

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

Injury No.: 04-141812

Employee: James LeRoy
Employer: Ahal Contracting Co.
Insurer: Amerisure Mutual Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: September 30, 2004
Place and County of Accident: St. Louis County, Missouri

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. We have reviewed the evidence and briefs and heard oral arguments, and we have considered the whole record. Pursuant to §286.090 RSMo, we issue this final award and decision modifying the July 10, 2007, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

Employer/insurer stipulated that employee was employed by employer on September 30, 2004, and that any liability assessed against it was fully insured. The administrative law judge heard this matter to consider 1) medical causation, 2) the nature and extent of employee's permanent disability, and, 3) the liability of the Second Injury Fund for permanent total disability/enhanced permanent partial disability.

The administrative law judge found that employee suffered a forty-five-percent (45%) permanent partial disability of the body as a whole due to the primary injury. The administrative law judge also found that employee had preexisting cervical discectomy with fusion at C5-6, left forearm pronator tunnel syndrome, left wrist carpal tunnel syndrome, surgically reconstructed ACL and medial meniscus of the right knee, and a chondral lesion and surgically repaired meniscal tear of the left knee.

Of these prior injuries, the administrative law judge determined that only the prior neck injury and right knee injury synergized with the primary injury. Based on this, the administrative law judge concluded that the primary injury, when combined with the preexisting neck and right knee injuries, created a greater disability than their simple sum, and assigned a load factor of twenty percent (20%). Based on his findings, the administrative law judge found that employee sustained 45% permanent partial disability of the body as a whole for his primary injury, and an additional 65.6 weeks of permanent partial disability from the Second Injury Fund as a result of the combination of the primary injury and preexisting neck and right knee injuries. The administrative law judge also awarded employee an additional six weeks of disability for employee's neck scar disfigurement.

Employee appealed to the Commission alleging the administrative law judge erred in several respects by concluding he is not permanently and totally disabled.

Legal Principles

Permanent Total Disability

[T]he term "total disability" is "defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident." *Sullivan v. Masters*

Jackson Paving Co., 35 S.W.3d 879, 884 (Mo.App. 2001); § 287.020.7. "It does not require that the claimant be completely inactive or inert." *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 826 (Mo.App. 1995); see also *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo.App. 1996); *Reiner v. Treasurer, State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

"To determine if claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition." *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo.App. 2000); see also *Massey v. Missouri Butcher & Cafe Supply*, 890 S.W.2d 761, 763 (Mo.App. 1995).

Pavia v. Smitty's Supermarket, 118 S.W.3d 228, 234 (Mo.App. 2003).

[T]he Commission does not have to make its decision only upon testimony from physicians; it can make its findings based on the entire evidence. *Smith*, 32 S.W.3d at 573; see *Eimer*, 895 S.W.2d at 120. "In determining the percentage of disability, the Commission is not bound by the percentage estimates of medical experts and it may consider all of the evidence, including the testimony of the employee and all reasonable inferences." *Eimer*, 895 S.W.2d at 120.

Pavia, 118 S.W.3d at 239 (citing *Smith v. Richardson Bros. Roofing*, 32 S.W.3d 568 (Mo.App. 2000)). ^[1]

Second Injury Fund

Section 287.220 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." It matters not whether the previous disability is "from compensable injury or otherwise."

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That portion of § 287.220 pertaining to permanent total disability is: " * * * If the previous disability * * * , and the last injury together result in total and permanent disability, the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable, is less than the compensation provided in this chapter for permanent total disability then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the second injury fund * * * ."

Stewart v. Johnson, 398 S.W.2d 850, 853 (Mo. 1966).

To trigger the liability of the Second Injury Fund, an employee must have a pre-existing permanent partial disability, whether from a compensable injury or otherwise. Section 287.220.1; "The permanent disability pre-dating the injury in question must 'exist at the time the work-related injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed.'" See also 287.220.1. To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, "the Commission should focus on the potential that the pre-existing injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition." Liability of the Second Injury Fund is triggered only "by a finding of the presence of an actual and measurable disability at the time the work injury is sustained."

