and was hospitalized for two weeks. He also injured his neck, right shoulder, and left wrist. He wore a brace on his left wrist because of injuries sustained in this accident. He still has headaches on occasion as a result of this injury, as well as aches and pains in his left wrist and right shoulder. He has a scar approximately 10 to 12 inches long which arcs over the top of his skull to the left ear.

The vehicle's trunk contained stolen property which the driver told police belonged to Mr. Ladd. Although Mr. Ladd denied this, he received a felony conviction for receiving stolen property and was sentenced to five years probation. *Id.* at 37:1.

Regarding Mr. Ladd's employment history, he essentially has been consistently employed since high school. While in high school, Mr. Ladd worked at McDonald's as a cashier. This job also involved cleaning bathrooms and taking out the trash. He did not have any injuries at McDonald's.

Upon graduating from high school in 1994, Mr. Ladd enlisted in the Navy. However, he had an asthma attack during basic training and was honorably discharged three weeks later. *See*, Claimant's Exhibit M at 82.

Mr. Ladd then obtained employment at the Springfield Nature Center, where he was responsible for feeding the animals, mowing grass, cleaning, and other general maintenance. Mr. Ladd got poison ivy through this employment, but had no other work-related injuries while employed at the Springfield Nature Center.

Mr. Ladd began working at Rival Corporation in Clinton, Missouri. This job involved running a plastic molding machine, pulling parts out of the machine and packaging them; he was employed in at Rival for six months and did not have any work-related injuries.

Mr. Ladd next worked for Tracker Boats in Clinton, Missouri. His job involved working on an assembly line installing sheets of fiberglass onto boats. He was employed in this position for three months earning \$7.25 per hour and did not have any work-related injuries.

Mr. Ladd next worked at Schreiber Cheese in Clinton, Missouri. He worked as a laborer in the "knock down" department, putting 40 pound blocks of cheese onto a line. Mr. Ladd injured his left wrist and, according to his testimony, underwent surgery for a DeQuervain's release. Although no records were submitted at hearing, the Division's file for this case, injury number 96-009238, shows medical expenses totaled \$3,950.98 together with two weeks of temporary total disability ("TTD"), and no settlement or permanent partial disability ("PPD") benefit.

Mr. Ladd next worked in a landscaping job in Clinton, Missouri. He did not have any work-related injuries during this employment.

His next job was at Wal-Mart in Harrisonville, Missouri. His job was to stock shelves and check inventory on delivery trucks. His left wrist ached at times during this job, but he had no work injuries there.

Mr. Ladd next worked at Hy-Vee. On May 23, 1997 while working at Hy-Vee, he suffered a hernia in his left groin while pulling a pallet of dog food. *See*, Claimant's Exhibit H at 14. On June 9, 2007, Dr. Edward Higgins surgically repaired the hernia at Research Hospital in Kansas City, Missouri. *Id.* at 26. The Division's file for this case, injury number 97-051782, shows medical expenses totaled \$5,301.51 together with eight days of TTD, and no settlement or PPD benefit.

Mr. Ladd next worked at Papa John's in Raytown, Missouri. He worked for two weeks in 1998 as a delivery driver before he was in the motor vehicle accident discussed above. After the accident, he was unable to return to work for approximately one year, so his employment with Papa John's ended.

Mr. Ladd next worked at Crosswaves Siding in Butler, Missouri. His job involved siding houses, mostly in the Kansas City area. He had pain in his right shoulder while using a hammer because of the prior right shoulder injury suffered in the 1998 motor vehicle accident. Crosswaves eventually went out of business, and Mr. Ladd returned to work at Papa John's.

This time at Papa John's, Mr. Ladd worked as an assistant manager and driver. He was responsible for scheduling work shifts and making deposits. While working at Papa John's, Mr. Ladd slipped and fell, injuring his right wrist. The Division's file for this case, injury number 00-059468, shows medical expenses totaled \$467.00, no TTD, and no settlement or PPD benefit.

Mr. Ladd next worked at Warrensburg Chrysler as a car porter. On December 13, 2000, he injured his right knee while pushing a car out of a ditch. It was a snowy day and he slipped, causing his right knee to fall against the car bumper. Although no medical records were submitted at hearing, the settlement on this injury shows medical expenses totaled \$1,480.57, that Mr. Ladd received \$668.19 in TTD<sup>1</sup>, and \$1,614.18 in PPD representing five percent (5%) disability of the right knee. *See*, Claimant's Exhibit K at 2.

Mr. Ladd next worked at Bullock Septic pumping septic tanks. This was his first experience in the septic industry. He did not have any work-related injuries in this employment.

Mr. Ladd next worked for Morton Buildings in Clinton, Missouri. His job involved framing and setting metal posts, which required him to use a hammer. On December 19, 2001, he injured his right wrist while hammering at work. John A. Gillen II, MD, administered a cortisone shot on January 11, 2002. *See*, Claimant's Exhibit G at 29. This shot was unsuccessful in relieving his symptoms. Dr. Gillen then performed a right first dorsal extensor compartment release in February 2002. *Id.* at 30. Post-operatively, Mr. Ladd completed several sessions of occupational therapy. *Id.* at 31. Because the surgery and occupational therapy were unsuccessful in relieving his symptoms Mr. Ladd was referred to Gary L. Baker, MD for additional treatment. Dr. Baker ordered a bone scan and MRI of the right wrist. *Id.* at 19. The MRI and bone scan were abnormal, so Dr. Baker recommended exploratory surgery. *Id.* at 15. On July 23, 2002, Dr. Baker performed a "radical right dorsal wrist compartment tenosynovectomy for relief and removal of work-related tenosynovitis". *Id.* at 41. The settlement on this injury shows medical expenses totaled \$30,863.43, that Mr. Ladd received \$12,762.48 in TTD for 41 5/7 weeks, and \$8,690.11 in PPD representing thirteen percent (13%) disability of the right wrist. *See*, Claimant's Exhibit K at 3. Although Dr. Baker released Mr. Ladd to return to regular work with no restrictions. *Id.* at 8. In addition, Dr. Baker rated Mr. Ladd at "four percent (4%) impairment measured at the level of right wrist (175 week level)." *Id.* at 6.

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<sup>1</sup> Although the blank for the number of weeks of TTD was filled in with "3 4/7", given the \$183.43 weekly compensation rate, the amount of TTD compensation, \$668.19, works out to just over three days of such benefit. I note that the Division's file also reflects that TTD totaled \$668.19.

Mr. Ladd next worked at Sonic as a car hop and cook. He did not have any work-related injuries from this employment.

His next job was cleaning carpets. He did not have any work-related injuries from this employment.

He also worked as a painter in Lake of the Ozarks, Missouri. He did not have any work-related injuries from this employment.

Mr. Ladd's next job was filling printer cartridges in 2004. He was injured on October 18, 2004 when an ink cartridge he was removing from a machine dislodged causing his left wrist to hit the machine's plastic protection cover. The settlement on this injury shows medical expenses totaled \$1,374.73, that Mr. Ladd did not receive any TTD, and that \$1,866.73 in PPD was paid representing five percent (5%) disability of the left wrist. *See*, Claimant's Exhibit K at 4.

Mr. Ladd's next and final employer was Residential Sewage Treatment Company, Inc. ("RST"). He started as a service technician installing and repairing septic systems, earning \$9.00 per hour. After a year, he got a raise to \$9.45. On January 25, 2006, Mr. Ladd was earning a monetary wage of \$9.45 per hour. In addition to his hourly rate, Mr. Ladd was given a company cell phone and truck, which he was free to use both at work and at home. His employer calculated the value of the phone and truck use at \$4.00 per hour. The value of these benefits was explained to all RST employees in a meeting, because there had been some complaints that field employees were earning less than office employees. The employer also paid for the gas and insurance for the truck. Mr. Ladd worked from 7 a.m. to 3:30 p.m. during the week and also worked two Saturdays per month. He worked at least 40 hours a week in this job.

*Left Knee Injury (06-006481)*

On January 25, 2006, Mr. Ladd injured his left knee. At the time of the injury, he was training a new employee on a septic tank when he stepped into a hole and his left leg sank into the ground up to his waist. His left knee twisted and immediately began swelling. Mr. Ladd initially participated in physical therapy. *See*, Claimant's Exhibit J at 55-93. When conservative treatment failed to relieve his symptoms, he was referred to Dr. Rhoades at Dickson-Dively Orthopaedic Clinic. *Id.* at 56. On March 1, 2006, Dr. Rhoades diagnosed a contusion and probable chondral lesion. He administered a steroid injection into the right knee. *See*, Claimant's Exhibit F at 15.

On March 8, 2006, Dr. Rhoades noted that the injection had not relieved Mr. Ladd's symptoms and recommended arthroscopy. *Id.* at 12. On March 14, 2006, Dr. Rhoades performed a left knee arthroscopic plica excision and chondroplasty of medial femoral condyle. *Id.* at 10-11. Dr. Rhoades released Mr. Ladd on May 17, 2006 to return to work full duty. *Id.* at 2-3. Mr. Munsell filed a Claim for Compensation for Mr. Ladd on this case; the settlement shows medical expenses totaled \$11,168.12, that Mr. Ladd received \$367.80 in TTD, and settled all issues for five hundred dollars (\$500.00). *See*, Claimant's Exhibit K at 6.

Cervical Injury (07-029181)

On March 27, 2007, Mr. Ladd injured himself in the course and scope of his employment with RST while lifting a one hundred twenty five (125) pound pump out of a septic system lift station. The pump got caught, but he kept pulling and felt a pop in his neck. At this time he earned between \$9.90 and \$10.40 per hour, plus the cell phone and truck valued at \$4.00 per hour. He immediately told his employer and was sent to Concentra. He was initially diagnosed with a strain and prescribed physical therapy. He completed physical therapy sessions at Concentra on 27, 2007, March 29, 2007, April 4, 2007 and April 10, 2007. See, Claimant's Exhibit at 10-38.

On April 10, 2007, the physical therapist noted Mr. Ladd's symptoms had not improved and recommended referral to a physiatrist as soon as possible. *Id.* at 12. Instead, Mr. Ladd was referred to Dr. Hess, a neurosurgeon. Dr. Hess recommended an anterior cervical decompression and fusion at C6-7. *Id.* at E, p. 17.<sup>2</sup> Dr. Ciccarelli recommended proceeding first with epidural steroid injections and then surgery should he have no benefit from them. *Id.* Mr. Ladd was then referred to spine surgeon, Adrian Jackson, M.D., who also recommended epidural injections before proceeding with surgery. On July 23, 2007, Dr. Jackson noted that the epidural steroid injections had provided Mr. Ladd with significant relief. *Id.* at 23. Unfortunately, this relief did not last. Mr. Ladd returned to Dr. Jackson on August 13, 2007 reporting neck and left arm pain. After discussing the options, Dr. Jackson and Mr. Ladd decided to proceed with surgical intervention. *Id.* at 24. On August 23, 2007, Dr. Jackson performed an anterior cervical discectomy and fusion with instrumentation at C6-7 as well as an exploration of the fusion at C5-6. *Id.* at 28.

Dr. Jackson released Mr. Ladd from treatment on November 14, 2007. At that time, Dr. Jackson noted:

Mr. Ladd is not 2 ½ months post ACDF of C6-7 below his congenital C5-6 fusion. He has done extremely well in his post operative course. **At this point we considered a short course of physical therapy for Mr. Ladd for generalized reconditioning prior to returning him to his normal activities. He does not feel that this is necessary and thinks he will be able to perform his normal functions without restrictions at this point.** Therefore, I believe he has reached maximum medical improvement with regards to this work related injury. **We will release him to ordinary duties with no restrictions.** He understands that he needs to use common sense with his activities both at work and at home. Any person working heavy physical job will always be at a baseline risk of injury or reinjury and he understands this. [emphasis added]

*Id.* at 35.

Dr. Jackson rated Mr. Ladd's disability at twenty percent (20%) to the body as a whole. *Id.* at 37. Mr. Ladd settled with the employer – without either filing a Claim for Compensation or

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<sup>2</sup> This information was provided by way of a letter from John M. Ciccarelli, MD as Dr. Hess' records were not provided at hearing.

the assistance of an attorney – for the value of Dr. Jackson’s rating. *See*, Claimant’s Exhibit K at 7. Of course, later, Mr. Ladd did file a Claim for Compensation against the Fund.

Mr. Ladd immediately returned to work, and was promoted to service manager with a corresponding pay raise. *See*, Second Injury Fund Exhibit 1 at 70:19-22. His job duties involved training new employees, handling customer complaints, checking parts inventory, and ordering supplies needed for the shop or for the field. *Id.* at 70:7-71:25. His position did not require any heavy work and clearly was less physically demanding than his previous technician position, but there is no credible evidence to suggest that this position was created for Mr. Ladd to accommodate his physical abilities. In fact, as noted in the quoted portion of Dr. Jackson’s records, above, not only did Dr. Jackson release Mr. Ladd without any restrictions, Mr. Ladd refused physical therapy that was offered to him.

Lumbar Injury (08-079188)

On August 11, 2008, Mr. Ladd sustained yet another work related injury. On that date, he injured his low back in the course and scope of his employment with RST. At the time, he was earning \$10.45 per hour and working two to five hours per week of overtime, at \$15.68 per hour. He was also still given the benefit of the company-provided cell phone and truck, valued at \$4.00 per hour.

Mr. Ladd was training another employee and felt a pop in his low back when lifting a twenty five (25) pound aeration motor out of a septic tank. His employer picked him up at the job site and took him to Dr. Mohan. Dr. Mohan initially diagnosed a strain and recommended physical therapy. Mr. Ladd completed a session of physical therapy at Concentra on August 18, 2008. *See*, Claimant’s Exhibit J at 2. The physical therapist diagnosed a lumbar strain and lumbar radiculopathy. *Id.* at 3.

On August 20, 2008, Mr. Ladd was evaluated by Dr. Pang, a physiatrist with Rockhill Orthopedics. *See*, Claimant’s Exhibit C at 11. Dr. Pang noted Mr. Ladd had low back pain along with numbness in his lower extremities and recommended an MRI of the lumbar spine. *Id.* at 11. An MRI of the lumbar spine revealed a “broad-based right paracentral disc herniation” at L5-S1, and both “mild disc bulging” and “a very small posterior central disc herniation” at L4-5. *See*, Claimant’s Exhibit B at 2. On August 27, 2008, Dr. Pang authorized Mr. Ladd to receive pain management. *Id.* at 8. Dr. Eubanks administered epidural injections on September 2, 2008 and September 19, 2008. *See*, Claimant’s Exhibit D at 34-37. On September 24, 2008, Dr. Pang noted that while Mr. Ladd did not have any side effects from the injections, and no weakness of the lower extremities or bowel/bladder function changes, the injections also did not relieve his back problems. *See*, Claimant’s Exhibit C at 2-4. Thus, Dr. Pang referred Mr. Ladd back to his spine surgeon, Dr. Jackson.

Mr. Ladd saw Dr. Jackson for an evaluation on October 6, 2008. *See* Claimant’s Exhibit E at 38. Dr. Jackson noted that “he has done extremely well” with his cervical fusion. Dr. Jackson had a positive straight leg raise on the left and a positive cross straight leg raise on the right together with “subjective numbness in no specific dermatomal pattern.” *Id.* Because the epidural injections did not relieve Mr. Ladd’s symptoms, Dr. Jackson recommended surgery. *Id.*

On October 23, 2008, Dr. Jackson performed a bilateral decompression and discectomy at L5-S1. *Id.* at 13. After the surgery, Mr. Ladd had continuing complaints in his low back so he had a series of epidural injections, which did not improve his symptoms. *Id.* at 7. Dr. Jackson observed that, "Mr. Ladd will need to consider a different type of employment. This is now the second spine surgery he has suffered doing this job and he needs to consider other long term options. Any job change will not be due to the specific injury that he has suffered but rather the predisposition that he has shown to spinal injuries with heavy manual labor." *Id.* at 7.

On February 13, 2009, Dr. Ebelke evaluated Mr. Ladd for a second opinion. After performing a physical exam and reviewing his medical records, Dr. Ebelke concluded that further surgical intervention was not appropriate and recommended a functional capacity evaluation. *See*, Claimant's Exhibit A at 2-3.

Dr. Jackson placed Mr. Ladd at MMI on March 13, 2009 and noted:

I had a very realistic discussion with Mr. Ladd today regarding his options at this point. These are to either consider functional capacity evaluation or to be released to ordinary duties with no restrictions and use common sense with his activities both at home and at work. My recommendation to Mr. Ladd is to avoid any permanent restrictions if possible as this may hamper him in terms of future employment. I certainly understand that he is not symptom free and I do think he will continue to improve over time. . . . After discussing the options with Mr. Ladd, we have elected to return him to his ordinary duties with no restrictions and bypass the functional capacity evaluation. He knows that using common sense with his activities both at home and at work will be critical for him to avoid further injury.

*See*, Claimant's Exhibit E at 6.

After he was released from treatment, Mr. Ladd was terminated from his job at RST and has not returned to work since then.

Mr. Ladd has applied for one job since his RST termination, one involving driving a trash truck. According to Mr. Ladd, he was not hired after the prospective employer "checked" his "workers' compensation records" and saw his history of work-related injuries. Mr. Ladd has not looked for work since then because he believes he is physically unable to do so. He acknowledges that at thirty-four, he is young to be permanently and totally disabled, but given his multiple injuries and the fact that he has constant pain all over his body, he does not believe there is any job he can perform on a full-time basis. Even if he had been hired for the position driving a trash truck, he does not believe he would have been able to perform the job because driving is very difficult for him. He applied for this job because he was trying to find an income to support his family. He also has applied for Social Security Disability benefits and his application is on appeal at this time.

Mr. Ladd's daily life now consists of preparing breakfast for his new wife's children and his daughter, supervising them, getting dressed, and monitoring their activities throughout the day. He spends a large portion of his day sitting in his recliner, because this chair is comfortable

for him. He does some household chores, including trying to rinse dishes or throw laundry down the stairs, but most chores cause him increased pain. He does not vacuum, dust, or mop to avoid exacerbating his pain. He does not do any outdoor work, such as mowing the lawn. He assists his wife with grocery shopping, but only carries the light bags. He currently takes Vicodin and blood pressure medication. He has taken Vicodin on and off since his neck injury but has taken it consistently since September 2009. Before Mr. Ladd's 2007 neck injury, he was able to play basketball, softball, and bowling, but no longer does those activities.

At the request of his attorney, Mr. Ladd was evaluated by Michael Poppa, D.O. on July 24, 2009. His deposition testimony was taken on April 22, 2010 and May 20, 2010 and is contained in Claimant's Exhibit L. Dr. Poppa's deposition took place on two days, not because of time constraints on April 24, but because it became apparent early in his testimony that he had authored two narrative reports each dated July 24, 2009 that contained significantly different opinions about Mr. Ladd. In his first report – the only one which had been provided to the Fund prior to the deposition – Dr. Poppa concluded that Mr. Ladd's injuries combined only to result in a twenty percent (20%) enhancement of his disability above their arithmetic sum. *See*, Claimant's Exhibit L at 106. However, in his second report, Dr. Poppa concluded that Mr. Ladd's injuries combined to result in his permanent and total disability. *Id.* at 118. Because the second report – with the permanent total disability opinion – had not been provided to the Fund pursuant to the "seven day rule", the deposition had to be continued to May 20. Claimant's counsel described this as a "draft report of Doctor Poppa's that inadvertently got sent" to the Fund's attorney. *Id.* at 22:12. However, not only did the Fund's attorney disagree with the characterization of this first report as a "draft", Dr. Poppa himself disavowed the description of his first report as a "draft":

A. No. I mean, the – terminology "draft" wasn't my terminology. I sent the [first] report and additional information was requested and I provided it.