E. W. v. Kansas City, Missouri, School District, 89 S.W.3d 527, 537 (Mo.App. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

A disability is considered "permanent" if it can be "shown to be of indefinite duration in recovery or substantial improvement is not expected." *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 865 (Mo.App. 1997).

Kerns v. Midwest Conveyor, 126 S.W.3d 445, 451 (Mo.App. 2004).

Discussion

The administrative law judge found the opinion of Dr. Chabot regarding employee's restrictions to be more persuasive than that of Dr. Volarich's. However, Dr. Chabot only evaluated employee in regards to his primary injury of September 30, 2004. Thus, his restrictions were based solely on this injury. Therefore, neither his restrictions nor ultimate opinion addressed whether employee was permanently and totally disabled as a result of the combination of his primary injury and preexisting disabilities.

On the other hand, Dr. Volarich evaluated employee's primary injury and each of his preexisting disabilities. Dr. Volarich also evaluated the combined effects of the primary injury and preexisting disabilities in making his determination that employee was permanently and totally disabled. Therefore, Dr. Volarich's opinion is more persuasive and credible in addressing whether employee was permanently and totally disabled.

The administrative law judge also reasoned in his award that not all of employee's preexisting injuries synergized with his primary injury. The administrative law judge specifically set forth that employee's prior neck injury and right knee injury synergized with the primary injury. He then noted that there was insufficient evidence to show that the left elbow, left wrist or left ^[2] knee injuries limited employee's pre-accident activity.

The Commission disagrees with this determination. The competent and substantial evidence shows that all of employee's prior injuries synergize with his primary injury to cause a greater disability than their simple sum. Employee testified that he still suffers pain and has diminished grip strength due to his left wrist and elbow injuries. He also testified that he cannot squat, kneel, or climb a ladder any longer due to the pain and potential that his left knee could "pop out" as a result of the prior injury to that knee.

Dr. Volarich testified that employee's primary injury and preexisting disabilities were all a hindrance to his reemployment. In his opinion, the combination of employee's primary injury and preexisting disabilities caused employee to be permanently and totally disabled.

The administrative law judge also erred when he "accepted" Mr. England's "alternative opinion" that employee was still employable. Mr. England did not opine that employee was still employable. Mr. England did discuss alternative conclusions regarding employee's employability depending on whether one accepted the restrictions of Dr. Chabot or Dr. Volarich in his report. His report notes that under Dr. Chabot's restrictions, employee could perform some types of sedentary work, while under Dr. Volarich's restrictions, employee would not be capable of working in the open labor market. However, the administrative law judge ignores Mr. England's ultimate opinion that employee is not employable in the open labor market. Thus, Mr. England clearly and unequivocally adopted Dr. Volarich's restrictions in finding employee unemployable, and did not opine directly or alternatively that employee was still employable.

Furthermore, as set forth above, Dr. Chabot's restrictions are based only on employee's primary injury, and therefore not as credible or persuasive as those of Dr. Volarich. As such, reliance on those restrictions to find that employee is employable was erroneous.

Based upon the foregoing, we do not believe any employer would reasonably be expected to hire employee in his present physical condition. *Pavia*, 118 S.W.3d at 234. Employee is permanently and totally disabled and unable to compete in the open labor market. We accept Dr. Volarich's and Mr. England's testimony that employee's inability to compete in the open labor market is due to the disability he suffers from the synergistic effect of the combination of his primary work injury and pre-existing disabilities. Therefore, the Second Injury Fund is liable to employee for permanent total disability benefits. See §287.220 RSMo.

Award

We modify the award of the administrative law judge on the issue of Second Injury Fund liability for permanent total disability benefits. The Second Injury Fund is liable to employee for permanent total disability benefits. In all other respects, we affirm the award.