Q. So it wasn't a – all right. So it wasn't a draft?

A. Not in my terminology. Others – I mean, it could be considered a draft, otherwise. But I guess what I'm saying is I don't – I don't – usually drafts don't go out and they're usually not sent. This was, and, you know, I just have to accept that and – and go on.

*Id.* at 68:21-69:5.

The first report does not contain the word "draft" and, in fact, if one were to conclude which report were a draft on appearances alone, it would be reasonable to conclude that the *second* report was the draft: the first report is on Dr. Poppa's blue printed stationary and contains his original signature, while the second report is a somewhat faint off-center photocopy without an original signature.

Regarding the second report providing "additional information" a substantive comparison of the two reports is in order. The first report is four pages long and the second report is four pages long. The first three pages of each report through the heading "Conclusions" are identical word-for-word; only until you reach "Conclusions" on page 3 do the reports diverge. Conclusion 1 of the first report is the same as conclusion 1 of the second report. Conclusion 2 of

the first report now simply is conclusion 3 of the second report. Conclusion 3 of the first report now simply is conclusion five of the second report. Conclusion 4 of the first report is now conclusion 6 of the second report except that in conclusion 4 of the first report Dr. Poppa opined that a 20% enhancement was in order, while in conclusion 6 of the second report he opined the Mr. Ladd was permanently and totally disabled as a result of all of his disabilities. *Id.* at 105-106 and 118. The only “additional information” contained in the second report – besides the permanent total opinion – is conclusion 2 which is that Mr. Ladd’s 2008 lumbar injury is really worth 30% body as a whole PPD even though he settled for 22.5% PPD, and conclusion 4 which is that the lumbar injury alone did not result in his total disability. *Id.* Dr. Poppa did not offer any substantive explanation as to why his opinion changed from a 20% enhancement in the first report to total disability in the second report.

On cross examination, Dr. Poppa admitted that no doctors gave Mr. Ladd any restrictions for his 1996 head injury, hypertension, alleged blurry vision, headaches, or his right wrist injury. *Id.* at 48:3, 49:7,11, 22, and 50:25. In addition, Dr. Poppa reviewed only a limited amount of Mr. Ladd’s medical records totaling only fifty-eight (58) pages.<sup>3</sup> *Id.* at 177-219. *The medical records offered at hearing by the claimant total four hundred sixty five (465) pages.*<sup>3</sup> Moreover Dr. Poppa was not even provided, nor did he review, any of the medical records contained in Claimant’s Exhibit’s A, B, C, D, E, F, H, or J. *Id.* at 29:13 - 30:1. These exhibits include records regarding: Dr. Ebelke’s evaluation for Mr. Ladd’s 2008 lumbar injury (Exhibit A); Mr. Ladd’s 2008 lumbar MRI (Exhibit B); Dr. Pang’s 2008 lumbar treatment (Exhibit C); Paincare 2008 lumbar treatment (Exhibit D); Dr. Jackson’s 2007 cervical and 2008 lumbar treatment (Exhibit E); Dr. Rhoades’ 2006 left knee treatment (Exhibit F); Research Medical hospitalization for hernia repair (Exhibit H); and Concentra treatment for Mr. Ladd’s 2006 knee injury, 2007 cervical injury and 2008 lumbar injury.

Given that Dr. Poppa rated these injuries one would think it important for him to actually have reviewed the treatment records for them. Moreover, his failure to adequately explain the vast difference of his opinion between his first July 24, 2009 report (20% enhancement) and his second July 24, 2009 report (permanent total) causes me to further question the credibility of his opinions in this case. In fact, given the paucity of records he reviewed, and his lack of adequate explanation of these divergent disability opinions, I find that Dr. Poppa’s opinions in this case lack credibility and I completely disregard them.

At the request of his attorney, Mr. Ladd also was evaluated by Mr. Michael Dreiling, a vocational consultant, on January 12, 2010. His deposition testimony was taken on May 18, 2010 and is contained in Claimant’s Exhibit M. Notably, Mr. Dreiling opined:

**I found that not taking into account Doctor Poppa’s medical opinion, but utilizing the other medical opinions of the other physicians that were cited in the medical restriction section, I felt this gentleman would be capable of working in the labor market.**

So that’s basically saying **if you ignored Doctor Poppa’s report, this person would have the ability to work.** When I looked at Doctor Poppa’s medical opinion, including the preexisting medical disabilities,

<sup>3</sup> Page totals do not include affidavit’s, attorney cover letters, duplicate records, Dr. Poppa’s report or CV.

and the more recent work injury, along with this individual's description of his level of functioning, it then became my vocational opinion that he would not be capable of performing work in the open labor market. [emphasis added]

*See*, Claimant's Exhibit M at 36:15 – 37:4.

On cross-examination, Mr. Dreiling testified that it was his understanding that Mr. Ladd already was a service manager for RST prior to his 2007 cervical injury and that he was able to “self-accommodate” in that position upon returning to RST after the cervical injury. *Id.* at 44:6-22. In addition, he admitted that if it turned out that Mr. Ladd actually had been promoted after the cervical injury to the service manager position that, “that would be different from what my understanding was.” *Id.* at 45:3-8. In fact, Mr. Ladd testified very clearly that it only was after his cervical injury that he became a manager, that he then was “in charge”, and that he described it as a “promotion.” *See*, Second Injury Fund Exhibit 1 at 70:7 and 21.

Given that Mr. Dreiling is a vocational consultant, it seems rather important that he understand clearly the positions in which the person he is evaluating has worked. An employee coming back to a position that he could “self-accommodate” could have far different implications than coming back to work and being promoted to a managerial position with higher pay. It is not that such different job positions might result in a different conclusion by Mr. Dreiling that gives me pause to view his testimony favorably, it is that as a vocational consultant it seems incumbent on him to pay close attention to the positions Mr. Ladd had occupied in his work – particularly when this job was the last one Mr. Ladd held. I note that Mr. Dreiling's deposition was taken a full week after Mr. Ladd's deposition and that had he simply read it, this discrepancy would have been plain for him to see. More importantly, though, is the fact that Mr. Dreiling's vocational opinion that Mr. Ladd is not employable is based completely on Dr. Poppa's opinion contained in his second July 24, 2009 report that Mr. Ladd is permanently and totally disabled; absent Dr. Poppa's opinion, Mr. Dreiling testified that he would have concluded that Mr. Ladd was employable. Because I completely reject Dr. Poppa's opinions in this case as not credible, I similarly reject Mr. Dreiling's opinion that Mr. Ladd is unemployable as it is predicated upon Dr. Poppa's permanent total opinion. Thus, I conclude, as would Mr. Dreiling without Dr. Poppa's opinion, that Mr. Ladd is employable.

## **RULINGS OF LAW**

### Average Weekly Wage

The purpose of determining average weekly wage is “to eventually measure the economic loss a worker experiences when he suffers ‘loss of wage earning capacity’ or ‘wage loss’ as those terms of art are statutorily defined.” *Grimes v. GAB Business Services, Inc.*, 988 S.W.2d 636, 639 (Mo.App. 1999). Here, Mr. Ladd suffered economic loss, not only in the form of lost wages, but also by losing the use of his company truck and cell phone. Thus, to fully compensate Mr. Ladd for his economic loss, these benefits must be part of the calculation of Mr. Ladd's average weekly wage.

Missouri's Workers' Compensation Law provides, in pertinent part, that:

For purposes of this section, the term "gross wages" includes, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging or similar advance received from the employer, ... "Wages", as used in this section, does not include fringe benefits such as retirement, pension, health and welfare, life insurance, training, Social Security or other employee or dependent benefit plan furnished by the employer for the benefit of the employee. . . .

MO.REV.STAT. §287.250.2 (2000)

Section 287.250.2 provides that while an employee is entitled to the use of "gross wages" in the determination of average weekly wage, he is not entitled to the inclusion of "special expenses" in the determination of average weekly wage. The Court in *Grimes* provided some insight into the distinction between gross wages and special expenses by explaining that while an employee may suffer economic loss when his employer stops providing clothing to be worn at work, the employee does not suffer economic loss if the employer stops making expense payments to the employee because the employee has stopped incurring those expenses. *Grimes*, 988 S.W.2d at 639-640. Likewise, Mr. Ladd suffered economic loss when his employer stopped providing a pick-up truck and mobile phone for his use.

In the most recent case on the issue of gross wages, *Caldwell v. Delta Express*, the Court held that Mr. Caldwell's per diem compensation was not a special expense because he was not required to keep track of how he spent the per diem payment. *Caldwell*, WL 708325 at 5 (Mo. App. 2009). As previously stated, Mr. Ladd was not required to keep track of his use of the company truck or the company cell phone. He was given free use of both as part of his employment. The *Caldwell* court further held that because Mr. Caldwell's per diem payment exceeded the expense Mr. Caldwell actually incurred on daily meals and board, he had an economic gain and thus, the payment was not a reimbursement of a special expense. *Id.* at 5.

The fact finder in a workers' compensation proceeding is vested with discretion over how average weekly wage is calculated. In that regard, Missouri's Workers' Compensation Law provides that if a weekly wage cannot "fairly and justly be determined [under 287.250.1], the division of the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage." §287.250.4 (RSMo. 2005). The Commission is entitled to rely upon an employee's testimony regarding his wages in calculating the value of an award, even if the employee does not produce documentation to support his testimony. *Seeley v. Anchor Fence Co.*, 96 S.W.3d 809, 821 (Mo. App. 2002).

In the case at bar, I find Mr. Ladd's receipt and use of a cell phone and truck indisputably fall into the category of gross wages. RST provided Mr. Ladd with a company truck and a company cell phone as part of his employment at RST. Mr. Ladd was allowed to use the vehicle and the phone for both work and personal uses. Mr. Ladd and the other field personnel at RST were in fact paid four dollars less per hour than office staff. Mr. Ladd was informed that this differential was because he received the unlimited use of the company truck and phone. When Mr. Ladd suffered his work-related injury and was no longer able to work at his regular job, he was deprived of the use of the truck and the phone. At the time of the August 11, 2008 injury, Mr. Ladd was earning \$10.45 per hour and working two to five hours per week of overtime, at

\$15.68 per hour. He was also still given the benefits of the company-provided cell phone and truck, valued at \$4.00 per hour. Thus, Mr. Ladd's average weekly wage at the time of this injury was \$617.20, giving him a compensation rate of \$411.46 for permanent total disability benefits.

At the time of the March 27, 2007 injury, Mr. Ladd was earning between \$9.90 and \$10.40 per hour, plus the cell phone and truck valued at \$4.00 per hour. Averaging \$9.90 and \$10.40 gives an hourly rate of \$10.15 per hour, plus \$4.00 per hour for additional wages gives Mr. Ladd an hourly rate of \$14.15. At 40 hours per week, Mr. Ladd had an average weekly wage of \$566.00. Two-thirds of \$566.00 is \$377.34, so Mr. Ladd qualifies for the maximum permanent partial disability rate at the time of his injury, \$376.55.

Likewise, on January 25, 2006, Mr. Ladd was earning \$9.45 per hour. In addition to his hourly rate, Mr. Ladd also had the company cell phone and truck, as discussed above. Thus, his average weekly wage at the time of his injury was \$538.00, giving him a compensation rate of \$358.67.

### Statute of Limitations

The Second Injury Fund has asserted that Mr. Ladd's claim for injury numbers 06-006481 and 07-029181 were not timely filed. The Court of Appeals recently addressed a statute of limitations issue in *Grubbs v. Treasurer of Missouri as Custodian for the Second Injury Fund*, 298 S.W.3d 907 (Mo. App. 2009). In *Grubbs*, the claimant was injured on July 30, 2003 and entered into a Stipulation for Compromise Settlement with the employer on November 15, 2004. *Id.* at 909. He filed a claim on September 29, 2005 against the Second Injury Fund only. *Id.* The Fund argued that the claim was time-barred based on Section 287.430 because the claimant did not file a claim against the Fund within two years after the injury or within one year after filing a claim against his employer. Missouri's Workers' Compensation Law provides, in pertinent part, that:

A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, *whichever is later*. [emphasis added]

MO.REV.STAT. §287.430 (2000)

The Court held that the phrase "claim for compensation" is not defined in Workers' Compensation Law. *Id.* at 911. In laymen's terms, a "claim" includes not only a lawsuit but also a claim settled out of court. *Id.* at 911. The Court held that a stipulation for compromise settlement therefore constitutes a claim under the Law. *Id.* Thus, the claimant filed a claim against the Second Injury Fund within one year of the claim against the Employer, making his claim against the Fund timely.

Here, Mr. Ladd filed his claim against the Second Injury and his employer for his 2006 injury on September 30, 2008 and settled his claim against the employer on May 6, 2009. As his claim against the Second Injury Fund for his injury was on file at the time of the settlement with the employer, it was filed within the one year prescribed by Section 287.430 and thus is a timely

claim. Regarding his 2007 injury, he filed his claim against the Fund on October 3, 2008, less than two years after his March 27, 2007 accident date. Thus, this claim is timely as well.

Mr. Ladd argued that he was rendered permanently and totally disabled due to the combined effect of the disability he sustained in the August 11, 2008 accident together with his alleged pre-existing disabilities. The applicable statute at §287.020(7) R.S.Mo. defines “total disability” as an inability to return to any employment and not merely. . . inability to return to the employment in which the employee was engaged at that time of the accident. The term “any employment” means “any reasonable or normal employment or occupation.” Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo.App. 1996); Crum v. Sachs Electric, 768 S.W.2d 131 (Mo.App. 1989); Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo.App. 1982); Groce v. Pyle, 315 S.W.2d (Mo.App. 1958).

It is not necessary that an individual be completely inactive or inert in order to meet the statutory definition of permanent total disability. It is necessary, however, that the employee be unable to compete in the open labor market. See Fletcher; Cearcy v. McDonald Douglas Aircraft, 894 S.W.2d 173 (Mo.App. 1995); Reiner v. Treasurer, 837 S.W.2d 363 (Mo.App. 1992); Brown v. Treasurer, 795 S.W.2d 478 (Mo.App. 1990).

Moreover, Missouri courts have also repeatedly held that the test for determining permanent total disability is whether the individual is able to complete in the open labor market and whether an employer in the usual course of business would reasonably be expected to employ the employee in his physical condition. See Garcia v. St. Louis County, 916 S.W.2d 263 (Mo.App. 1995); Lawrence v. R-II School District, 834 S.W.2d 789 (Mo.App. 1992); Carron v. St. Genevieve School District, 800 S.W.2d 6 (Mo.App. 1991); Fischer v. Arch Diocese of St. Louis, 793 S.W.2d 195 (Mo.App. 1999).

A determination of permanent total disability should focus on the ability or inability of the employee to perform the usual duties of various employments in the manner as such duties are customarily performed by the average person engaged in such employment. Gordon v. Tri State Motor Transit, 908 S.W.2d 849 (Mo.App. 1995). Courts have held that various factors may be considered, including an employee’s physical and mental condition, age, education, job experience, and skills in determining whether the employee is permanently and totally disabled. See e.g., Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo.App. 1997); Olds v. Treasurer, 964 S.W.2d 406 (Mo.App. 1993); Brown v. Treasurer, 795 S.W.2d 439 (Mo.App. 1990); Patchin v. National Supermarket, Inc., 738 S.W.2d 166 (Mo.App. 1997); Laturno v. Carnahan, 640 S.W.2d 470 (Mo.App. 1982).

But, in order to establish Second Injury Fund liability for permanent total disability benefits, the employee must prove the following:

- (1) That he or she has permanent disability resulting from a compensable work-related injury. See, MO.REV.STAT. §287.220.1 (2000);
- (2) That he or she has permanent disability predating the work-related injury which is of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment: See, MO.REV.STAT. §287.220.1

(2000); Garibay v. Treasurer, 930 S.W.2d 57 (Mo.App. 1996); Rolls v. Treasurer, 895 S.W.2d 591 (Mo.App. 1995); Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo.App. 1995); and

- (3) That the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time the last injury was sustained resulted in permanent total disability. Boring v. Treasurer, 947 S.W.2d 483 (Mo.App. 1997); Reiner v. Treasurer, 837 S.W.2d 152 (Mo.App. 1994).

After considering the testimony at the hearing by Mr. Ladd and the depositions of Dr. Poppa and Mr. Dreiling, I find that Mr. Ladd failed to prove either elements two (2) or three (3), above. Dr. Poppa's opinion regarding the impact of Mr. Ladd's injuries prior to his August 11, 2008 lumbar injury was unpersuasive given the paucity of medical records he reviewed. In addition, it ignored the fact that Mr. Ladd did not have any restrictions from any doctor on the right knee, the right wrist, left wrist, and lower left extremity at the 160 level. Mr. Ladd did not offer any credible evidence that he missed any work because of the aforementioned conditions after being released from medical treatment. He did not offer any medical records of any follow-up care on his head, any "residual issues" from the laceration from the motor vehicle accident or for his wrists or lower extremities. He did not offer any substantive or credible testimony that in any of his jobs, he was unable to pursue an occupation or perform a service for wages because of a prior injury or impairment. He testified that he did not ask for any accommodations in any jobs after his injuries with the exception of using a bucket to sit upon instead of kneeling on his left knee. He testified he had pain; merely having "pain" does not equal "disability" under Missouri's Workers' Compensation Law.

When faced with the question of what constitutes evidence of disability, the Labor and Industrial Relations Commission has held: "Disability" for workers' compensation purposes means, "the inability to do something; the deprivation or lack of physical, intellectual, or emotional capacity or fitness; the inability to pursue an occupation or perform services for wages because of physical or mental impairment." *Loven v. Greene County*, 63 S.W.3d 278 (Mo. App. 2001), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003); cited by the LIRC in *Amy Walters v. Children's Mercy Hospital & Truman Medical*, 2009 WL 4723711 (2009).

In applying the above to the case at hand, no substantive or persuasive evidence was introduced that Mr. Ladd was unable to pursue his occupation or perform his services for wages because of his conditions prior to August 11, 2008. On the contrary, according to his testimony, Mr. Ladd was hindered only by his felony conviction. *See*, Second Injury Fund Exhibit 1 at 37:4-6. He voluntarily quit his various jobs until becoming employed at RST in 2004.

After Mr. Ladd was released from medical treatment from his 2007 cervical injury, he received a promotion with a salary increase. He worked full time and overtime when necessary until August 11, 2008.

All of Mr. Ladd's prior injuries fall below the statutory threshold for Fund liability except for his 2007 cervical injury (07-029181), which settled for 20% PPD to his body as a whole. But

his testimony and the medical records show that he was not given any medical restrictions other than to use common sense. In addition, because I give Dr. Poppa's opinions no credibility in this case, Mr. Ladd similarly failed to prove any enhanced permanent partial liability as a result of these injuries.