We direct the Second Injury Fund to pay to employee a weekly permanent total disability benefit in the amount of \$275.51 (\$629.56 – \$354.05), the difference between employee's permanent total disability rate and permanent partial disability rate, for 180 weeks beginning October 5, 2006, the day after employee reached maximum medical improvement. Thereafter, the Second Injury Fund shall pay to employee \$629.56 per week for his permanent total disability benefit for

the remainder of his lifetime, or until as modified by law.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued July 10, 2007, is attached hereto and incorporated herein to the extent that it is not inconsistent with this decision and award.

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

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

Given at Jefferson City, State of Missouri, this 8th day of February 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James LeRoy

Injury No.: 04-141812

Dependents: N/A

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

Employer: Ahal Contracting Co.

Additional Party:

Insurer: Amerisure Mutual Insurance Co.

Hearing Date: April 9, 2007

Checked by: JED:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 30, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Mo.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was driving from main office to job site and sustained injury in a motor vehicle accident.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Neck
14. Nature and extent of any permanent disability: 45% PPD BAW – cervical/lumbar spine
15. Compensation paid to-date for temporary disability: \$66,733.36
16. Value necessary medical aid paid to date by employer/insurer? \$55,888.09

Employee: James LeRoy

Injury No.: 04-141812

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$994.33
19. Weekly compensation rate: \$629.56/\$354.05
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

180 weeks of permanent partial disability from Employer	\$63,729.00
6 weeks disfigurement	2,124.30

22. Second Injury Fund liability: Yes

65.6 weeks of permanent partial disability from SIF	23,225.68
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TOTAL:	\$89,078.98
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23. Future requirements awarded: None

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

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

James M. Dowd

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James LeRoy	Injury No.:	04-141812
Dependents:	N/A		
Employer:	Ahal Contracting Co.		
Additional Party:	Second Injury Fund		
Insurer:	Amerisure Mutual Insurance Co.	Checked by:	JED

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

This case involves a compensable motor vehicle accident resulting in serious injury to Claimant with the reported accident date of September 30, 2004. Employer admits Claimant was an employee on that date and that any liability is fully insured. The Second Injury Fund ("SIF") is a party to this claim. All/Both parties are represented by counsel.

Issues for Trial

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- 1. Medical causation/attribution;
- 2. Nature and extent of permanency; and,
- 3. Liability of the Second Injury Fund.

FINDINGS OF FACT

The parties stipulated Claimant's applicable rates of compensation of \$629.56 for TTD and \$354.05 for PPD. Employer paid \$55,888.09 in medical expenses and \$66,733.36 in TTD benefits for the period September 30, 2004 through October 11, 2006 (106 weeks).

Reported Injury

1. On the morning of 9/30/04, Claimant was driving from the employer's headquarters to a construction site in his personal vehicle when he was struck from behind by an oncoming vehicle. Claimant's vehicle was pushed into a ditch adjoining the roadway. Claimant initially reported symptoms referable to his vision, feet, head, neck, right shoulder, right arm and low back. Claimant was taken to the hospital emergency room for initial treatment.
2. Claimant was next treated by Dr. Martin, on the referral of Dr. Schaberg. An MRI was obtained on 10/11/04 which revealed post-operative changes at the C5-6 level. Also noted was possible asymmetric posterior spurring towards the left and possible central spinal canal narrowing at C5-6. Degenerative spurring was noted at all levels from C4 through T1.
3. Claimant was referred to Dr. Curylo for surgical consultation. Dr. Curylo diagnosed cervical stenosis, slight myelopathy with hyperflexia and positive Hoffman signs, and severe stenosis in the right recess at C6-7 with symptomatology likely exacerbated by the accident. Dr. Curylo further diagnosed cervical stenosis at C6-7 adjacent to Claimant's prior C5-6 fusion in 1997.
4. On 2/11/05, Claimant underwent cervical spine surgery, performed by Dr. Curylo. The procedure included a revision of the prior fusion, anterior cervical discectomy with decompression at C6-7, and anterior cervical fusion at C5-C7. Claimant wore a cervical collar postoperatively and reported an improvement as to his right hand pain initially.
5. Claimant presented to Dr. Sohn on 7/7/05 with complaints of ongoing low back and lower extremity pain. Claimant was diagnosed with degenerative disc disease, spondylosis and stenosis. Claimant underwent a series of epidural steroid injections. Claimant continued to undergo treatment with Dr. Curylo.
6. Claimant underwent a Functional Capacity Evaluation on 10/6/05 that placed him at the medium demand work level, short of the heavy demand work level required of Claimant's prior employment.
7. Claimant was referred to Dr. Chabot on 10/13/05. Claimant presented with complaints of ongoing neck and upper thoracic pain. Claimant reported some loss of bowel and bladder control. Claimant further complained of spasticity of the upper and lower extremities. Dr. Chabot initially recommended that Claimant return to limited duty work, but upon further review of diagnostic studies recommended that Claimant undergo a nerve conduction EMG and remain off work.
8. Claimant underwent nerve conduction EMG of the upper extremities on 12/15/05. The study revealed significant bilateral, left greater than right, chronic C6-7 radiculopathy and right greater than left chronic C5-6 radiculopathy, with moderate median neuropathy across the right carpal tunnel. The EMG demonstrated chronic left thenar root denervation consistent with Claimant's prior left carpal tunnel.
9. Claimant underwent a cervical myelogram and CT scan on 12/15/05 that revealed high-grade central stenosis C5-6 and to a slightly less degree at C6-7 and C3-4, severe foraminal stenosis C3-4 right and C6-7 bilaterally, with a moderately severe left foraminal stenosis and moderate right foraminal stenosis at the C5-6 level. The C5 to C7 anterior fusion plate and screws appeared in appropriate alignment. Dr. Chabot opined that Claimant was myelopathic with persisting radiculopathy associated with neural compression; additional surgery was discussed. Dr. Chabot recommended a posterior cervical decompressive laminectomy, partial facetectomies and foraminotomies to address Claimant's spinal cord compression, along with posterolateral fusion utilizing local bone graft to address Claimant's disc degeneration.
10. On 1/16/06 Claimant complained of left leg jumping at night. Claimant saw Dr. Curylo for a second opinion regarding surgery. Claimant complained of ongoing neck and shoulder symptoms. Dr. Curylo opined that there were no surgical options for Claimant's ongoing pain, which the doctor classified as myofascial. Dr. Curylo recommended pain management.
12. Claimant was referred to Dr. Coyle for yet another opinion. Dr. Coyle ordered a CT myelogram, which was done on 4/18/06. The results indicated that Claimant's prior fusion was solid at C5-6, but not at C6-7. Spinal

canal stenosis and foraminal encroachment at several levels were noted. Dr. Coyle agreed with Dr. Chabot's analysis of Claimant's problems and proposals for surgical treatment, with the additional suggestion that Claimant's pseudoarthrosis at C6-7 be addressed, either during the posterior surgery or at a subsequent session for anterior revision.

13. Claimant underwent another cervical spine surgery on 5/22/06 (by Dr. Chabot). The procedure included: a posterior cervical decompressive laminectomy with partial facetectomies and foraminotomies, at C3-4, C4-5, C5-6 and C6-7; and posterolateral cervical fusion, C3-4, C4-5, C5-6, and C6-7, using local bone.

14. Claimant was seen by Dr. Chabot for re-evaluation on 7/27/06. Dr. Chabot questioned Claimant about the discrepancy between his reports of very significant levels of pain to the physical therapist, which was inconsistent with Claimant's presentation and infrequent use of pain medication. Dr. Chabot recommended that Claimant continue with physical therapy.

15. Claimant was seen by Dr. Chabot for re-evaluation on 8/16/06. Claimant reported to Dr. Chabot that he was doing better, and that he had recently returned from a fishing trip to Canada. The intertransverse fusion appeared to be progressing satisfactorily. Dr. Chabot recommended that Claimant remain off work and continue daily work conditioning. Dr. Chabot noted that it was not likely that Claimant would progress to the point where he could resume his prior work duties.