For these reasons, all of Mr. Ladd's Fund claims are denied.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

**Carl Mueller**  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
**Naomi Pearson**  
*Division of Workers' Compensation*

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

Injury No.: 07-029181

Employee: Anthony Ladd

Employer: Residential Sewage Treatment Company, Inc. (Settled)

Insurer: Secura Insurance Company (Settled)

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

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge (ALJ), dated August 24, 2010, referable solely to Injury No. 07-029181, as supplemented herein.

**Preliminaries**

Employee settled his claim against employer and proceeded to final hearing against the Second Injury Fund. The ALJ heard this matter to consider, among other issues, the nature and extent of any Second Injury Fund liability with respect to employee's 2007, accident.

The ALJ found that employee failed to prove any enhanced permanent partial disability as a result of his alleged preexisting disabilities combining with his 2007, injury. Therefore, employee's claim against the Second Injury Fund for the 2007, injury was denied.

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

Therefore, the primary issue currently before the Commission is the nature and extent of any Second Injury Fund liability.

**Findings of Fact and Conclusions of Law**

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

On March 27, 2007, employee injured his neck at work while lifting a 125 pound pump out of a septic system lift station (2007, injury). Employee's neck injury was initially treated conservatively, but without relief. On August 23, 2007, Dr. Jackson performed an anterior cervical discectomy and fusion with instrumentation at C6-7 as well as an exploration of the fusion at C5-6. Dr. Jackson released employee from treatment on November 14, 2007, and employee immediately returned to work. Dr. Jackson rated employee's disability at 20% permanent partial disability of the body as a whole

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2005 unless otherwise indicated.

Employee: Anthony Ladd

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referable to his cervical spine. Dr. Poppa also rated employee's cervical spine disability at 20% permanent partial disability of the body as a whole.

Employee filed a workers' compensation claim for his 2007, injury. Employee settled his claim with employer for 20% permanent partial disability of the body as a whole referable to his cervical spine.

Based on the totality of the evidence, we find that employee is 20% permanently partially disabled of the body as a whole as a direct result of his 2007, injury.

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." The employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Section 287.220.1 provides certain thresholds that both the primary injury and the preexisting disabilities must meet before the Second Injury Fund is found liable. Before analyzing any synergistic effect of the primary injury and preexisting disabilities, it must be determined that both the primary injury, by itself, and the preexisting disabilities, by themselves, result in a minimum of 12.5% permanent partial disability of the body as a whole, or if the injury is to a major extremity, 15% permanent partial disability to said extremity. If the primary injury and preexisting disabilities do not both satisfy either of these disability minimums, the analysis stops there and the claim against the Second Injury Fund is denied.

Employee's 2007, injury meets the primary injury disability threshold provided in § 287.220.1 because said injury resulted in more than 12.5% permanent partial disability of the body as a whole. However, we find that employee's disabilities preexisting said injury do not meet the disability threshold for Second Injury Fund liability provided in § 287.220.1.

Employee suffered various injuries prior to his 2007, injury. In fact, employee had settled four workers' compensation claims prior to his 2007, injury, ranging from 5% permanent partial disability of the right knee in 2000; 13% permanent partial disability of the right wrist in 2001; 5% permanent partial disability of the left wrist in 2004; and a lump sum of \$500.00 for the 2006, injury. In addition, Dr. Poppa opined that at the time of the 2007, injury, employee had already sustained the following permanent partial disabilities: 15% permanent partial disability of the body as a whole referable to head trauma; 20% permanent partial disability of the right upper extremity rated at the elbow referable to a 2001, injury; and 20% permanent partial disability of the left lower extremity rated at the knee referable to a 2006, injury.

With regard to Dr. Poppa's ratings, we find, as did the ALJ, that his opinions are not credible. Regardless of the fact that Dr. Poppa issued two separate reports with different conclusions both dated July 24, 2009, his opinions do not accurately reflect the prior medical records with regard to his alleged preexisting disabilities.

Employee: Anthony Ladd

- 3 -

While employee suffered various injuries prior to the 2007, injury, there is a lack of significant medical records regarding any permanent disabilities resulting from his prior injuries. The medical records that were provided do not show a history of increased medical attention or complaints regarding the body parts allegedly permanently partially disabled. In addition, employee did not have any restrictions from any doctor for his alleged preexisting disabilities. Lastly, there is no objective medical record showing employee had a further hindrance or obstacle by any of the conditions in his jobs through the years.

Based on the foregoing, we find that employee failed to prove that any of his alleged preexisting disabilities reached the threshold of 12.5% permanent partial disability of the body as a whole, or 15% permanent partial disability to a major extremity. For this reason, we find that employee's claim against the Second Injury fund for his 2007, injury is denied.

**Award**

We affirm, as supplemented herein, the ALJ's denial of Second Injury Fund liability with respect to employee's 2007, injury.

The award and decision of Administrative Law Judge Carl Mueller, issued August 24, 2010, is attached and incorporated to the extent it is not inconsistent with this final award.

Given at Jefferson City, State of Missouri, this 31<sup>st</sup> day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

**DISSENTING OPINION FILED**

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John J. Hickey, Member

Attest:

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Secretary

Employee: Anthony Ladd

**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 ALJ should be reversed and employee should be awarded enhanced permanent partial disability benefits against the Second Injury Fund.

Dr. Poppa, the only doctor to perform an independent medical evaluation of employee, concluded that as a result of the 2007, injury employee sustained 20% permanent partial disability of the body as a whole. Dr. Poppa also opined that employee's 1998, head injury resulted in 15% permanent partial disability of the body as a whole, his 2001, right elbow injury resulted in 20% permanent partial disability of the right upper extremity rated at the elbow, and his 2006, injury resulted in 20% permanent partial disability of the left lower extremity rated at the knee.

Despite Dr. Poppa's ratings and no contradictory ratings presented by the Second Injury Fund, the ALJ and the majority found that employee's preexisting permanent partial disabilities did not meet the threshold provided in § 287.220.1. I find this in error.

Although employee settled his claims with respect to his preexisting disabilities against employer for amounts less than the § 287.220 thresholds, these settlements are not binding with regard to his claim against the Second Injury Fund. See *Totten v. Treasurer of the State of Missouri*, 116 S.W.3d 624, 628 (Mo. App. 2003).

I find that the ALJ and the majority erroneously disregarded the opinions of Dr. Poppa in finding that employee's preexisting permanent partial disabilities did not meet the § 287.220 thresholds. I find that employee's 2007, injury combined with his preexisting disabilities to result in enhanced permanent partial disability and that the Second Injury Fund is liable for this enhanced amount.

I find that the ALJ and the majority arbitrarily disregarded employee's undisputed evidence and, therefore, the ALJ's award should be reversed. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member

## FINAL AWARD

Employee: Anthony Ladd Injury Nos: 06-006481  
07-029181  
08-079188

Dependents: N/A

Employer: Residential Sewage Treatment Company, Inc. (settled)

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Insurer: Secura Insurance Company

Hearing Date: July 19, 2010 Checked by: RCM/rm

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein?  
06-006481: No  
07-029181: No  
08-079188: No
2. Was the injury or occupational disease compensable under Chapter 287?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
3. Was there an accident or incident of occupational disease under the Law?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
4. Date of accident or onset of occupational disease:  
06-006481: January 25, 2006  
07-029181: March 27, 2007  
08-079188: August 11, 2008
5. State location where accident occurred or occupational disease was contracted:  
06-006481: Holden, Johnson County, Missouri  
07-029181: Leavenworth, Kansas  
08-079188: Smithville, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
7. Did employer receive proper notice?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes

8. Did accident or occupational disease arise out of and in the course of the employment?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
9. Was claim for compensation filed within time required by Law?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
10. Was employer insured by above insurer?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
06-006481: employee stepped in a hole and injured his left knee.  
07-029181: employee injured his back when lifting a 125 pound pump out of a septic system lift station.  
08-079188: employee injured his back when lifting a 25 pound aeration motor out of a septic tank.
12. Did accident or occupational disease cause death? Date of death? N/A  
06-006481: No  
07-029181: No  
08-079188: No
13. Part(s) of body injured by accident or occupational disease:  
06-006481: left knee (settled with employer for \$500.00)  
07-029181: neck, body as a whole (settled with employer for 20% PPD)  
08-079188: low back, body as a whole (settled with employer for 22.5% PPD)
14. Nature and extent of any permanent disability: See Award
15. Compensation paid to-date for temporary disability:  
06-006481: \$367.80  
07-029181: \$1,035.31  
08-079188: \$9,126.38
16. Value necessary medical aid paid to date by employer/insurer? \$5,169.21  
06-006481: \$11,168.12  
07-029181: \$75,297.56  
08-079188: \$42,606.64
17. Value necessary medical aid not furnished by employer/insurer?  
06-006481: none  
07-029181: none  
08-079188: none
18. Employee's average weekly wages:  
06-006481: \$538.00  
07-029181: \$566.00  
08-079188: \$617.20

19. Weekly compensation rate:

06-006481: \$358.67/\$358.67

07-029181: \$376.55/\$376.55

08-079188: \$411.47/\$404.66

20. Method wages computation: MO.REV.STAT. §287.250

21. Amount of compensation payable from Employer: Not applicable; claimant settled with the employer.

22. Second Injury Fund liability: None.

23. Future requirements awarded: None

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Anthony Ladd Injury Nos: 06-006481  
07-029181  
08-079188

Dependents: N/A

Employer: Residential Sewage Treatment Company, Inc. (settled)

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Insurer: Residential Sewage Treatment Company, Inc. (settled)

Hearing Date: July 19, 2010 Checked by: RCM/rm

On July 19, 2010, the employee and the State Treasurer as Custodian of the Second Injury Fund (“Second Injury Fund” and “Fund”) appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Anthony Ladd, appeared in person and with counsel, Thomas G. Munsell. The Fund appeared through Assistant Attorney General Benita Seliga. The issues presented were whether Mr. Ladd is permanently and totally disabled and whether the Fund is liable for such disability. For the reasons noted below, I find Mr. Ladd failed to prove that the disability from his August 11, 2008 combined with his alleged disabilities that pre-existed his accident to result in any additional disability, partial or total.

### **STIPULATIONS**

The parties stipulated that:

1. January 25, 2006, March 27, 2007 and August 11, 2008 (“the injury dates”), the Residential Sewage Treatment Company, Inc. (“RST”) was an employer operating subject to Missouri’s Workers’ Compensation law with its liability fully insured by Secura Insurance Company;
2. Mr. Ladd was RST’s employee working subject to the law in Holden, Missouri for the January 25, 2006 injury, Leavenworth, Kansas for the March 27, 2007 injury, and Smithville, Missouri for the August 11, 2008 injury;
3. Mr. Ladd sustained an accident arising out of and in the course of employment with RST on January 25, 2006, March 27, 2007 and August 11, 2008;

4. Mr. Ladd notified RST of his injuries and filed his claim for the August 11, 2008 injury within the time allowed by law;
5. RST provided Mr. Ladd with medical care costing \$11,168.12 for the January 25, 2006 injury, \$75,297.56 for the March 27, 2007 injury, and \$42,606.64 for the August 11, 2008 injury; and,
6. RST paid Mr. Ladd temporary total disability compensation totaling \$367.80 for the January 25, 2006 injury, \$1,035.31 for the March 27, 2007 injury, and \$9,126.38 for the August 11, 2008 injury.

### **ISSUES**

The parties requested the Division to determine:

1. Whether Mr. Ladd suffered any disability and, if so, the nature and extent of his disability and whether he is permanently and totally disabled?
2. Whether the SIF is liable to Mr. Ladd for any disability compensation?
3. Determining the employee's average weekly wage and compensation rates?
4. Whether Mr. Ladd's claim was filed within the time allowed by law and 06-006481 and 07-029181?
5. Whether the accidents caused the disability the employee claims?

### **FINDINGS OF FACT**

Mr. Ladd testified on his own behalf and presented three exhibits, all of which were admitted into evidence without objection:

- A - Records, David Ebelke, MD
- B - Stateline Imaging Records
- C - Records, Dr. Pang (Rockhill Orthopaedics)
- D - Paincare Records
- E - Records, Dr. Adrian Jackson
- F - Records, Dr. Charles Rhoades
- G - Records, Dr. Gary Baker

- H - Records, Research Medical Center
- I - Withdrawn
- J - Records, Concentra
- K - Certified copies of Settlements
- L - Deposition, Michael Poppa, DO, 4/22/2010 and 5/10/201
- M - Deposition, Michael Dreiling, May 18, 2010

In addition, Monica Ladd, the Claimant's wife, testified on his behalf. Although the Fund did not call any witnesses, it presented Exhibit 1, the May 22, 2010 deposition testimony of Mr. Ladd that was admitted into evidence without objection.

Based on the above exhibits and the testimony of Mr. Ladd, I make the following findings:

Mr. Ladd is thirty-four (34) years old and lives in Lee's Summit, Missouri with his wife of eleven (11) months, Monica Ladd, two of her children from a previous marriage (Brenden Meyerkorth, age 6, and Connor Meyerkorth, age 2) and another child from his second marriage (Aliyah, age 8); Mr. Ladd has another child from his first marriage (Alyson, age 13) but she does not reside with him. Mr. Ladd graduated from high school in Clinton, Missouri in 1994. He took some classes in computers after high school but did not earn any credits. He played football and basketball in high school. Mr. Ladd enjoys watching sports, including the Chiefs, Braves, Royals, and Lakers. He is no longer able to participate in sports, but does enjoy fantasy sports online. He does not have any computer knowledge other than basic use of the Internet.

Mr. Ladd has had several injuries, both in the course and scope of employment and outside of employment. His first noteworthy injury happened when he was nine or ten years old when he fell from a second-story balcony. He hit his head on landscaping and was in a coma for three days. He missed a month of school. He has scar on his head from this injury.

Mr. Ladd next injured his right hand while fighting with his brother. He was sixteen or seventeen years old at the time. He was diagnosed with a "boxer's fracture" and his right hand was in a cast for eight weeks. His hand still aches occasionally from this injury. Mr. Ladd next injured his left ankle while playing football in high school. He heard a pop in his ankle when he was tackled on the football field. He wore a brace. His ankle is still sometimes sore as a result of this injury.

Mr. Ladd's next noteworthy, non-work related injury was a motor vehicle accident in 1998. He was twenty-two years old at the time. Mr. Ladd was a passenger in a vehicle involved in a single-car accident that hit a telephone pole at ninety (90) miles an hour. *See*, Second Injury Fund Exhibit 1 at 36:6-10. Mr. Ladd was ejected from the car and crashed through the windshield. He was unconscious following the accident and was hospitalized for two weeks. He also injured his neck, right shoulder, and left wrist. He wore a brace on his left wrist because of injuries sustained in this accident. He still has headaches on occasion as a result of this injury, as well as aches and pains in his left wrist and right shoulder. He has a scar approximately 10 to 12 inches long which arcs over the top of his skull to the left ear.

The vehicle's trunk contained stolen property which the driver told police belonged to Mr. Ladd. Although Mr. Ladd denied this, he received a felony conviction for receiving stolen property and was sentenced to five years probation. *Id.* at 37:1.

Regarding Mr. Ladd's employment history, he essentially has been consistently employed since high school. While in high school, Mr. Ladd worked at McDonald's as a cashier. This job also involved cleaning bathrooms and taking out the trash. He did not have any injuries at McDonald's.

Upon graduating from high school in 1994, Mr. Ladd enlisted in the Navy. However, he had an asthma attack during basic training and was honorably discharged three weeks later. *See*, Claimant's Exhibit M at 82.

Mr. Ladd then obtained employment at the Springfield Nature Center, where he was responsible for feeding the animals, mowing grass, cleaning, and other general maintenance. Mr. Ladd got poison ivy through this employment, but had no other work-related injuries while employed at the Springfield Nature Center.

Mr. Ladd began working at Rival Corporation in Clinton, Missouri. This job involved running a plastic molding machine, pulling parts out of the machine and packaging them; he was employed in at Rival for six months and did not have any work-related injuries.

Mr. Ladd next worked for Tracker Boats in Clinton, Missouri. His job involved working on an assembly line installing sheets of fiberglass onto boats. He was employed in this position for three months earning \$7.25 per hour and did not have any work-related injuries.

Mr. Ladd next worked at Schreiber Cheese in Clinton, Missouri. He worked as a laborer in the "knock down" department, putting 40 pound blocks of cheese onto a line. Mr. Ladd injured his left wrist and, according to his testimony, underwent surgery for a DeQuervain's release. Although no records were submitted at hearing, the Division's file for this case, injury number 96-009238, shows medical expenses totaled \$3,950.98 together with two weeks of temporary total disability ("TTD"), and no settlement or permanent partial disability ("PPD") benefit.

Mr. Ladd next worked in a landscaping job in Clinton, Missouri. He did not have any work-related injuries during this employment.

His next job was at Wal-Mart in Harrisonville, Missouri. His job was to stock shelves and check inventory on delivery trucks. His left wrist ached at times during this job, but he had no work injuries there.

Mr. Ladd next worked at Hy-Vee. On May 23, 1997 while working at Hy-Vee, he suffered a hernia in his left groin while pulling a pallet of dog food. *See*, Claimant's Exhibit H at 14. On June 9, 2007, Dr. Edward Higgins surgically repaired the hernia at Research Hospital in Kansas City, Missouri. *Id.* at 26. The Division's file for this case, injury number 97-051782, shows medical expenses totaled \$5,301.51 together with eight days of TTD, and no settlement or PPD benefit.

Mr. Ladd next worked at Papa John's in Raytown, Missouri. He worked for two weeks in 1998 as a delivery driver before he was in the motor vehicle accident discussed above. After the accident, he was unable to return to work for approximately one year, so his employment with Papa John's ended.

Mr. Ladd next worked at Crosswaves Siding in Butler, Missouri. His job involved siding houses, mostly in the Kansas City area. He had pain in his right shoulder while using a hammer because of the prior right shoulder injury suffered in the 1998 motor vehicle accident. Crosswaves eventually went out of business, and Mr. Ladd returned to work at Papa John's.

This time at Papa John's, Mr. Ladd worked as an assistant manager and driver. He was responsible for scheduling work shifts and making deposits. While working at Papa John's, Mr. Ladd slipped and fell, injuring his right wrist. The Division's file for this case, injury number 00-059468, shows medical expenses totaled \$467.00, no TTD, and no settlement or PPD benefit.

Mr. Ladd next worked at Warrensburg Chrysler as a car porter. On December 13, 2000, he injured his right knee while pushing a car out of a ditch. It was a snowy day and he slipped, causing his right knee to fall against the car bumper. Although no medical records were submitted at hearing, the settlement on this injury shows medical expenses totaled \$1,480.57, that Mr. Ladd received \$668.19 in TTD<sup>1</sup>, and \$1,614.18 in PPD representing five percent (5%) disability of the right knee. *See*, Claimant's Exhibit K at 2.

Mr. Ladd next worked at Bullock Septic pumping septic tanks. This was his first experience in the septic industry. He did not have any work-related injuries in this employment.