16. Claimant was seen by Dr. Chabot for re-evaluation on 9/1/06. Dr. Chabot again discussed with Claimant the discrepancy between Claimant's reports of significant symptomology to the physical therapy personnel and Claimant's presentation to the doctor, in which he appeared free of distress. Dr. Chabot noted that Claimant's subjective complaints may not necessarily correspond to his objective physical findings. Dr. Chabot recommended that Claimant continue physical therapy and home exercise.

17. Claimant was seen by Dr. Chabot for re-evaluation on 9/18/06. Dr. Chabot again noted the inconsistency between Claimant's reports of significant symptomology to the physical therapist and his presentation before the doctor, in which he appeared in no discomfort. Dr. Chabot further noted Claimant's apparent sparing use of pain medication, not having requested a refill since July 27, 2006. Dr. Chabot released Claimant to return to work with limited duties, no more than ½ days, and no lifting in excess of 40 pounds.

18. Claimant was seen by Dr. Chabot for re-evaluation on 10/4/06. Dr. Chabot noted that Claimant had progressed in physical therapy to a more formal work conditioning program, in which he was reported to be lifting in the 30-35 pound range. Dr. Chabot noted that Claimant voiced little or no complaints that day. Dr. Chabot recommended that Claimant return to limited work duties with no lifting in excess of 35 pounds, with limited overhead lifting. Jobs that required repetitive overhead work should be avoided. Dr. Chabot noted that Claimant was scheduled for a Functional Capacity Evaluation.

19. Claimant underwent a Functional Capacity Evaluation on 10/5/06 and demonstrated safe function up to the medium work demand level. Dr. Chabot, in an addendum to his 10/4/06 report, restated his work restrictions of 10/4/06, placed Claimant at MMI, and released him from care.

20. On 10/24/06, Dr. Chabot issued a disability rating of 20% PPD BAW-cervical spine. Dr. Chabot restated his opinion that Claimant should be able to work [elsewhere] within his previously stated restrictions.

Prior Neck Injury & Surgery

21. On 6/5/97, Claimant sustained a work-related injury to his cervical spine, in an accident that occurred while Claimant and some co-workers were manually transporting a troweling machine. On 2/26/98 Claimant underwent cervical spine surgery for anterior cervical discectomy with partial carpectomy of C5-6 and interbody fusion. Claimant settled a claim for 25% PPD of the neck (#97-073616).

Other Prior Injuries

22. In 1988, Claimant developed left sided carpal tunnel syndrome, and underwent surgical release. In or around May, 1990, Claimant developed problems with his left elbow. Claimant was treated by Dr. James Schaberg of St. Charles Orthopedic Surgery Associates. Dr. Schaberg performed a surgical release of the median nerve of Claimant's left elbow on 6/26/90. Claimant settled a workers' compensation claim for this injury (#90-052835) with his then employer Jim Lawing Construction based upon an approximate disability of 32% of the left elbow.

23. In 1995, Claimant sustained a work-related injury to his right knee. Claimant subsequently underwent surgical repair of the knee. The procedure included a partial medial meniscectomy, debridement of chondral defects from the medial femoral condyle, and ACL reconstruction. Claimant settled a workers' compensation claim for this injury (#95-154997) with employer based upon an approximate disability of 30% right knee.

24. In 2003, Claimant sustained a work-related injury to his left knee, when he fell into a hole at a construction site. Claimant subsequently underwent arthroscopic surgical repair of the left knee, in a procedure that included repair of a torn meniscus. Claimant elected not to file a workers' compensation claim against his employer for this injury.

25. Claimant stated that all of his various prior injuries hindered his ability to perform the duties of his employment. Claimant stated that his former employer accommodated him whenever possible by assigning him to less physically demanding duties.