Mr. Ladd next worked for Morton Buildings in Clinton, Missouri. His job involved framing and setting metal posts, which required him to use a hammer. On December 19, 2001, he injured his right wrist while hammering at work. John A. Gillen II, MD, administered a cortisone shot on January 11, 2002. *See*, Claimant's Exhibit G at 29. This shot was unsuccessful in relieving his symptoms. Dr. Gillen then performed a right first dorsal extensor compartment release in February 2002. *Id.* at 30. Post-operatively, Mr. Ladd completed several sessions of occupational therapy. *Id.* at 31. Because the surgery and occupational therapy were unsuccessful in relieving his symptoms Mr. Ladd was referred to Gary L. Baker, MD for additional treatment. Dr. Baker ordered a bone scan and MRI of the right wrist. *Id.* at 19. The MRI and bone scan were abnormal, so Dr. Baker recommended exploratory surgery. *Id.* at 15. On July 23, 2002, Dr. Baker performed a "radical right dorsal wrist compartment tenosynovectomy for relief and removal of work-related tenosynovitis". *Id.* at 41. The settlement on this injury shows medical expenses totaled \$30,863.43, that Mr. Ladd received \$12,762.48 in TTD for 41 5/7 weeks, and \$8,690.11 in PPD representing thirteen percent (13%) disability of the right wrist. *See*, Claimant's Exhibit K at 3. Although Dr. Baker released Mr. Ladd to return to regular work with no restrictions. *Id.* at 8. In addition, Dr. Baker rated Mr. Ladd at "four percent (4%) impairment measured at the level of right wrist (175 week level)." *Id.* at 6.

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<sup>1</sup> Although the blank for the number of weeks of TTD was filled in with "3 4/7", given the \$183.43 weekly compensation rate, the amount of TTD compensation, \$668.19, works out to just over three days of such benefit. I note that the Division's file also reflects that TTD totaled \$668.19.

Mr. Ladd next worked at Sonic as a car hop and cook. He did not have any work-related injuries from this employment.

His next job was cleaning carpets. He did not have any work-related injuries from this employment.

He also worked as a painter in Lake of the Ozarks, Missouri. He did not have any work-related injuries from this employment.

Mr. Ladd's next job was filling printer cartridges in 2004. He was injured on October 18, 2004 when an ink cartridge he was removing from a machine dislodged causing his left wrist to hit the machine's plastic protection cover. The settlement on this injury shows medical expenses totaled \$1,374.73, that Mr. Ladd did not receive any TTD, and that \$1,866.73 in PPD was paid representing five percent (5%) disability of the left wrist. *See*, Claimant's Exhibit K at 4.

Mr. Ladd's next and final employer was Residential Sewage Treatment Company, Inc. ("RST"). He started as a service technician installing and repairing septic systems, earning \$9.00 per hour. After a year, he got a raise to \$9.45. On January 25, 2006, Mr. Ladd was earning a monetary wage of \$9.45 per hour. In addition to his hourly rate, Mr. Ladd was given a company cell phone and truck, which he was free to use both at work and at home. His employer calculated the value of the phone and truck use at \$4.00 per hour. The value of these benefits was explained to all RST employees in a meeting, because there had been some complaints that field employees were earning less than office employees. The employer also paid for the gas and insurance for the truck. Mr. Ladd worked from 7 a.m. to 3:30 p.m. during the week and also worked two Saturdays per month. He worked at least 40 hours a week in this job.

*Left Knee Injury (06-006481)*

On January 25, 2006, Mr. Ladd injured his left knee. At the time of the injury, he was training a new employee on a septic tank when he stepped into a hole and his left leg sank into the ground up to his waist. His left knee twisted and immediately began swelling. Mr. Ladd initially participated in physical therapy. *See*, Claimant's Exhibit J at 55-93. When conservative treatment failed to relieve his symptoms, he was referred to Dr. Rhoades at Dickson-Dively Orthopaedic Clinic. *Id.* at 56. On March 1, 2006, Dr. Rhoades diagnosed a contusion and probable chondral lesion. He administered a steroid injection into the right knee. *See*, Claimant's Exhibit F at 15.

On March 8, 2006, Dr. Rhoades noted that the injection had not relieved Mr. Ladd's symptoms and recommended arthroscopy. *Id.* at 12. On March 14, 2006, Dr. Rhoades performed a left knee arthroscopic plica excision and chondroplasty of medial femoral condyle. *Id.* at 10-11. Dr. Rhoades released Mr. Ladd on May 17, 2006 to return to work full duty. *Id.* at 2-3. Mr. Munsell filed a Claim for Compensation for Mr. Ladd on this case; the settlement shows medical expenses totaled \$11,168.12, that Mr. Ladd received \$367.80 in TTD, and settled all issues for five hundred dollars (\$500.00). *See*, Claimant's Exhibit K at 6.

Cervical Injury (07-029181)

On March 27, 2007, Mr. Ladd injured himself in the course and scope of his employment with RST while lifting a one hundred twenty five (125) pound pump out of a septic system lift station. The pump got caught, but he kept pulling and felt a pop in his neck. At this time he earned between \$9.90 and \$10.40 per hour, plus the cell phone and truck valued at \$4.00 per hour. He immediately told his employer and was sent to Concentra. He was initially diagnosed with a strain and prescribed physical therapy. He completed physical therapy sessions at Concentra on 27, 2007, March 29, 2007, April 4, 2007 and April 10, 2007. See, Claimant's Exhibit at 10-38.

On April 10, 2007, the physical therapist noted Mr. Ladd's symptoms had not improved and recommended referral to a physiatrist as soon as possible. *Id.* at 12. Instead, Mr. Ladd was referred to Dr. Hess, a neurosurgeon. Dr. Hess recommended an anterior cervical decompression and fusion at C6-7. *Id.* at E, p. 17.<sup>2</sup> Dr. Ciccarelli recommended proceeding first with epidural steroid injections and then surgery should he have no benefit from them. *Id.* Mr. Ladd was then referred to spine surgeon, Adrian Jackson, M.D., who also recommended epidural injections before proceeding with surgery. On July 23, 2007, Dr. Jackson noted that the epidural steroid injections had provided Mr. Ladd with significant relief. *Id.* at 23. Unfortunately, this relief did not last. Mr. Ladd returned to Dr. Jackson on August 13, 2007 reporting neck and left arm pain. After discussing the options, Dr. Jackson and Mr. Ladd decided to proceed with surgical intervention. *Id.* at 24. On August 23, 2007, Dr. Jackson performed an anterior cervical discectomy and fusion with instrumentation at C6-7 as well as an exploration of the fusion at C5-6. *Id.* at 28.

Dr. Jackson released Mr. Ladd from treatment on November 14, 2007. At that time, Dr. Jackson noted:

Mr. Ladd is not 2 ½ months post ACDF of C6-7 below his congenital C5-6 fusion. He has done extremely well in his post operative course. **At this point we considered a short course of physical therapy for Mr. Ladd for generalized reconditioning prior to returning him to his normal activities. He does not feel that this is necessary and thinks he will be able to perform his normal functions without restrictions at this point.** Therefore, I believe he has reached maximum medical improvement with regards to this work related injury. **We will release him to ordinary duties with no restrictions.** He understands that he needs to use common sense with his activities both at work and at home. Any person working heavy physical job will always be at a baseline risk of injury or reinjury and he understands this. [emphasis added]

*Id.* at 35.

Dr. Jackson rated Mr. Ladd's disability at twenty percent (20%) to the body as a whole. *Id.* at 37. Mr. Ladd settled with the employer – without either filing a Claim for Compensation or

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<sup>2</sup> This information was provided by way of a letter from John M. Ciccarelli, MD as Dr. Hess' records were not provided at hearing.

the assistance of an attorney – for the value of Dr. Jackson’s rating. *See*, Claimant’s Exhibit K at 7. Of course, later, Mr. Ladd did file a Claim for Compensation against the Fund.

Mr. Ladd immediately returned to work, and was promoted to service manager with a corresponding pay raise. *See*, Second Injury Fund Exhibit 1 at 70:19-22. His job duties involved training new employees, handling customer complaints, checking parts inventory, and ordering supplies needed for the shop or for the field. *Id.* at 70:7-71:25. His position did not require any heavy work and clearly was less physically demanding than his previous technician position, but there is no credible evidence to suggest that this position was created for Mr. Ladd to accommodate his physical abilities. In fact, as noted in the quoted portion of Dr. Jackson’s records, above, not only did Dr. Jackson release Mr. Ladd without any restrictions, Mr. Ladd refused physical therapy that was offered to him.

Lumbar Injury (08-079188)

On August 11, 2008, Mr. Ladd sustained yet another work related injury. On that date, he injured his low back in the course and scope of his employment with RST. At the time, he was earning \$10.45 per hour and working two to five hours per week of overtime, at \$15.68 per hour. He was also still given the benefit of the company-provided cell phone and truck, valued at \$4.00 per hour.

Mr. Ladd was training another employee and felt a pop in his low back when lifting a twenty five (25) pound aeration motor out of a septic tank. His employer picked him up at the job site and took him to Dr. Mohan. Dr. Mohan initially diagnosed a strain and recommended physical therapy. Mr. Ladd completed a session of physical therapy at Concentra on August 18, 2008. *See*, Claimant’s Exhibit J at 2. The physical therapist diagnosed a lumbar strain and lumbar radiculopathy. *Id.* at 3.

On August 20, 2008, Mr. Ladd was evaluated by Dr. Pang, a physiatrist with Rockhill Orthopedics. *See*, Claimant’s Exhibit C at 11. Dr. Pang noted Mr. Ladd had low back pain along with numbness in his lower extremities and recommended an MRI of the lumbar spine. *Id.* at 11. An MRI of the lumbar spine revealed a “broad-based right paracentral disc herniation” at L5-S1, and both “mild disc bulging” and “a very small posterior central disc herniation” at L4-5. *See*, Claimant’s Exhibit B at 2. On August 27, 2008, Dr. Pang authorized Mr. Ladd to receive pain management. *Id.* at 8. Dr. Eubanks administered epidural injections on September 2, 2008 and September 19, 2008. *See*, Claimant’s Exhibit D at 34-37. On September 24, 2008, Dr. Pang noted that while Mr. Ladd did not have any side effects from the injections, and no weakness of the lower extremities or bowel/bladder function changes, the injections also did not relieve his back problems. *See*, Claimant’s Exhibit C at 2-4. Thus, Dr. Pang referred Mr. Ladd back to his spine surgeon, Dr. Jackson.

Mr. Ladd saw Dr. Jackson for an evaluation on October 6, 2008. *See* Claimant’s Exhibit E at 38. Dr. Jackson noted that “he has done extremely well” with his cervical fusion. Dr. Jackson had a positive straight leg raise on the left and a positive cross straight leg raise on the right together with “subjective numbness in no specific dermatomal pattern.” *Id.* Because the epidural injections did not relieve Mr. Ladd’s symptoms, Dr. Jackson recommended surgery. *Id.*

On October 23, 2008, Dr. Jackson performed a bilateral decompression and discectomy at L5-S1. *Id.* at 13. After the surgery, Mr. Ladd had continuing complaints in his low back so he had a series of epidural injections, which did not improve his symptoms. *Id.* at 7. Dr. Jackson observed that, "Mr. Ladd will need to consider a different type of employment. This is now the second spine surgery he has suffered doing this job and he needs to consider other long term options. Any job change will not be due to the specific injury that he has suffered but rather the predisposition that he has shown to spinal injuries with heavy manual labor." *Id.* at 7.

On February 13, 2009, Dr. Ebelke evaluated Mr. Ladd for a second opinion. After performing a physical exam and reviewing his medical records, Dr. Ebelke concluded that further surgical intervention was not appropriate and recommended a functional capacity evaluation. *See*, Claimant's Exhibit A at 2-3.

Dr. Jackson placed Mr. Ladd at MMI on March 13, 2009 and noted:

I had a very realistic discussion with Mr. Ladd today regarding his options at this point. These are to either consider functional capacity evaluation or to be released to ordinary duties with no restrictions and use common sense with his activities both at home and at work. My recommendation to Mr. Ladd is to avoid any permanent restrictions if possible as this may hamper him in terms of future employment. I certainly understand that he is not symptom free and I do think he will continue to improve over time. . . . After discussing the options with Mr. Ladd, we have elected to return him to his ordinary duties with no restrictions and bypass the functional capacity evaluation. He knows that using common sense with his activities both at home and at work will be critical for him to avoid further injury.

*See*, Claimant's Exhibit E at 6.

After he was released from treatment, Mr. Ladd was terminated from his job at RST and has not returned to work since then.

Mr. Ladd has applied for one job since his RST termination, one involving driving a trash truck. According to Mr. Ladd, he was not hired after the prospective employer "checked" his "workers' compensation records" and saw his history of work-related injuries. Mr. Ladd has not looked for work since then because he believes he is physically unable to do so. He acknowledges that at thirty-four, he is young to be permanently and totally disabled, but given his multiple injuries and the fact that he has constant pain all over his body, he does not believe there is any job he can perform on a full-time basis. Even if he had been hired for the position driving a trash truck, he does not believe he would have been able to perform the job because driving is very difficult for him. He applied for this job because he was trying to find an income to support his family. He also has applied for Social Security Disability benefits and his application is on appeal at this time.

Mr. Ladd's daily life now consists of preparing breakfast for his new wife's children and his daughter, supervising them, getting dressed, and monitoring their activities throughout the day. He spends a large portion of his day sitting in his recliner, because this chair is comfortable

for him. He does some household chores, including trying to rinse dishes or throw laundry down the stairs, but most chores cause him increased pain. He does not vacuum, dust, or mop to avoid exacerbating his pain. He does not do any outdoor work, such as mowing the lawn. He assists his wife with grocery shopping, but only carries the light bags. He currently takes Vicodin and blood pressure medication. He has taken Vicodin on and off since his neck injury but has taken it consistently since September 2009. Before Mr. Ladd's 2007 neck injury, he was able to play basketball, softball, and bowling, but no longer does those activities.

At the request of his attorney, Mr. Ladd was evaluated by Michael Poppa, D.O. on July 24, 2009. His deposition testimony was taken on April 22, 2010 and May 20, 2010 and is contained in Claimant's Exhibit L. Dr. Poppa's deposition took place on two days, not because of time constraints on April 24, but because it became apparent early in his testimony that he had authored two narrative reports each dated July 24, 2009 that contained significantly different opinions about Mr. Ladd. In his first report – the only one which had been provided to the Fund prior to the deposition – Dr. Poppa concluded that Mr. Ladd's injuries combined only to result in a twenty percent (20%) enhancement of his disability above their arithmetic sum. *See*, Claimant's Exhibit L at 106. However, in his second report, Dr. Poppa concluded that Mr. Ladd's injuries combined to result in his permanent and total disability. *Id.* at 118. Because the second report – with the permanent total disability opinion – had not been provided to the Fund pursuant to the "seven day rule", the deposition had to be continued to May 20. Claimant's counsel described this as a "draft report of Doctor Poppa's that inadvertently got sent" to the Fund's attorney. *Id.* at 22:12. However, not only did the Fund's attorney disagree with the characterization of this first report as a "draft", Dr. Poppa himself disavowed the description of his first report as a "draft":

A. No. I mean, the – terminology "draft" wasn't my terminology. I sent the [first] report and additional information was requested and I provided it.

Q. So it wasn't a – all right. So it wasn't a draft?

A. Not in my terminology. Others – I mean, it could be considered a draft, otherwise. But I guess what I'm saying is I don't – I don't – usually drafts don't go out and they're usually not sent. This was, and, you know, I just have to accept that and – and go on.

*Id.* at 68:21-69:5.

The first report does not contain the word "draft" and, in fact, if one were to conclude which report were a draft on appearances alone, it would be reasonable to conclude that the *second* report was the draft: the first report is on Dr. Poppa's blue printed stationary and contains his original signature, while the second report is a somewhat faint off-center photocopy without an original signature.

Regarding the second report providing "additional information" a substantive comparison of the two reports is in order. The first report is four pages long and the second report is four pages long. The first three pages of each report through the heading "Conclusions" are identical word-for-word; only until you reach "Conclusions" on page 3 do the reports diverge. Conclusion 1 of the first report is the same as conclusion 1 of the second report. Conclusion 2 of

the first report now simply is conclusion 3 of the second report. Conclusion 3 of the first report now simply is conclusion five of the second report. Conclusion 4 of the first report is now conclusion 6 of the second report except that in conclusion 4 of the first report Dr. Poppa opined that a 20% enhancement was in order, while in conclusion 6 of the second report he opined the Mr. Ladd was permanently and totally disabled as a result of all of his disabilities. *Id.* at 105-106 and 118. The only “additional information” contained in the second report – besides the permanent total opinion – is conclusion 2 which is that Mr. Ladd’s 2008 lumbar injury is really worth 30% body as a whole PPD even though he settled for 22.5% PPD, and conclusion 4 which is that the lumbar injury alone did not result in his total disability. *Id.* Dr. Poppa did not offer any substantive explanation as to why his opinion changed from a 20% enhancement in the first report to total disability in the second report.

On cross examination, Dr. Poppa admitted that no doctors gave Mr. Ladd any restrictions for his 1996 head injury, hypertension, alleged blurry vision, headaches, or his right wrist injury. *Id.* at 48:3, 49:7,11, 22, and 50:25. In addition, Dr. Poppa reviewed only a limited amount of Mr. Ladd’s medical records totaling only fifty-eight (58) pages.<sup>3</sup> *Id.* at 177-219. *The medical records offered at hearing by the claimant total four hundred sixty five (465) pages.*<sup>3</sup> Moreover Dr. Poppa was not even provided, nor did he review, any of the medical records contained in Claimant’s Exhibit’s A, B, C, D, E, F, H, or J. *Id.* at 29:13 - 30:1. These exhibits include records regarding: Dr. Ebelke’s evaluation for Mr. Ladd’s 2008 lumbar injury (Exhibit A); Mr. Ladd’s 2008 lumbar MRI (Exhibit B); Dr. Pang’s 2008 lumbar treatment (Exhibit C); Paincare 2008 lumbar treatment (Exhibit D); Dr. Jackson’s 2007 cervical and 2008 lumbar treatment (Exhibit E); Dr. Rhoades’ 2006 left knee treatment (Exhibit F); Research Medical hospitalization for hernia repair (Exhibit H); and Concentra treatment for Mr. Ladd’s 2006 knee injury, 2007 cervical injury and 2008 lumbar injury.

Given that Dr. Poppa rated these injuries one would think it important for him to actually have reviewed the treatment records for them. Moreover, his failure to adequately explain the vast difference of his opinion between his first July 24, 2009 report (20% enhancement) and his second July 24, 2009 report (permanent total) causes me to further question the credibility of his opinions in this case. In fact, given the paucity of records he reviewed, and his lack of adequate explanation of these divergent disability opinions, I find that Dr. Poppa’s opinions in this case lack credibility and I completely disregard them.