Expert Opinion – Medical

26. On 12/5/05 Claimant was evaluated by David T. Volarich, D.O., at the request of Claimant's attorney. Dr. Volarich issued two diagnoses referable to Claimant's injury of 9/30/04: 1) aggravation of cervical spine degenerative disc and joint disease, as well as aggravation of pre-existing post-operative change at C5-6 causing myelopathy, status post anterior cervical discectomy C6-7 with prior fusion extended through C7; and 2) lumbar syndrome secondary to aggravation of degenerative disc and joint disease. Dr. Volarich issued disability ratings of 50% PPD BAW cervical spine and 12.5% PPD BAW lumbar spine.

27. Dr. Volarich diagnosed five preexisting conditions with ratings as follows:

- 1) cervical discectomy with fusion (25% PPD BAW);
- 2) left forearm pronator tunnel syndrome (35% PPD);
- 3) left wrist carpal tunnel syndrome (35% PPD);
- 4) right knee – torn ACL/medial meniscus with chondral defects (45% PPD);
- 5) left knee – chondral lesion and meniscal tear (35% PPD).

Dr. Volarich opined that Claimant is permanently and totally disabled as a result of the current WC injury in combination with his preexisting medical conditions.

28. On 12/7/06, Dr. Volarich increased his disability rating of the cervical spine to 65% PPD due to the additional fusion surgery. The other rating remained unchanged. Dr. Volarich restated his opinion that Claimant was permanently and totally disabled.

Expert Opinion - Vocational

29. Claimant was born 1/29/59, and is presently 48 years old. Claimant is married, and has one son, age 15. Claimant resides in the Warrenton, MO area. Claimant attended school in the Hazelwood School District until the start of the 11th grade, at which time he left school in favor of working. Claimant has not subsequently obtained a GED. Testing conducted by vocational rehabilitation counselor James M. England, Jr., indicated Claimant could read at the end of high school level and performs math problems at the beginning high school level.

30. Prior to his injury of 9/30/04, Claimant had worked for the employer for 25 years. Employer is a concrete

contractor which performs "flat" concrete work on a wide variety of projects, both commercial and residential, in the St. Louis area. Claimant was employed as a concrete laborer/foreman. Claimant estimates that he was designated foreman anywhere from 75%-90% of the time. When Claimant was working as a foreman, he had a variety of administrative duties to perform, but he also worked along with his crew. The duties required of a concrete laborer included layout of the equipment and pins; transporting, maintaining and cleaning of the machines. In addition, concrete laborers were routinely required to transport material manually, using wheelbarrows and/or buckets as necessary.

31. Prior to becoming employed by the employer, Claimant had experience in both residential concrete work with Siegler Brothers Concrete and carpentry labor with Jim Lawing Construction.

32. Bruce Deeken, the employer's Safety Director since 3/02 testified that prior to the injury of 9/30/04 the employer had accommodated Claimant's various physical infirmities by trying to assign Claimant to duties that were within his limitations to the extent possible. Mostly this entailed trying to make sure that Claimant was not assigned to projects at which he would have to work on ladders or structural decks. Mr. Deeken stated that notwithstanding his physical limitations, the Claimant was considered a valuable employee. Mr. Deeken conceded that if, hypothetically, work was available with the employer within the medical restrictions imposed on Claimant, and he would be willing to consider offering such work to Claimant. Mr. Deeken stressed, however, that under the current management arrangement in the employer's organization, such a decision was not his to make alone.

33. On 11/16/05, Claimant was evaluated by James M. England, Jr., a vocational rehabilitation counselor. He reviewed treatment through Dr. Chabot's records ending 10/24/06. Mr. England gave alternative employability opinions. Mr. England concluded that if one were to consider the restrictions imposed by the surgeon, Dr. Chabot, there would be some types of entry level service employment available that the Claimant could handle. Were one to consider the restrictions determined by Dr. Volarich's forensic analysis, however, it did not appear to Mr. England that the Claimant would be able to handle even sedentary work on a consistent basis. Mr. England concluded that the Claimant was likely to remain totally disabled from a vocational standpoint, absent significant improvement in his overall functional ability.