At the request of his attorney, Mr. Ladd also was evaluated by Mr. Michael Dreiling, a vocational consultant, on January 12, 2010. His deposition testimony was taken on May 18, 2010 and is contained in Claimant’s Exhibit M. Notably, Mr. Dreiling opined:

**I found that not taking into account Doctor Poppa’s medical opinion, but utilizing the other medical opinions of the other physicians that were cited in the medical restriction section, I felt this gentleman would be capable of working in the labor market.**

So that’s basically saying **if you ignored Doctor Poppa’s report, this person would have the ability to work.** When I looked at Doctor Poppa’s medical opinion, including the preexisting medical disabilities,

<sup>3</sup> Page totals do not include affidavit’s, attorney cover letters, duplicate records, Dr. Poppa’s report or CV.

and the more recent work injury, along with this individual's description of his level of functioning, it then became my vocational opinion that he would not be capable of performing work in the open labor market. [emphasis added]

*See*, Claimant's Exhibit M at 36:15 – 37:4.

On cross-examination, Mr. Dreiling testified that it was his understanding that Mr. Ladd already was a service manager for RST prior to his 2007 cervical injury and that he was able to “self-accommodate” in that position upon returning to RST after the cervical injury. *Id.* at 44:6-22. In addition, he admitted that if it turned out that Mr. Ladd actually had been promoted after the cervical injury to the service manager position that, “that would be different from what my understanding was.” *Id.* at 45:3-8. In fact, Mr. Ladd testified very clearly that it only was after his cervical injury that he became a manager, that he then was “in charge”, and that he described it as a “promotion.” *See*, Second Injury Fund Exhibit 1 at 70:7 and 21.

Given that Mr. Dreiling is a vocational consultant, it seems rather important that he understand clearly the positions in which the person he is evaluating has worked. An employee coming back to a position that he could “self-accommodate” could have far different implications than coming back to work and being promoted to a managerial position with higher pay. It is not that such different job positions might result in a different conclusion by Mr. Dreiling that gives me pause to view his testimony favorably, it is that as a vocational consultant it seems incumbent on him to pay close attention to the positions Mr. Ladd had occupied in his work – particularly when this job was the last one Mr. Ladd held. I note that Mr. Dreiling's deposition was taken a full week after Mr. Ladd's deposition and that had he simply read it, this discrepancy would have been plain for him to see. More importantly, though, is the fact that Mr. Dreiling's vocational opinion that Mr. Ladd is not employable is based completely on Dr. Poppa's opinion contained in his second July 24, 2009 report that Mr. Ladd is permanently and totally disabled; absent Dr. Poppa's opinion, Mr. Dreiling testified that he would have concluded that Mr. Ladd was employable. Because I completely reject Dr. Poppa's opinions in this case as not credible, I similarly reject Mr. Dreiling's opinion that Mr. Ladd is unemployable as it is predicated upon Dr. Poppa's permanent total opinion. Thus, I conclude, as would Mr. Dreiling without Dr. Poppa's opinion, that Mr. Ladd is employable.

## **RULINGS OF LAW**

### Average Weekly Wage

The purpose of determining average weekly wage is “to eventually measure the economic loss a worker experiences when he suffers ‘loss of wage earning capacity’ or ‘wage loss’ as those terms of art are statutorily defined.” *Grimes v. GAB Business Services, Inc.*, 988 S.W.2d 636, 639 (Mo.App. 1999). Here, Mr. Ladd suffered economic loss, not only in the form of lost wages, but also by losing the use of his company truck and cell phone. Thus, to fully compensate Mr. Ladd for his economic loss, these benefits must be part of the calculation of Mr. Ladd's average weekly wage.

Missouri's Workers' Compensation Law provides, in pertinent part, that:

For purposes of this section, the term "gross wages" includes, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging or similar advance received from the employer, ... "Wages", as used in this section, does not include fringe benefits such as retirement, pension, health and welfare, life insurance, training, Social Security or other employee or dependent benefit plan furnished by the employer for the benefit of the employee. . . .

MO.REV.STAT. §287.250.2 (2000)

Section 287.250.2 provides that while an employee is entitled to the use of "gross wages" in the determination of average weekly wage, he is not entitled to the inclusion of "special expenses" in the determination of average weekly wage. The Court in *Grimes* provided some insight into the distinction between gross wages and special expenses by explaining that while an employee may suffer economic loss when his employer stops providing clothing to be worn at work, the employee does not suffer economic loss if the employer stops making expense payments to the employee because the employee has stopped incurring those expenses. *Grimes*, 988 S.W.2d at 639-640. Likewise, Mr. Ladd suffered economic loss when his employer stopped providing a pick-up truck and mobile phone for his use.

In the most recent case on the issue of gross wages, *Caldwell v. Delta Express*, the Court held that Mr. Caldwell's per diem compensation was not a special expense because he was not required to keep track of how he spent the per diem payment. *Caldwell*, WL 708325 at 5 (Mo. App. 2009). As previously stated, Mr. Ladd was not required to keep track of his use of the company truck or the company cell phone. He was given free use of both as part of his employment. The *Caldwell* court further held that because Mr. Caldwell's per diem payment exceeded the expense Mr. Caldwell actually incurred on daily meals and board, he had an economic gain and thus, the payment was not a reimbursement of a special expense. *Id.* at 5.

The fact finder in a workers' compensation proceeding is vested with discretion over how average weekly wage is calculated. In that regard, Missouri's Workers' Compensation Law provides that if a weekly wage cannot "fairly and justly be determined [under 287.250.1], the division of the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage." §287.250.4 (RSMo. 2005). The Commission is entitled to rely upon an employee's testimony regarding his wages in calculating the value of an award, even if the employee does not produce documentation to support his testimony. *Seeley v. Anchor Fence Co.*, 96 S.W.3d 809, 821 (Mo. App. 2002).

In the case at bar, I find Mr. Ladd's receipt and use of a cell phone and truck indisputably fall into the category of gross wages. RST provided Mr. Ladd with a company truck and a company cell phone as part of his employment at RST. Mr. Ladd was allowed to use the vehicle and the phone for both work and personal uses. Mr. Ladd and the other field personnel at RST were in fact paid four dollars less per hour than office staff. Mr. Ladd was informed that this differential was because he received the unlimited use of the company truck and phone. When Mr. Ladd suffered his work-related injury and was no longer able to work at his regular job, he was deprived of the use of the truck and the phone. At the time of the August 11, 2008 injury, Mr. Ladd was earning \$10.45 per hour and working two to five hours per week of overtime, at

\$15.68 per hour. He was also still given the benefits of the company-provided cell phone and truck, valued at \$4.00 per hour. Thus, Mr. Ladd's average weekly wage at the time of this injury was \$617.20, giving him a compensation rate of \$411.46 for permanent total disability benefits.

At the time of the March 27, 2007 injury, Mr. Ladd was earning between \$9.90 and \$10.40 per hour, plus the cell phone and truck valued at \$4.00 per hour. Averaging \$9.90 and \$10.40 gives an hourly rate of \$10.15 per hour, plus \$4.00 per hour for additional wages gives Mr. Ladd an hourly rate of \$14.15. At 40 hours per week, Mr. Ladd had an average weekly wage of \$566.00. Two-thirds of \$566.00 is \$377.34, so Mr. Ladd qualifies for the maximum permanent partial disability rate at the time of his injury, \$376.55.

Likewise, on January 25, 2006, Mr. Ladd was earning \$9.45 per hour. In addition to his hourly rate, Mr. Ladd also had the company cell phone and truck, as discussed above. Thus, his average weekly wage at the time of his injury was \$538.00, giving him a compensation rate of \$358.67.

### Statute of Limitations

The Second Injury Fund has asserted that Mr. Ladd's claim for injury numbers 06-006481 and 07-029181 were not timely filed. The Court of Appeals recently addressed a statute of limitations issue in *Grubbs v. Treasurer of Missouri as Custodian for the Second Injury Fund*, 298 S.W.3d 907 (Mo. App. 2009). In *Grubbs*, the claimant was injured on July 30, 2003 and entered into a Stipulation for Compromise Settlement with the employer on November 15, 2004. *Id.* at 909. He filed a claim on September 29, 2005 against the Second Injury Fund only. *Id.* The Fund argued that the claim was time-barred based on Section 287.430 because the claimant did not file a claim against the Fund within two years after the injury or within one year after filing a claim against his employer. Missouri's Workers' Compensation Law provides, in pertinent part, that:

A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, *whichever is later*. [emphasis added]

MO.REV.STAT. §287.430 (2000)

The Court held that the phrase "claim for compensation" is not defined in Workers' Compensation Law. *Id.* at 911. In laymen's terms, a "claim" includes not only a lawsuit but also a claim settled out of court. *Id.* at 911. The Court held that a stipulation for compromise settlement therefore constitutes a claim under the Law. *Id.* Thus, the claimant filed a claim against the Second Injury Fund within one year of the claim against the Employer, making his claim against the Fund timely.

Here, Mr. Ladd filed his claim against the Second Injury and his employer for his 2006 injury on September 30, 2008 and settled his claim against the employer on May 6, 2009. As his claim against the Second Injury Fund for his injury was on file at the time of the settlement with the employer, it was filed within the one year prescribed by Section 287.430 and thus is a timely

claim. Regarding his 2007 injury, he filed his claim against the Fund on October 3, 2008, less than two years after his March 27, 2007 accident date. Thus, this claim is timely as well.

Mr. Ladd argued that he was rendered permanently and totally disabled due to the combined effect of the disability he sustained in the August 11, 2008 accident together with his alleged pre-existing disabilities. The applicable statute at §287.020(7) R.S.Mo. defines “total disability” as an inability to return to any employment and not merely. . . inability to return to the employment in which the employee was engaged at that time of the accident. The term “any employment” means “any reasonable or normal employment or occupation.” Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo.App. 1996); Crum v. Sachs Electric, 768 S.W.2d 131 (Mo.App. 1989); Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo.App. 1982); Groce v. Pyle, 315 S.W.2d (Mo.App. 1958).

It is not necessary that an individual be completely inactive or inert in order to meet the statutory definition of permanent total disability. It is necessary, however, that the employee be unable to compete in the open labor market. See Fletcher; Cearcy v. McDonald Douglas Aircraft, 894 S.W.2d 173 (Mo.App. 1995); Reiner v. Treasurer, 837 S.W.2d 363 (Mo.App. 1992); Brown v. Treasurer, 795 S.W.2d 478 (Mo.App. 1990).

Moreover, Missouri courts have also repeatedly held that the test for determining permanent total disability is whether the individual is able to complete in the open labor market and whether an employer in the usual course of business would reasonably be expected to employ the employee in his physical condition. See Garcia v. St. Louis County, 916 S.W.2d 263 (Mo.App. 1995); Lawrence v. R-II School District, 834 S.W.2d 789 (Mo.App. 1992); Carron v. St. Genevieve School District, 800 S.W.2d 6 (Mo.App. 1991); Fischer v. Arch Diocese of St. Louis, 793 S.W.2d 195 (Mo.App. 1999).

A determination of permanent total disability should focus on the ability or inability of the employee to perform the usual duties of various employments in the manner as such duties are customarily performed by the average person engaged in such employment. Gordon v. Tri State Motor Transit, 908 S.W.2d 849 (Mo.App. 1995). Courts have held that various factors may be considered, including an employee’s physical and mental condition, age, education, job experience, and skills in determining whether the employee is permanently and totally disabled. See e.g., Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo.App. 1997); Olds v. Treasurer, 964 S.W.2d 406 (Mo.App. 1993); Brown v. Treasurer, 795 S.W.2d 439 (Mo.App. 1990); Patchin v. National Supermarket, Inc., 738 S.W.2d 166 (Mo.App. 1997); Laturno v. Carnahan, 640 S.W.2d 470 (Mo.App. 1982).

But, in order to establish Second Injury Fund liability for permanent total disability benefits, the employee must prove the following:

- (1) That he or she has permanent disability resulting from a compensable work-related injury. See, MO.REV.STAT. §287.220.1 (2000);
- (2) That he or she has permanent disability predating the work-related injury which is of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment: See, MO.REV.STAT. §287.220.1

(2000); Garibay v. Treasurer, 930 S.W.2d 57 (Mo.App. 1996); Rolls v. Treasurer, 895 S.W.2d 591 (Mo.App. 1995); Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo.App. 1995); and

- (3) That the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time the last injury was sustained resulted in permanent total disability. Boring v. Treasurer, 947 S.W.2d 483 (Mo.App. 1997); Reiner v. Treasurer, 837 S.W.2d 152 (Mo.App. 1994).

After considering the testimony at the hearing by Mr. Ladd and the depositions of Dr. Poppa and Mr. Dreiling, I find that Mr. Ladd failed to prove either elements two (2) or three (3), above. Dr. Poppa's opinion regarding the impact of Mr. Ladd's injuries prior to his August 11, 2008 lumbar injury was unpersuasive given the paucity of medical records he reviewed. In addition, it ignored the fact that Mr. Ladd did not have any restrictions from any doctor on the right knee, the right wrist, left wrist, and lower left extremity at the 160 level. Mr. Ladd did not offer any credible evidence that he missed any work because of the aforementioned conditions after being released from medical treatment. He did not offer any medical records of any follow-up care on his head, any "residual issues" from the laceration from the motor vehicle accident or for his wrists or lower extremities. He did not offer any substantive or credible testimony that in any of his jobs, he was unable to pursue an occupation or perform a service for wages because of a prior injury or impairment. He testified that he did not ask for any accommodations in any jobs after his injuries with the exception of using a bucket to sit upon instead of kneeling on his left knee. He testified he had pain; merely having "pain" does not equal "disability" under Missouri's Workers' Compensation Law.

When faced with the question of what constitutes evidence of disability, the Labor and Industrial Relations Commission has held: "Disability" for workers' compensation purposes means, "the inability to do something; the deprivation or lack of physical, intellectual, or emotional capacity or fitness; the inability to pursue an occupation or perform services for wages because of physical or mental impairment." *Loven v. Greene County*, 63 S.W.3d 278 (Mo. App. 2001), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003); cited by the LIRC in *Amy Walters v. Children's Mercy Hospital & Truman Medical*, 2009 WL 4723711 (2009).

In applying the above to the case at hand, no substantive or persuasive evidence was introduced that Mr. Ladd was unable to pursue his occupation or perform his services for wages because of his conditions prior to August 11, 2008. On the contrary, according to his testimony, Mr. Ladd was hindered only by his felony conviction. *See*, Second Injury Fund Exhibit 1 at 37:4-6. He voluntarily quit his various jobs until becoming employed at RST in 2004.

After Mr. Ladd was released from medical treatment from his 2007 cervical injury, he received a promotion with a salary increase. He worked full time and overtime when necessary until August 11, 2008.

All of Mr. Ladd's prior injuries fall below the statutory threshold for Fund liability except for his 2007 cervical injury (07-029181), which settled for 20% PPD to his body as a whole. But

his testimony and the medical records show that he was not given any medical restrictions other than to use common sense. In addition, because I give Dr. Poppa's opinions no credibility in this case, Mr. Ladd similarly failed to prove any enhanced permanent partial liability as a result of these injuries.

For these reasons, all of Mr. Ladd's Fund claims are denied.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

**Carl Mueller**  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
**Naomi Pearson**  
*Division of Workers' Compensation*

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

Injury No.: 08-079188

Employee: Anthony Ladd  
Employer: Residential Sewage Treatment Company, Inc. (Settled)  
Insurer: Secura Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission, with regard to Injury No. 08-079188, reverses the award and decision of the administrative law judge (ALJ) dated August 24, 2010.

**Preliminaries**

Employee settled his claim against employer and proceeded to final hearing against the Second Injury Fund. The ALJ heard this matter to consider, among other issues, the nature and extent of any Second Injury Fund liability with respect to employee's 2008, injury.

The ALJ found that employee failed to prove any enhanced permanent partial disability as a result of his alleged preexisting disabilities combining with his 2008, injury. Therefore, employee's claim against the Second Injury Fund for the 2008, injury was denied.

Employee appealed to the Commission alleging that the ALJ erred in denying him permanent total disability (PTD) benefits against the Second Injury Fund. In addition, employee filed a Motion to Supplement the Record with Additional Evidence (motion). Employee's motion requested that the Commission allow him to supplement the record with an award of Social Security Disability benefits from the Social Security Administration.

Therefore, the primary issues currently before the Commission are whether employee's motion to supplement the record should be granted and the nature and extent of any Second Injury Fund liability.

**I. Additional Evidence**

On December 23, 2010, employee, through counsel, filed with the Commission a Motion to Supplement the Record with Additional Evidence. On January 14, 2011, the Second Injury Fund filed its response objecting to employee's Motion to Supplement the Record with Additional Evidence. On January 20, 2011, employee filed its Reply in Support of Motion to Supplement the Record with Additional Evidence.

Commission Rule 8 CSR 20-3.030 (2) governs the determination of this request. That rule states, in part:

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2005 unless otherwise indicated.

Employee: Anthony Ladd

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(A) After an application for review has been filed with the commission, any interested party may file a motion to submit additional evidence to the commission. The hearing of additional evidence by the commission shall not be granted except upon the ground of newly discovered evidence which with reasonable diligence could not have been produced at the hearing before the administrative law judge. . .

(B) The commission shall consider the motion to submit additional evidence and any answer of opposing parties without oral argument of the parties and enter an order either granting or denying the motion. If the motion is granted, the opposing party(ies) shall be permitted to present rebuttal evidence. As a matter of policy, the commission is opposed to the submission of additional evidence except where it furthers the interests of justice. Therefore, all available evidence shall be introduced at the hearing before the administrative law judge. The commission shall have discretion, after notice to the parties, to extend or accelerate the briefing schedule.

Employee has requested that we supplement the record with the Social Security Administration's December 8, 2010, award, approving employee for Social Security Disability benefits. First, employee argues that this award is new evidence, which he obtained on December 14, 2010, and, therefore, was not available at the time of the July 19, 2010, hearing. Second, employee argues that this recent approval should be considered because the Second Injury Fund repeatedly focused on the fact that employee's first application for Social Security Disability benefits was unsuccessful. Finally, employee argues that although approval for Social Security Disability benefits is not binding on the Commission, it constitutes relevant and material evidence of the nature and extent of employee's permanent disability.

In *Whiteman v. Del-Jen Construction, Inc.*, 37 S.W.3d 823 (Mo. App. 2001), the Missouri Court of Appeals for the Western District provided some guidance for the Commission in deciding whether to grant or deny a motion to supplement the record with additional evidence.

In *Whiteman*, the Court affirmed the Commission's decision to grant a claimant's request to introduce phone records as additional evidence. Prior to the Division of Workers' Compensation (Division) hearing, the claimant in that case attempted to obtain long distance phone records from his girlfriend's residence. He was under the impression that "Sprint" was the long-distance carrier for his girlfriend's residence and contacted them about the records. Sprint informed him that they only kept records for two years and when the claimant called three years had already passed from the relevant time period. Claimant went to the hearing under the impression that the pertinent phone records were unavailable to both parties. *Id.* at 829-30.

At the hearing, however, the employer introduced Sprint phone records to the ALJ without affording the claimant the proper seven-day notice for the introduction of business records. The claimant was made aware not only of the fact that the Sprint records were available, but also that the records did not reflect his long-distance calls to

Employee: Anthony Ladd

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the employer.<sup>2</sup> Claimant also discovered that the long-distance calls from his girlfriend's residence would have been handled by Southwestern Bell, not Sprint. *Id.*

On appeal, the claimant attempted to introduce the additional evidence of the Southwestern Bell long-distance telephone records to the Commission. The Commission found that the claimant was clearly surprised by the attempted introduction of the Sprint records at the Division hearing and noted the extensive referencing of the Sprint records in the ALJ's award. The Commission stated that it granted the claimant's request to submit the additional evidence and employer's rebuttal evidence "due to the apparent influence of these records on the ALJ's decision," and specifically, on the ALJ's credibility determinations. *Id.* at 829-30.

In affirming the Commission's decision, the Court noted that the ALJ "set out the content of the Sprint records in great detail in his findings of fact ..." and ultimately concluded that the Commission correctly decided that the ALJ was influenced by the Sprint records in making his award. The Court found that the granting of the claimant's motion "furthered the interests of justice." *Id.* at 831.

We find that the facts in this case are substantially different than the facts in *Whiteman*. In this case, there was no "surprise element" at the Division hearing, nor was there any reliance by the ALJ of employee's initial denial of Social Security Disability benefits. In fact, after reviewing the ALJ's award, we find that the only reference to employee's Social Security Disability application in the ALJ's August 24, 2010, award is one sentence on page 12 of the award in which the ALJ stated that "[employee] also has applied for Social Security Disability benefits and his application is on appeal at this time."

While employee concedes that the Commission is not bound by the Social Security Administration's award, he argues that the award is relevant and material evidence of the nature and extent of his permanent disability under workers' compensation law. We agree that relevance is important with respect to the admissibility of evidence; however, the issue we must determine is whether the admittance of the evidence furthers the interests of justice.

Although the Social Security Administration's actual award of benefits could not have been produced at the hearing before the administrative law judge, all of the medical evidence supporting the award was readily available at the hearing. Therefore, in light of the fact that the standard for permanent disability under workers' compensation law is significantly different than the standard used to determine whether an individual qualifies for Social Security Disability benefits, and the fact that the ALJ barely referenced employee's application for Social Security Disability benefits, we find that employee's initial denial of Social Security Disability benefits had no bearing on the ALJ's decision.<sup>3</sup>

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<sup>2</sup> The employment relationship in *Whiteman* was formed during a telephone conversation. Therefore, employee's location during said phone conversation was pertinent to the issue of whether Missouri or Kansas Workers' Compensation Law was applicable to his claim.

<sup>3</sup> *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. 2000).

Employee: Anthony Ladd

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For the foregoing reasons, we deny employee's request to submit additional evidence. Ultimately, we find that the admittance of the additional evidence does not further the interests of justice so as to overcome the Commission's general opposition to the submission of additional evidence.

## **II. Merits**

### **Findings of Fact and Conclusions of Law**

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

On August 11, 2008, employee injured his low back at work while lifting a 25 pound aeration motor out of a septic tank (2008, injury). Employee's low back injury was initially treated conservatively, but without relief. On October 23, 2008, Dr. Jackson performed a bilateral decompression and discectomy at L5-S1. Following the surgery, employee continued to complain of low back pain, which was treated with a series of epidural injections. Dr. Jackson placed employee at maximum medical improvement on March 13, 2009, and released him to work with no restrictions.

After being released from treatment, employee was subsequently discharged from his job with employer and has not returned to work.

Employee filed a workers' compensation claim for his 2008, injury. Employee settled his claim with employer for 22.5% permanent partial disability of the body as a whole referable to his lumbar spine.

Employee is currently limited in his daily life as a result of his neck and low back injuries. Employee testified that he spends a large portion of his day sitting in his recliner. He does some household chores, but most of the chores cause him increased pain.

Dr. Poppa evaluated employee and concluded that his 2008, injury resulted in 30% permanent partial disability of the body as a whole referable to his lumbar spine. In addition, Dr. Poppa found that employee had the following preexisting disabilities: 15% permanent partial disability of the body as a whole referable to head trauma he suffered in a 1998, motor vehicle accident; 20% permanent partial disability of the right upper extremity rated at the elbow due to a 2001, injury; 20% permanent partial disability of the left knee due to employee's 2006, injury; and 20% permanent partial disability of the body as a whole referable to the 2007, injury.

Dr. Poppa ultimately concluded that employee is permanently and totally disabled as a result of his 2008, injury combining with his preexisting disabilities.

We find, as did the ALJ, that Dr. Poppa's opinions are not credible. Regardless of the fact that Dr. Poppa issued two separate reports with different conclusions both dated July 24, 2009, his opinions do not accurately reflect employee's condition with regard to the 2008, injury or employee's preexisting disabilities.

Employee: Anthony Ladd

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We find, based on a totality of the evidence, that employee's permanent partial disability resulting from the 2008, injury did not rise to the 30% rating opined by Dr. Poppa. We find, after reviewing the medical records, employee's testimony, and the record as a whole, that a more accurate assessment of employee's permanent disability resulting solely from the 2008, injury is that he is 20% permanently partially disabled of the body as a whole referable to his lumbar spine. Further, we find that although employee may be limited in some respects due to his 2007 and 2008, injuries, we do not find that he is permanently and totally disabled.

Permanent and total disability is defined by § 287.020.6 RSMo 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).

In this case, employee was never actually issued any work restrictions by a treating doctor. Following employee's 2008, injury and rehabilitation, Dr. Jackson told employee that he would need to use common sense with regard to his job duties, but still released him to full duty work. In addition, Mr. Dreiling, a vocational rehabilitation expert, opined that "not taking into account Dr. Poppa's medical opinion, but utilizing the other medical opinions of the other physicians ..., [he] felt [employee] would be capable of working in the labor market." Because we do not find Dr. Poppa's opinion credible, we rely on Mr. Dreiling's aforementioned opinion and find that employee is capable of working in the labor market.

For the foregoing reasons, we agree with the ALJ's conclusion that employee is not permanently and totally disabled. However, we disagree with the ALJ's conclusion that employee failed to prove any enhanced permanent partial liability as a result of his 2008, injury combining with his preexisting disabilities.

As stated above, we find that employee's 2008, injury (primary injury) resulted in 20% permanent partial disability of the body as a whole referable to the lumbar spine, and that employee's 2007, injury resulted in 20% permanent partial disability of the body as a whole referable to the cervical spine (preexisting disability). In this instance, both the primary injury and preexisting disability thresholds provided in § 287.220.1 are satisfied and, therefore, the next step in the Second Injury Fund liability analysis requires an assessment of the combined effect of the primary injury and the preexisting disabilities.

Following employee's recovery from the 2007, injury, he went back to work without restrictions and even received a promotion and pay raise. However, following his recovery from the 2008, injury, he was released to work without restrictions, but the evidence

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suggests that employee's second spinal injury within a two year span had a more significant effect on him than the simple arithmetic sum of the two resultant disabilities.

We find, based upon the medical records, employee's testimony, and the record as a whole, that employee's 20% permanent partial disability of the body as a whole referable to the 2008, injury and the 20% preexisting permanent partial disability of the body as a whole referable to the 2007, injury, combined to result in an enhancement of 10% permanent partial disability of the body as a whole. The Second Injury Fund shall be liable for this 10% (or 16 weeks) enhancement, which amounts to a total of \$6,474.56 (16 weeks x \$404.66 PPD rate).

**Award**

With respect to Injury No.: 08-079188, we reverse the ALJ's denial of Second Injury Fund liability and find that the Second Injury Fund is liable for a 10% enhancement, which amounts to \$6,474.56.

Thomas G. Munsell, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee which shall constitute a lien on said compensation.

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

The award and decision of Administrative Law Judge Carl Mueller, issued August 24, 2010, is attached and incorporated to the extent it is not inconsistent with this final award.

Given at Jefferson City, State of Missouri, this 31<sup>st</sup> day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

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Secretary

Employee: Anthony Ladd

**SEPARATE OPINION**  
**CONCURRING IN PART AND DISSENTING IN PART**

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, as the majority concluded, that employee's Motion to Supplement the Record with Additional Evidence should be denied. However, I dissent from the majority's decision as to the finding that employee is not permanently and totally disabled.

Employee concedes that he is young to be permanently and totally disabled; however, given his multiple injuries and constant pain he suffers from literally head to toe, he does not believe there is any job he can perform on a full-time basis.

Employee sustained the following injuries prior to the 2008, injury: 1) Head injury, which rendered him comatose twice, with skull fractures and a cervical fusion; 2) Right hand fracture; 3) Left ankle sprain; 4) Injury and de Quervain's release, left wrist; 5) Right knee sprain – work related with 5% permanent partial disability settlement; 6) Injury and surgery, right wrist twice – work related with 13% permanent partial disability settlement; 7) Left wrist strain/sprain/contusion – work related 5% permanent partial disability settlement; 8) Left knee internal derangement with surgery – work related; and 9) Herniated cervical disc with surgery and fusion – work related with 20% permanent partial disability of the body as a whole settlement.

In addition to employee's preexisting injuries and resulting disabilities, the 2008, injury caused a herniated lumbar disc which required surgery. His claim against employer for said injury was settled for 22.5% permanent partial disability of the body as a whole.

Employee testified that prior to the 2008, injury, he had difficulty gripping, grasping, working overhead, looking up, standing for extended periods of time, squatting, kneeling and lifting. Employee testified that each injury took a little bit more out of him and the 2008, injury "pushed him over the hump." Employee stated, however, that the 2008, injury alone would not have prevented him from returning to work. It was the combination of injuries that renders him unable to compete in the open labor market.

Employee currently has pain daily in his neck, low back, both wrists, both knees, both shoulders and he suffers headaches. Employee is limited to sitting for one hour, standing for 20 minutes, walking for 20 minutes, and lifting no more than 15 to 20 pounds.

Dr. Poppa, the only doctor to perform an independent medical evaluation of employee, concluded that employee is permanently and totally disabled as a result of the 2008, injury combining with his preexisting disabilities.

Mr. Dreiling, the only vocational expert to perform a vocational evaluation of employee, concluded that "no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ [employee] in his existing physical condition."

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The test for permanent total disability is the worker's ability to compete in the open labor market. *Kinsley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo. App. 2007). The test measures the worker's potential for returning to employment. *Id.* The primary determination is whether an employer can reasonably be expected to hire the employee, given his or her present physical condition, and reasonably expect the employee to successfully perform the work. *Id.* However, an injured employee is not required to be completely inactive or inert in order to be totally disabled. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo. App. 1990).

I find that the ALJ erroneously disregarded the opinions of Dr. Poppa and Mr. Dreiling in finding that employee is not permanently and totally disabled. Even disregarding the expert testimony and documentation presented at trial, employee's uncontroverted testimony and the documentary evidence offered, is sufficient to support a finding that employee is not employable in the open labor market due to a combination of his preexisting and primary injuries. The Second Injury Fund offered nothing to rebut this evidence. I find that the ALJ arbitrarily disregarded this undisputed evidence and, therefore, the award should be reversed.

For the foregoing reasons, I respectfully concur in part and dissent in part from the decision of the majority of the Commission.

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John J. Hickey, Member

## FINAL AWARD

Employee: Anthony Ladd Injury Nos: 06-006481  
07-029181  
08-079188

Dependents: N/A

Employer: Residential Sewage Treatment Company, Inc. (settled)

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Insurer: Secura Insurance Company

Hearing Date: July 19, 2010 Checked by: RCM/rm

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein?  
06-006481: No  
07-029181: No  
08-079188: No
2. Was the injury or occupational disease compensable under Chapter 287?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
3. Was there an accident or incident of occupational disease under the Law?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
4. Date of accident or onset of occupational disease:  
06-006481: January 25, 2006  
07-029181: March 27, 2007  
08-079188: August 11, 2008
5. State location where accident occurred or occupational disease was contracted:  
06-006481: Holden, Johnson County, Missouri  
07-029181: Leavenworth, Kansas  
08-079188: Smithville, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
7. Did employer receive proper notice?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes

8. Did accident or occupational disease arise out of and in the course of the employment?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
9. Was claim for compensation filed within time required by Law?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
10. Was employer insured by above insurer?  
06-006481: Yes  
07-029181: Yes  
08-079188: Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
06-006481: employee stepped in a hole and injured his left knee.  
07-029181: employee injured his back when lifting a 125 pound pump out of a septic system lift station.  
08-079188: employee injured his back when lifting a 25 pound aeration motor out of a septic tank.
12. Did accident or occupational disease cause death? Date of death? N/A  
06-006481: No  
07-029181: No  
08-079188: No
13. Part(s) of body injured by accident or occupational disease:  
06-006481: left knee (settled with employer for \$500.00)  
07-029181: neck, body as a whole (settled with employer for 20% PPD)  
08-079188: low back, body as a whole (settled with employer for 22.5% PPD)
14. Nature and extent of any permanent disability: See Award
15. Compensation paid to-date for temporary disability:  
06-006481: \$367.80  
07-029181: \$1,035.31  
08-079188: \$9,126.38
16. Value necessary medical aid paid to date by employer/insurer? \$5,169.21  
06-006481: \$11,168.12  
07-029181: \$75,297.56  
08-079188: \$42,606.64
17. Value necessary medical aid not furnished by employer/insurer?  
06-006481: none  
07-029181: none  
08-079188: none
18. Employee's average weekly wages:  
06-006481: \$538.00  
07-029181: \$566.00  
08-079188: \$617.20

19. Weekly compensation rate:

06-006481: \$358.67/\$358.67

07-029181: \$376.55/\$376.55

08-079188: \$411.47/\$404.66

20. Method wages computation: MO.REV.STAT. §287.250

21. Amount of compensation payable from Employer: Not applicable; claimant settled with the employer.

22. Second Injury Fund liability: None.

23. Future requirements awarded: None

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Anthony Ladd Injury Nos: 06-006481  
07-029181  
08-079188

Dependents: N/A

Employer: Residential Sewage Treatment Company, Inc. (settled)

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Insurer: Residential Sewage Treatment Company, Inc. (settled)

Hearing Date: July 19, 2010 Checked by: RCM/rm

On July 19, 2010, the employee and the State Treasurer as Custodian of the Second Injury Fund (“Second Injury Fund” and “Fund”) appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Anthony Ladd, appeared in person and with counsel, Thomas G. Munsell. The Fund appeared through Assistant Attorney General Benita Seliga. The issues presented were whether Mr. Ladd is permanently and totally disabled and whether the Fund is liable for such disability. For the reasons noted below, I find Mr. Ladd failed to prove that the disability from his August 11, 2008 combined with his alleged disabilities that pre-existed his accident to result in any additional disability, partial or total.

### **STIPULATIONS**

The parties stipulated that:

1. January 25, 2006, March 27, 2007 and August 11, 2008 (“the injury dates”), the Residential Sewage Treatment Company, Inc. (“RST”) was an employer operating subject to Missouri’s Workers’ Compensation law with its liability fully insured by Secura Insurance Company;
2. Mr. Ladd was RST’s employee working subject to the law in Holden, Missouri for the January 25, 2006 injury, Leavenworth, Kansas for the March 27, 2007 injury, and Smithville, Missouri for the August 11, 2008 injury;
3. Mr. Ladd sustained an accident arising out of and in the course of employment with RST on January 25, 2006, March 27, 2007 and August 11, 2008;

4. Mr. Ladd notified RST of his injuries and filed his claim for the August 11, 2008 injury within the time allowed by law;
5. RST provided Mr. Ladd with medical care costing \$11,168.12 for the January 25, 2006 injury, \$75,297.56 for the March 27, 2007 injury, and \$42,606.64 for the August 11, 2008 injury; and,
6. RST paid Mr. Ladd temporary total disability compensation totaling \$367.80 for the January 25, 2006 injury, \$1,035.31 for the March 27, 2007 injury, and \$9,126.38 for the August 11, 2008 injury.

## **ISSUES**

The parties requested the Division to determine:

1. Whether Mr. Ladd suffered any disability and, if so, the nature and extent of his disability and whether he is permanently and totally disabled?
2. Whether the SIF is liable to Mr. Ladd for any disability compensation?
3. Determining the employee's average weekly wage and compensation rates?
4. Whether Mr. Ladd's claim was filed within the time allowed by law and 06-006481 and 07-029181?
5. Whether the accidents caused the disability the employee claims?

## **FINDINGS OF FACT**

Mr. Ladd testified on his own behalf and presented three exhibits, all of which were admitted into evidence without objection:

- A - Records, David Ebelke, MD
- B - Stateline Imaging Records
- C - Records, Dr. Pang (Rockhill Orthopaedics)
- D - Paincare Records
- E - Records, Dr. Adrian Jackson
- F - Records, Dr. Charles Rhoades
- G - Records, Dr. Gary Baker

- H - Records, Research Medical Center
- I - Withdrawn
- J - Records, Concentra
- K - Certified copies of Settlements
- L - Deposition, Michael Poppa, DO, 4/22/2010 and 5/10/201
- M - Deposition, Michael Dreiling, May 18, 2010

In addition, Monica Ladd, the Claimant's wife, testified on his behalf. Although the Fund did not call any witnesses, it presented Exhibit 1, the May 22, 2010 deposition testimony of Mr. Ladd that was admitted into evidence without objection.

Based on the above exhibits and the testimony of Mr. Ladd, I make the following findings:

Mr. Ladd is thirty-four (34) years old and lives in Lee's Summit, Missouri with his wife of eleven (11) months, Monica Ladd, two of her children from a previous marriage (Brenden Meyerkorth, age 6, and Connor Meyerkorth, age 2) and another child from his second marriage (Aliyah, age 8); Mr. Ladd has another child from his first marriage (Alyson, age 13) but she does not reside with him. Mr. Ladd graduated from high school in Clinton, Missouri in 1994. He took some classes in computers after high school but did not earn any credits. He played football and basketball in high school. Mr. Ladd enjoys watching sports, including the Chiefs, Braves, Royals, and Lakers. He is no longer able to participate in sports, but does enjoy fantasy sports online. He does not have any computer knowledge other than basic use of the Internet.

Mr. Ladd has had several injuries, both in the course and scope of employment and outside of employment. His first noteworthy injury happened when he was nine or ten years old when he fell from a second-story balcony. He hit his head on landscaping and was in a coma for three days. He missed a month of school. He has scar on his head from this injury.

Mr. Ladd next injured his right hand while fighting with his brother. He was sixteen or seventeen years old at the time. He was diagnosed with a "boxer's fracture" and his right hand was in a cast for eight weeks. His hand still aches occasionally from this injury. Mr. Ladd next injured his left ankle while playing football in high school. He heard a pop in his ankle when he was tackled on the football field. He wore a brace. His ankle is still sometimes sore as a result of this injury.

Mr. Ladd's next noteworthy, non-work related injury was a motor vehicle accident in 1998. He was twenty-two years old at the time. Mr. Ladd was a passenger in a vehicle involved in a single-car accident that hit a telephone pole at ninety (90) miles an hour. *See*, Second Injury Fund Exhibit 1 at 36:6-10. Mr. Ladd was ejected from the car and crashed through the windshield. He was unconscious following the accident and was hospitalized for two weeks. He also injured his neck, right shoulder, and left wrist. He wore a brace on his left wrist because of injuries sustained in this accident. He still has headaches on occasion as a result of this injury, as well as aches and pains in his left wrist and right shoulder. He has a scar approximately 10 to 12 inches long which arcs over the top of his skull to the left ear.

The vehicle's trunk contained stolen property which the driver told police belonged to Mr. Ladd. Although Mr. Ladd denied this, he received a felony conviction for receiving stolen property and was sentenced to five years probation. *Id.* at 37:1.

Regarding Mr. Ladd's employment history, he essentially has been consistently employed since high school. While in high school, Mr. Ladd worked at McDonald's as a cashier. This job also involved cleaning bathrooms and taking out the trash. He did not have any injuries at McDonald's.

Upon graduating from high school in 1994, Mr. Ladd enlisted in the Navy. However, he had an asthma attack during basic training and was honorably discharged three weeks later. *See*, Claimant's Exhibit M at 82.

Mr. Ladd then obtained employment at the Springfield Nature Center, where he was responsible for feeding the animals, mowing grass, cleaning, and other general maintenance. Mr. Ladd got poison ivy through this employment, but had no other work-related injuries while employed at the Springfield Nature Center.

Mr. Ladd began working at Rival Corporation in Clinton, Missouri. This job involved running a plastic molding machine, pulling parts out of the machine and packaging them; he was employed in at Rival for six months and did not have any work-related injuries.

Mr. Ladd next worked for Tracker Boats in Clinton, Missouri. His job involved working on an assembly line installing sheets of fiberglass onto boats. He was employed in this position for three months earning \$7.25 per hour and did not have any work-related injuries.

Mr. Ladd next worked at Schreiber Cheese in Clinton, Missouri. He worked as a laborer in the "knock down" department, putting 40 pound blocks of cheese onto a line. Mr. Ladd injured his left wrist and, according to his testimony, underwent surgery for a DeQuervain's release. Although no records were submitted at hearing, the Division's file for this case, injury number 96-009238, shows medical expenses totaled \$3,950.98 together with two weeks of temporary total disability ("TTD"), and no settlement or permanent partial disability ("PPD") benefit.

Mr. Ladd next worked in a landscaping job in Clinton, Missouri. He did not have any work-related injuries during this employment.

His next job was at Wal-Mart in Harrisonville, Missouri. His job was to stock shelves and check inventory on delivery trucks. His left wrist ached at times during this job, but he had no work injuries there.

Mr. Ladd next worked at Hy-Vee. On May 23, 1997 while working at Hy-Vee, he suffered a hernia in his left groin while pulling a pallet of dog food. *See*, Claimant's Exhibit H at 14. On June 9, 2007, Dr. Edward Higgins surgically repaired the hernia at Research Hospital in Kansas City, Missouri. *Id.* at 26. The Division's file for this case, injury number 97-051782, shows medical expenses totaled \$5,301.51 together with eight days of TTD, and no settlement or PPD benefit.

Mr. Ladd next worked at Papa John's in Raytown, Missouri. He worked for two weeks in 1998 as a delivery driver before he was in the motor vehicle accident discussed above. After the accident, he was unable to return to work for approximately one year, so his employment with Papa John's ended.

Mr. Ladd next worked at Crosswaves Siding in Butler, Missouri. His job involved siding houses, mostly in the Kansas City area. He had pain in his right shoulder while using a hammer because of the prior right shoulder injury suffered in the 1998 motor vehicle accident. Crosswaves eventually went out of business, and Mr. Ladd returned to work at Papa John's.

This time at Papa John's, Mr. Ladd worked as an assistant manager and driver. He was responsible for scheduling work shifts and making deposits. While working at Papa John's, Mr. Ladd slipped and fell, injuring his right wrist. The Division's file for this case, injury number 00-059468, shows medical expenses totaled \$467.00, no TTD, and no settlement or PPD benefit.

Mr. Ladd next worked at Warrensburg Chrysler as a car porter. On December 13, 2000, he injured his right knee while pushing a car out of a ditch. It was a snowy day and he slipped, causing his right knee to fall against the car bumper. Although no medical records were submitted at hearing, the settlement on this injury shows medical expenses totaled \$1,480.57, that Mr. Ladd received \$668.19 in TTD<sup>1</sup>, and \$1,614.18 in PPD representing five percent (5%) disability of the right knee. *See*, Claimant's Exhibit K at 2.

Mr. Ladd next worked at Bullock Septic pumping septic tanks. This was his first experience in the septic industry. He did not have any work-related injuries in this employment.

Mr. Ladd next worked for Morton Buildings in Clinton, Missouri. His job involved framing and setting metal posts, which required him to use a hammer. On December 19, 2001, he injured his right wrist while hammering at work. John A. Gillen II, MD, administered a cortisone shot on January 11, 2002. *See*, Claimant's Exhibit G at 29. This shot was unsuccessful in relieving his symptoms. Dr. Gillen then performed a right first dorsal extensor compartment release in February 2002. *Id.* at 30. Post-operatively, Mr. Ladd completed several sessions of occupational therapy. *Id.* at 31. Because the surgery and occupational therapy were unsuccessful in relieving his symptoms Mr. Ladd was referred to Gary L. Baker, MD for additional treatment. Dr. Baker ordered a bone scan and MRI of the right wrist. *Id.* at 19. The MRI and bone scan were abnormal, so Dr. Baker recommended exploratory surgery. *Id.* at 15. On July 23, 2002, Dr. Baker performed a "radical right dorsal wrist compartment tenosynovectomy for relief and removal of work-related tenosynovitis". *Id.* at 41. The settlement on this injury shows medical expenses totaled \$30,863.43, that Mr. Ladd received \$12,762.48 in TTD for 41 5/7 weeks, and \$8,690.11 in PPD representing thirteen percent (13%) disability of the right wrist. *See*, Claimant's Exhibit K at 3. Although Dr. Baker released Mr. Ladd to return to regular work with no restrictions. *Id.* at 8. In addition, Dr. Baker rated Mr. Ladd at "four percent (4%) impairment measured at the level of right wrist (175 week level)." *Id.* at 6.

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<sup>1</sup> Although the blank for the number of weeks of TTD was filled in with "3 4/7", given the \$183.43 weekly compensation rate, the amount of TTD compensation, \$668.19, works out to just over three days of such benefit. I note that the Division's file also reflects that TTD totaled \$668.19.

Mr. Ladd next worked at Sonic as a car hop and cook. He did not have any work-related injuries from this employment.

His next job was cleaning carpets. He did not have any work-related injuries from this employment.

He also worked as a painter in Lake of the Ozarks, Missouri. He did not have any work-related injuries from this employment.

Mr. Ladd's next job was filling printer cartridges in 2004. He was injured on October 18, 2004 when an ink cartridge he was removing from a machine dislodged causing his left wrist to hit the machine's plastic protection cover. The settlement on this injury shows medical expenses totaled \$1,374.73, that Mr. Ladd did not receive any TTD, and that \$1,866.73 in PPD was paid representing five percent (5%) disability of the left wrist. *See*, Claimant's Exhibit K at 4.

Mr. Ladd's next and final employer was Residential Sewage Treatment Company, Inc. ("RST"). He started as a service technician installing and repairing septic systems, earning \$9.00 per hour. After a year, he got a raise to \$9.45. On January 25, 2006, Mr. Ladd was earning a monetary wage of \$9.45 per hour. In addition to his hourly rate, Mr. Ladd was given a company cell phone and truck, which he was free to use both at work and at home. His employer calculated the value of the phone and truck use at \$4.00 per hour. The value of these benefits was explained to all RST employees in a meeting, because there had been some complaints that field employees were earning less than office employees. The employer also paid for the gas and insurance for the truck. Mr. Ladd worked from 7 a.m. to 3:30 p.m. during the week and also worked two Saturdays per month. He worked at least 40 hours a week in this job.

*Left Knee Injury (06-006481)*

On January 25, 2006, Mr. Ladd injured his left knee. At the time of the injury, he was training a new employee on a septic tank when he stepped into a hole and his left leg sank into the ground up to his waist. His left knee twisted and immediately began swelling. Mr. Ladd initially participated in physical therapy. *See*, Claimant's Exhibit J at 55-93. When conservative treatment failed to relieve his symptoms, he was referred to Dr. Rhoades at Dickson-Dively Orthopaedic Clinic. *Id.* at 56. On March 1, 2006, Dr. Rhoades diagnosed a contusion and probable chondral lesion. He administered a steroid injection into the right knee. *See*, Claimant's Exhibit F at 15.

On March 8, 2006, Dr. Rhoades noted that the injection had not relieved Mr. Ladd's symptoms and recommended arthroscopy. *Id.* at 12. On March 14, 2006, Dr. Rhoades performed a left knee arthroscopic plica excision and chondroplasty of medial femoral condyle. *Id.* at 10-11. Dr. Rhoades released Mr. Ladd on May 17, 2006 to return to work full duty. *Id.* at 2-3. Mr. Munsell filed a Claim for Compensation for Mr. Ladd on this case; the settlement shows medical expenses totaled \$11,168.12, that Mr. Ladd received \$367.80 in TTD, and settled all issues for five hundred dollars (\$500.00). *See*, Claimant's Exhibit K at 6.

Cervical Injury (07-029181)

On March 27, 2007, Mr. Ladd injured himself in the course and scope of his employment with RST while lifting a one hundred twenty five (125) pound pump out of a septic system lift station. The pump got caught, but he kept pulling and felt a pop in his neck. At this time he earned between \$9.90 and \$10.40 per hour, plus the cell phone and truck valued at \$4.00 per hour. He immediately told his employer and was sent to Concentra. He was initially diagnosed with a strain and prescribed physical therapy. He completed physical therapy sessions at Concentra on 27, 2007, March 29, 2007, April 4, 2007 and April 10, 2007. *See*, Claimant's Exhibit at 10-38.

On April 10, 2007, the physical therapist noted Mr. Ladd's symptoms had not improved and recommended referral to a physiatrist as soon as possible. *Id.* at 12. Instead, Mr. Ladd was referred to Dr. Hess, a neurosurgeon. Dr. Hess recommended an anterior cervical decompression and fusion at C6-7. *Id.* at E, p. 17.<sup>2</sup> Dr. Ciccarelli recommended proceeding first with epidural steroid injections and then surgery should he have no benefit from them. *Id.* Mr. Ladd was then referred to spine surgeon, Adrian Jackson, M.D., who also recommended epidural injections before proceeding with surgery. On July 23, 2007, Dr. Jackson noted that the epidural steroid injections had provided Mr. Ladd with significant relief. *Id.* at 23. Unfortunately, this relief did not last. Mr. Ladd returned to Dr. Jackson on August 13, 2007 reporting neck and left arm pain. After discussing the options, Dr. Jackson and Mr. Ladd decided to proceed with surgical intervention. *Id.* at 24. On August 23, 2007, Dr. Jackson performed an anterior cervical discectomy and fusion with instrumentation at C6-7 as well as an exploration of the fusion at C5-6. *Id.* at 28.

Dr. Jackson released Mr. Ladd from treatment on November 14, 2007. At that time, Dr. Jackson noted:

Mr. Ladd is not 2 ½ months post ACDF of C6-7 below his congenital C5-6 fusion. He has done extremely well in his post operative course. **At this point we considered a short course of physical therapy for Mr. Ladd for generalized reconditioning prior to returning him to his normal activities. He does not feel that this is necessary and thinks he will be able to perform his normal functions without restrictions at this point.** Therefore, I believe he has reached maximum medical improvement with regards to this work related injury. **We will release him to ordinary duties with no restrictions.** He understands that he needs to use common sense with his activities both at work and at home. Any person working heavy physical job will always be at a baseline risk of injury or reinjury and he understands this. [emphasis added]

*Id.* at 35.

Dr. Jackson rated Mr. Ladd's disability at twenty percent (20%) to the body as a whole. *Id.* at 37. Mr. Ladd settled with the employer – without either filing a Claim for Compensation or

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<sup>2</sup> This information was provided by way of a letter from John M. Ciccarelli, MD as Dr. Hess' records were not provided at hearing.

the assistance of an attorney – for the value of Dr. Jackson’s rating. *See*, Claimant’s Exhibit K at 7. Of course, later, Mr. Ladd did file a Claim for Compensation against the Fund.

Mr. Ladd immediately returned to work, and was promoted to service manager with a corresponding pay raise. *See*, Second Injury Fund Exhibit 1 at 70:19-22. His job duties involved training new employees, handling customer complaints, checking parts inventory, and ordering supplies needed for the shop or for the field. *Id.* at 70:7-71:25. His position did not require any heavy work and clearly was less physically demanding than his previous technician position, but there is no credible evidence to suggest that this position was created for Mr. Ladd to accommodate his physical abilities. In fact, as noted in the quoted portion of Dr. Jackson’s records, above, not only did Dr. Jackson release Mr. Ladd without any restrictions, Mr. Ladd refused physical therapy that was offered to him.

Lumbar Injury (08-079188)

On August 11, 2008, Mr. Ladd sustained yet another work related injury. On that date, he injured his low back in the course and scope of his employment with RST. At the time, he was earning \$10.45 per hour and working two to five hours per week of overtime, at \$15.68 per hour. He was also still given the benefit of the company-provided cell phone and truck, valued at \$4.00 per hour.

Mr. Ladd was training another employee and felt a pop in his low back when lifting a twenty five (25) pound aeration motor out of a septic tank. His employer picked him up at the job site and took him to Dr. Mohan. Dr. Mohan initially diagnosed a strain and recommended physical therapy. Mr. Ladd completed a session of physical therapy at Concentra on August 18, 2008. *See*, Claimant’s Exhibit J at 2. The physical therapist diagnosed a lumbar strain and lumbar radiculopathy. *Id.* at 3.

On August 20, 2008, Mr. Ladd was evaluated by Dr. Pang, a physiatrist with Rockhill Orthopedics. *See*, Claimant’s Exhibit C at 11. Dr. Pang noted Mr. Ladd had low back pain along with numbness in his lower extremities and recommended an MRI of the lumbar spine. *Id.* at 11. An MRI of the lumbar spine revealed a “broad-based right paracentral disc herniation” at L5-S1, and both “mild disc bulging” and “a very small posterior central disc herniation” at L4-5. *See*, Claimant’s Exhibit B at 2. On August 27, 2008, Dr. Pang authorized Mr. Ladd to receive pain management. *Id.* at 8. Dr. Eubanks administered epidural injections on September 2, 2008 and September 19, 2008. *See*, Claimant’s Exhibit D at 34-37. On September 24, 2008, Dr. Pang noted that while Mr. Ladd did not have any side effects from the injections, and no weakness of the lower extremities or bowel/bladder function changes, the injections also did not relieve his back problems. *See*, Claimant’s Exhibit C at 2-4. Thus, Dr. Pang referred Mr. Ladd back to his spine surgeon, Dr. Jackson.

Mr. Ladd saw Dr. Jackson for an evaluation on October 6, 2008. *See* Claimant’s Exhibit E at 38. Dr. Jackson noted that “he has done extremely well” with his cervical fusion. Dr. Jackson had a positive straight leg raise on the left and a positive cross straight leg raise on the right together with “subjective numbness in no specific dermatomal pattern.” *Id.* Because the epidural injections did not relieve Mr. Ladd’s symptoms, Dr. Jackson recommended surgery. *Id.*

On October 23, 2008, Dr. Jackson performed a bilateral decompression and discectomy at L5-S1. *Id.* at 13. After the surgery, Mr. Ladd had continuing complaints in his low back so he had a series of epidural injections, which did not improve his symptoms. *Id.* at 7. Dr. Jackson observed that, "Mr. Ladd will need to consider a different type of employment. This is now the second spine surgery he has suffered doing this job and he needs to consider other long term options. Any job change will not be due to the specific injury that he has suffered but rather the predisposition that he has shown to spinal injuries with heavy manual labor." *Id.* at 7.

On February 13, 2009, Dr. Ebelke evaluated Mr. Ladd for a second opinion. After performing a physical exam and reviewing his medical records, Dr. Ebelke concluded that further surgical intervention was not appropriate and recommended a functional capacity evaluation. *See*, Claimant's Exhibit A at 2-3.

Dr. Jackson placed Mr. Ladd at MMI on March 13, 2009 and noted:

I had a very realistic discussion with Mr. Ladd today regarding his options at this point. These are to either consider functional capacity evaluation or to be released to ordinary duties with no restrictions and use common sense with his activities both at home and at work. My recommendation to Mr. Ladd is to avoid any permanent restrictions if possible as this may hamper him in terms of future employment. I certainly understand that he is not symptom free and I do think he will continue to improve over time. . . . After discussing the options with Mr. Ladd, we have elected to return him to his ordinary duties with no restrictions and bypass the functional capacity evaluation. He knows that using common sense with his activities both at home and at work will be critical for him to avoid further injury.

*See*, Claimant's Exhibit E at 6.

After he was released from treatment, Mr. Ladd was terminated from his job at RST and has not returned to work since then.

Mr. Ladd has applied for one job since his RST termination, one involving driving a trash truck. According to Mr. Ladd, he was not hired after the prospective employer "checked" his "workers' compensation records" and saw his history of work-related injuries. Mr. Ladd has not looked for work since then because he believes he is physically unable to do so. He acknowledges that at thirty-four, he is young to be permanently and totally disabled, but given his multiple injuries and the fact that he has constant pain all over his body, he does not believe there is any job he can perform on a full-time basis. Even if he had been hired for the position driving a trash truck, he does not believe he would have been able to perform the job because driving is very difficult for him. He applied for this job because he was trying to find an income to support his family. He also has applied for Social Security Disability benefits and his application is on appeal at this time.

Mr. Ladd's daily life now consists of preparing breakfast for his new wife's children and his daughter, supervising them, getting dressed, and monitoring their activities throughout the day. He spends a large portion of his day sitting in his recliner, because this chair is comfortable

for him. He does some household chores, including trying to rinse dishes or throw laundry down the stairs, but most chores cause him increased pain. He does not vacuum, dust, or mop to avoid exacerbating his pain. He does not do any outdoor work, such as mowing the lawn. He assists his wife with grocery shopping, but only carries the light bags. He currently takes Vicodin and blood pressure medication. He has taken Vicodin on and off since his neck injury but has taken it consistently since September 2009. Before Mr. Ladd's 2007 neck injury, he was able to play basketball, softball, and bowling, but no longer does those activities.

At the request of his attorney, Mr. Ladd was evaluated by Michael Poppa, D.O. on July 24, 2009. His deposition testimony was taken on April 22, 2010 and May 20, 2010 and is contained in Claimant's Exhibit L. Dr. Poppa's deposition took place on two days, not because of time constraints on April 24, but because it became apparent early in his testimony that he had authored two narrative reports each dated July 24, 2009 that contained significantly different opinions about Mr. Ladd. In his first report – the only one which had been provided to the Fund prior to the deposition – Dr. Poppa concluded that Mr. Ladd's injuries combined only to result in a twenty percent (20%) enhancement of his disability above their arithmetic sum. *See*, Claimant's Exhibit L at 106. However, in his second report, Dr. Poppa concluded that Mr. Ladd's injuries combined to result in his permanent and total disability. *Id.* at 118. Because the second report – with the permanent total disability opinion – had not been provided to the Fund pursuant to the "seven day rule", the deposition had to be continued to May 20. Claimant's counsel described this as a "draft report of Doctor Poppa's that inadvertently got sent" to the Fund's attorney. *Id.* at 22:12. However, not only did the Fund's attorney disagree with the characterization of this first report as a "draft", Dr. Poppa himself disavowed the description of his first report as a "draft":

A. No. I mean, the – terminology "draft" wasn't my terminology. I sent the [first] report and additional information was requested and I provided it.

Q. So it wasn't a – all right. So it wasn't a draft?

A. Not in my terminology. Others – I mean, it could be considered a draft, otherwise. But I guess what I'm saying is I don't – I don't – usually drafts don't go out and they're usually not sent. This was, and, you know, I just have to accept that and – and go on.

*Id.* at 68:21-69:5.

The first report does not contain the word "draft" and, in fact, if one were to conclude which report were a draft on appearances alone, it would be reasonable to conclude that the *second* report was the draft: the first report is on Dr. Poppa's blue printed stationary and contains his original signature, while the second report is a somewhat faint off-center photocopy without an original signature.

Regarding the second report providing "additional information" a substantive comparison of the two reports is in order. The first report is four pages long and the second report is four pages long. The first three pages of each report through the heading "Conclusions" are identical word-for-word; only until you reach "Conclusions" on page 3 do the reports diverge. Conclusion 1 of the first report is the same as conclusion 1 of the second report. Conclusion 2 of

the first report now simply is conclusion 3 of the second report. Conclusion 3 of the first report now simply is conclusion five of the second report. Conclusion 4 of the first report is now conclusion 6 of the second report except that in conclusion 4 of the first report Dr. Poppa opined that a 20% enhancement was in order, while in conclusion 6 of the second report he opined the Mr. Ladd was permanently and totally disabled as a result of all of his disabilities. *Id.* at 105-106 and 118. The only “additional information” contained in the second report – besides the permanent total opinion – is conclusion 2 which is that Mr. Ladd’s 2008 lumbar injury is really worth 30% body as a whole PPD even though he settled for 22.5% PPD, and conclusion 4 which is that the lumbar injury alone did not result in his total disability. *Id.* Dr. Poppa did not offer any substantive explanation as to why his opinion changed from a 20% enhancement in the first report to total disability in the second report.

On cross examination, Dr. Poppa admitted that no doctors gave Mr. Ladd any restrictions for his 1996 head injury, hypertension, alleged blurry vision, headaches, or his right wrist injury. *Id.* at 48:3, 49:7,11, 22, and 50:25. In addition, Dr. Poppa reviewed only a limited amount of Mr. Ladd’s medical records totaling only fifty-eight (58) pages.<sup>3</sup> *Id.* at 177-219. *The medical records offered at hearing by the claimant total four hundred sixty five (465) pages.*<sup>3</sup> Moreover Dr. Poppa was not even provided, nor did he review, any of the medical records contained in Claimant’s Exhibit’s A, B, C, D, E, F, H, or J. *Id.* at 29:13 - 30:1. These exhibits include records regarding: Dr. Ebelke’s evaluation for Mr. Ladd’s 2008 lumbar injury (Exhibit A); Mr. Ladd’s 2008 lumbar MRI (Exhibit B); Dr. Pang’s 2008 lumbar treatment (Exhibit C); Paincare 2008 lumbar treatment (Exhibit D); Dr. Jackson’s 2007 cervical and 2008 lumbar treatment (Exhibit E); Dr. Rhoades’ 2006 left knee treatment (Exhibit F); Research Medical hospitalization for hernia repair (Exhibit H); and Concentra treatment for Mr. Ladd’s 2006 knee injury, 2007 cervical injury and 2008 lumbar injury.

Given that Dr. Poppa rated these injuries one would think it important for him to actually have reviewed the treatment records for them. Moreover, his failure to adequately explain the vast difference of his opinion between his first July 24, 2009 report (20% enhancement) and his second July 24, 2009 report (permanent total) causes me to further question the credibility of his opinions in this case. In fact, given the paucity of records he reviewed, and his lack of adequate explanation of these divergent disability opinions, I find that Dr. Poppa’s opinions in this case lack credibility and I completely disregard them.

At the request of his attorney, Mr. Ladd also was evaluated by Mr. Michael Dreiling, a vocational consultant, on January 12, 2010. His deposition testimony was taken on May 18, 2010 and is contained in Claimant’s Exhibit M. Notably, Mr. Dreiling opined:

**I found that not taking into account Doctor Poppa’s medical opinion, but utilizing the other medical opinions of the other physicians that were cited in the medical restriction section, I felt this gentleman would be capable of working in the labor market.**

So that’s basically saying **if you ignored Doctor Poppa’s report, this person would have the ability to work.** When I looked at Doctor Poppa’s medical opinion, including the preexisting medical disabilities,

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<sup>3</sup> Page totals do not include affidavit’s, attorney cover letters, duplicate records, Dr. Poppa’s report or CV.

and the more recent work injury, along with this individual's description of his level of functioning, it then became my vocational opinion that he would not be capable of performing work in the open labor market. [emphasis added]

*See*, Claimant's Exhibit M at 36:15 – 37:4.

On cross-examination, Mr. Dreiling testified that it was his understanding that Mr. Ladd already was a service manager for RST prior to his 2007 cervical injury and that he was able to “self-accommodate” in that position upon returning to RST after the cervical injury. *Id.* at 44:6-22. In addition, he admitted that if it turned out that Mr. Ladd actually had been promoted after the cervical injury to the service manager position that, “that would be different from what my understanding was.” *Id.* at 45:3-8. In fact, Mr. Ladd testified very clearly that it only was after his cervical injury that he became a manager, that he then was “in charge”, and that he described it as a “promotion.” *See*, Second Injury Fund Exhibit 1 at 70:7 and 21.

Given that Mr. Dreiling is a vocational consultant, it seems rather important that he understand clearly the positions in which the person he is evaluating has worked. An employee coming back to a position that he could “self-accommodate” could have far different implications than coming back to work and being promoted to a managerial position with higher pay. It is not that such different job positions might result in a different conclusion by Mr. Dreiling that gives me pause to view his testimony favorably, it is that as a vocational consultant it seems incumbent on him to pay close attention to the positions Mr. Ladd had occupied in his work – particularly when this job was the last one Mr. Ladd held. I note that Mr. Dreiling's deposition was taken a full week after Mr. Ladd's deposition and that had he simply read it, this discrepancy would have been plain for him to see. More importantly, though, is the fact that Mr. Dreiling's vocational opinion that Mr. Ladd is not employable is based completely on Dr. Poppa's opinion contained in his second July 24, 2009 report that Mr. Ladd is permanently and totally disabled; absent Dr. Poppa's opinion, Mr. Dreiling testified that he would have concluded that Mr. Ladd was employable. Because I completely reject Dr. Poppa's opinions in this case as not credible, I similarly reject Mr. Dreiling's opinion that Mr. Ladd is unemployable as it is predicated upon Dr. Poppa's permanent total opinion. Thus, I conclude, as would Mr. Dreiling without Dr. Poppa's opinion, that Mr. Ladd is employable.

## **RULINGS OF LAW**

### Average Weekly Wage

The purpose of determining average weekly wage is “to eventually measure the economic loss a worker experiences when he suffers ‘loss of wage earning capacity’ or ‘wage loss’ as those terms of art are statutorily defined.” *Grimes v. GAB Business Services, Inc.*, 988 S.W.2d 636, 639 (Mo.App. 1999). Here, Mr. Ladd suffered economic loss, not only in the form of lost wages, but also by losing the use of his company truck and cell phone. Thus, to fully compensate Mr. Ladd for his economic loss, these benefits must be part of the calculation of Mr. Ladd's average weekly wage.

Missouri's Workers' Compensation Law provides, in pertinent part, that:

For purposes of this section, the term “gross wages” includes, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging or similar advance received from the employer, ... “Wages”, as used in this section, does not include fringe benefits such as retirement, pension, health and welfare, life insurance, training, Social Security or other employee or dependent benefit plan furnished by the employer for the benefit of the employee. . . .

MO.REV.STAT. §287.250.2 (2000)

Section 287.250.2 provides that while an employee is entitled to the use of “gross wages” in the determination of average weekly wage, he is not entitled to the inclusion of “special expenses” in the determination of average weekly wage. The Court in *Grimes* provided some insight into the distinction between gross wages and special expenses by explaining that while an employee may suffer economic loss when his employer stops providing clothing to be worn at work, the employee does not suffer economic loss if the employer stops making expense payments to the employee because the employee has stopped incurring those expenses. *Grimes*, 988 S.W.2d at 639-640. Likewise, Mr. Ladd suffered economic loss when his employer stopped providing a pick-up truck and mobile phone for his use.

In the most recent case on the issue of gross wages, *Caldwell v. Delta Express*, the Court held that Mr. Caldwell’s per diem compensation was not a special expense because he was not required to keep track of how he spent the per diem payment. *Caldwell*, WL 708325 at 5 (Mo. App. 2009). As previously stated, Mr. Ladd was not required to keep track of his use of the company truck or the company cell phone. He was given free use of both as part of his employment. The *Caldwell* court further held that because Mr. Caldwell’s per diem payment exceeded the expense Mr. Caldwell actually incurred on daily meals and board, he had an economic gain and thus, the payment was not a reimbursement of a special expense. *Id.* at 5.

The fact finder in a workers’ compensation proceeding is vested with discretion over how average weekly wage is calculated. In that regard, Missouri’s Workers’ Compensation Law provides that if a weekly wage cannot “fairly and justly be determined [under 287.250.1], the division of the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee’s average weekly wage.” §287.250.4 (RSMo. 2005). The Commission is entitled to rely upon an employee’s testimony regarding his wages in calculating the value of an award, even if the employee does not produce documentation to support his testimony. *Seeley v. Anchor Fence Co.*, 96 S.W.3d 809, 821 (Mo. App. 2002).

In the case at bar, I find Mr. Ladd’s receipt and use of a cell phone and truck indisputably fall into the category of gross wages. RST provided Mr. Ladd with a company truck and a company cell phone as part of his employment at RST. Mr. Ladd was allowed to use the vehicle and the phone for both work and personal uses. Mr. Ladd and the other field personnel at RST were in fact paid four dollars less per hour than office staff. Mr. Ladd was informed that this differential was because he received the unlimited use of the company truck and phone. When Mr. Ladd suffered his work-related injury and was no longer able to work at his regular job, he was deprived of the use of the truck and the phone. At the time of the August 11, 2008 injury, Mr. Ladd was earning \$10.45 per hour and working two to five hours per week of overtime, at

\$15.68 per hour. He was also still given the benefits of the company-provided cell phone and truck, valued at \$4.00 per hour. Thus, Mr. Ladd's average weekly wage at the time of this injury was \$617.20, giving him a compensation rate of \$411.46 for permanent total disability benefits.

At the time of the March 27, 2007 injury, Mr. Ladd was earning between \$9.90 and \$10.40 per hour, plus the cell phone and truck valued at \$4.00 per hour. Averaging \$9.90 and \$10.40 gives an hourly rate of \$10.15 per hour, plus \$4.00 per hour for additional wages gives Mr. Ladd an hourly rate of \$14.15. At 40 hours per week, Mr. Ladd had an average weekly wage of \$566.00. Two-thirds of \$566.00 is \$377.34, so Mr. Ladd qualifies for the maximum permanent partial disability rate at the time of his injury, \$376.55.

Likewise, on January 25, 2006, Mr. Ladd was earning \$9.45 per hour. In addition to his hourly rate, Mr. Ladd also had the company cell phone and truck, as discussed above. Thus, his average weekly wage at the time of his injury was \$538.00, giving him a compensation rate of \$358.67.

### Statute of Limitations

The Second Injury Fund has asserted that Mr. Ladd's claim for injury numbers 06-006481 and 07-029181 were not timely filed. The Court of Appeals recently addressed a statute of limitations issue in *Grubbs v. Treasurer of Missouri as Custodian for the Second Injury Fund*, 298 S.W.3d 907 (Mo. App. 2009). In *Grubbs*, the claimant was injured on July 30, 2003 and entered into a Stipulation for Compromise Settlement with the employer on November 15, 2004. *Id.* at 909. He filed a claim on September 29, 2005 against the Second Injury Fund only. *Id.* The Fund argued that the claim was time-barred based on Section 287.430 because the claimant did not file a claim against the Fund within two years after the injury or within one year after filing a claim against his employer. Missouri's Workers' Compensation Law provides, in pertinent part, that:

A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, *whichever is later*. [emphasis added]

MO.REV.STAT. §287.430 (2000)

The Court held that the phrase "claim for compensation" is not defined in Workers' Compensation Law. *Id.* at 911. In laymen's terms, a "claim" includes not only a lawsuit but also a claim settled out of court. *Id.* at 911. The Court held that a stipulation for compromise settlement therefore constitutes a claim under the Law. *Id.* Thus, the claimant filed a claim against the Second Injury Fund within one year of the claim against the Employer, making his claim against the Fund timely.

Here, Mr. Ladd filed his claim against the Second Injury and his employer for his 2006 injury on September 30, 2008 and settled his claim against the employer on May 6, 2009. As his claim against the Second Injury Fund for his injury was on file at the time of the settlement with the employer, it was filed within the one year prescribed by Section 287.430 and thus is a timely

claim. Regarding his 2007 injury, he filed his claim against the Fund on October 3, 2008, less than two years after his March 27, 2007 accident date. Thus, this claim is timely as well.

Mr. Ladd argued that he was rendered permanently and totally disabled due to the combined effect of the disability he sustained in the August 11, 2008 accident together with his alleged pre-existing disabilities. The applicable statute at §287.020(7) R.S.Mo. defines “total disability” as an inability to return to any employment and not merely. . . inability to return to the employment in which the employee was engaged at that time of the accident. The term “any employment” means “any reasonable or normal employment or occupation.” Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo.App. 1996); Crum v. Sachs Electric, 768 S.W.2d 131 (Mo.App. 1989); Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo.App. 1982); Groce v. Pyle, 315 S.W.2d (Mo.App. 1958).

It is not necessary that an individual be completely inactive or inert in order to meet the statutory definition of permanent total disability. It is necessary, however, that the employee be unable to compete in the open labor market. See Fletcher; Cearcy v. McDonald Douglas Aircraft, 894 S.W.2d 173 (Mo.App. 1995); Reiner v. Treasurer, 837 S.W.2d 363 (Mo.App. 1992); Brown v. Treasurer, 795 S.W.2d 478 (Mo.App. 1990).

Moreover, Missouri courts have also repeatedly held that the test for determining permanent total disability is whether the individual is able to complete in the open labor market and whether an employer in the usual course of business would reasonably be expected to employ the employee in his physical condition. See Garcia v. St. Louis County, 916 S.W.2d 263 (Mo.App. 1995); Lawrence v. R-II School District, 834 S.W.2d 789 (Mo.App. 1992); Carron v. St. Genevieve School District, 800 S.W.2d 6 (Mo.App. 1991); Fischer v. Arch Diocese of St. Louis, 793 S.W.2d 195 (Mo.App. 1999).

A determination of permanent total disability should focus on the ability or inability of the employee to perform the usual duties of various employments in the manner as such duties are customarily performed by the average person engaged in such employment. Gordon v. Tri State Motor Transit, 908 S.W.2d 849 (Mo.App. 1995). Courts have held that various factors may be considered, including an employee’s physical and mental condition, age, education, job experience, and skills in determining whether the employee is permanently and totally disabled. See e.g., Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo.App. 1997); Olds v. Treasurer, 964 S.W.2d 406 (Mo.App. 1993); Brown v. Treasurer, 795 S.W.2d 439 (Mo.App. 1990); Patchin v. National Supermarket, Inc., 738 S.W.2d 166 (Mo.App. 1997); Laturno v. Carnahan, 640 S.W.2d 470 (Mo.App. 1982).

But, in order to establish Second Injury Fund liability for permanent total disability benefits, the employee must prove the following:

- (1) That he or she has permanent disability resulting from a compensable work-related injury. See, MO.REV.STAT. §287.220.1 (2000);
- (2) That he or she has permanent disability predating the work-related injury which is of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment: See, MO.REV.STAT. §287.220.1

(2000); Garibay v. Treasurer, 930 S.W.2d 57 (Mo.App. 1996); Rolls v. Treasurer, 895 S.W.2d 591 (Mo.App. 1995); Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo.App. 1995); and

- (3) That the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time the last injury was sustained resulted in permanent total disability. Boring v. Treasurer, 947 S.W.2d 483 (Mo.App. 1997); Reiner v. Treasurer, 837 S.W.2d 152 (Mo.App. 1994).

After considering the testimony at the hearing by Mr. Ladd and the depositions of Dr. Poppa and Mr. Dreiling, I find that Mr. Ladd failed to prove either elements two (2) or three (3), above. Dr. Poppa's opinion regarding the impact of Mr. Ladd's injuries prior to his August 11, 2008 lumbar injury was unpersuasive given the paucity of medical records he reviewed. In addition, it ignored the fact that Mr. Ladd did not have any restrictions from any doctor on the right knee, the right wrist, left wrist, and lower left extremity at the 160 level. Mr. Ladd did not offer any credible evidence that he missed any work because of the aforementioned conditions after being released from medical treatment. He did not offer any medical records of any follow-up care on his head, any "residual issues" from the laceration from the motor vehicle accident or for his wrists or lower extremities. He did not offer any substantive or credible testimony that in any of his jobs, he was unable to pursue an occupation or perform a service for wages because of a prior injury or impairment. He testified that he did not ask for any accommodations in any jobs after his injuries with the exception of using a bucket to sit upon instead of kneeling on his left knee. He testified he had pain; merely having "pain" does not equal "disability" under Missouri's Workers' Compensation Law.

When faced with the question of what constitutes evidence of disability, the Labor and Industrial Relations Commission has held: "Disability" for workers' compensation purposes means, "the inability to do something; the deprivation or lack of physical, intellectual, or emotional capacity or fitness; the inability to pursue an occupation or perform services for wages because of physical or mental impairment." *Loven v. Greene County*, 63 S.W.3d 278 (Mo. App. 2001), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003); cited by the LIRC in *Amy Walters v. Children's Mercy Hospital & Truman Medical*, 2009 WL 4723711 (2009).

In applying the above to the case at hand, no substantive or persuasive evidence was introduced that Mr. Ladd was unable to pursue his occupation or perform his services for wages because of his conditions prior to August 11, 2008. On the contrary, according to his testimony, Mr. Ladd was hindered only by his felony conviction. *See*, Second Injury Fund Exhibit 1 at 37:4-6. He voluntarily quit his various jobs until becoming employed at RST in 2004.

After Mr. Ladd was released from medical treatment from his 2007 cervical injury, he received a promotion with a salary increase. He worked full time and overtime when necessary until August 11, 2008.

All of Mr. Ladd's prior injuries fall below the statutory threshold for Fund liability except for his 2007 cervical injury (07-029181), which settled for 20% PPD to his body as a whole. But

his testimony and the medical records show that he was not given any medical restrictions other than to use common sense. In addition, because I give Dr. Poppa's opinions no credibility in this case, Mr. Ladd similarly failed to prove any enhanced permanent partial liability as a result of these injuries.

For these reasons, all of Mr. Ladd's Fund claims are denied.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

**Carl Mueller**  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
**Naomi Pearson**  
*Division of Workers' Compensation*