34. On 3/28/07, Karen Kane-Thaler, vocational rehabilitation counselor, issued an employability assessment of Claimant at the request of the Employer. Ms. Kane-Thaler concluded that Claimant would be able to seek, accept, be hired and participate in the open labor market in the greater Warrenton, Missouri area, using either the restrictions imposed by Dr. Volarich, or those imposed by Dr. Chabot. Further, Ms. Kane-Thaler identified a number of light duty employment opportunities available in the greater Warrenton area with physical requirements well within those of either Dr. Volarich or Dr. Chabot.

35. At hearing Claimant testified to a variety of symptoms that he claims preclude him from being able to work. Claimant has not attempted to return to work in any capacity since his injury of 9/30/04. Claimant traveled to Montana on two occasions for hunting trips, and Canada once, to fish.

RULINGS OF LAW

Permanent Disability

As stated above, Dr. Volarich expressed opinions of permanent total disability and unemployability as a result of the combination of pre-existing PPD and the primary injury, a twice operated neck. However, a number of points on cross-examination bring into question the probative value of these opinions. It is reasonable to expect an expert to be fully informed about pre-existing disabilities. Plaster v. Dayco Corp., 760 S.W.2d 911 (Mo.App. 1988). Also, the multiple injuries and surgeries suggest a degree of complexity the recommendations about which are necessarily the subject of expert opinion. Griggs v. A.B. Chance Co., 503 S.W.2d 697, 704 (Mo.App. 1973). Claimant's treatment record alone is not sufficient to infer PTD.

The first step here is to determine the PPD resulting from the current injury. The prior cervical PPD continues undiminished at 25 percent. Section 287.190.2 RSMo (2000). The experts' PPD opinions ranged from

Dr. Volarich at 65 percent to Dr. Chabot at 20 percent. Based on the evidence Claimant sustained a 45 percent PPD of the cervical spine from this accident alone.

The record reveals that Dr. Volarich had not identified an MMI date but accepted Dr. Chabot's date (p. 68). The records review of the 1997 neck surgery is in doubt (pp. 51, 69). Although Dr. Volarich stated he review surgeon Dr. Curylo's letter to Dr. Martin regarding the absence of neck symptoms on the day before the accident, Dr. Volarich failed to state as much and stated that if Claimant had no symptoms on that date his PPD opinion would change, "no question" (pp. 72-73).

Dr. Volarich's assumption of ongoing problems and listing of serious restrictions, which he specifically stated would have been imposed on Claimant the day before the accident (for pre-existing PPD) and which remain in effect, are irreconcilable, retrospectively, with Claimant's absence of neck symptoms, lack of prescription therapy, unlimited (very) heavy work prior to the accident, and, prospectively, with Claimant's remote hunting trips with his young son and his demonstrated ability at trial to ambulate freely, unremarkable use of prescription pain relievers and his undistressed, if not animated courtroom, testimony (pp. 55, 59-60, 62, 70-71, 75-76). Also noteworthy is his stated consideration of age, education and that Claimant "had been unable to get back to work since [the accident date]" in support of his PTD opinion, even though he did not inquire about attempts to return to work (pp. 33, 79-80). No one of these items is, in and of itself, dispositive, but the aggregate is persuasive. Indeed, Dr. Volarich readily agreed he would reconsider his restrictions if his assumptions were shown to be different from what he was told (as a non-treating physician).

On the other hand, Dr. Chabot's restrictions are also quite serious. His restrictions focus on the neck and upper body activity which is consistent with the primacy of Claimant's thrice operated neck. His lifting restrictions constrain Claimant to only one-third, i.e. 35 pounds, of average lifting for Claimant's heavy labor. These restrictions are bolstered by the FCE report. Dr. Volarich's restrictions of no bending, stooping etc., are characteristic of a low back syndrome rather than the neck condition that is preeminent here. Again, Claimant's ambulation and pre-accident work activity contrast many of these restrictions which Dr. Volarich stated were applicable pre-accident. Regarding overhead lifting, Dr. Chabot was thorough but allowed some overhead work although presumably without any appreciable exertion or weight.

Dr. Chabot, the Claimant's treating surgeon, opines that the Claimant should be able to work within the restrictions he has imposed. The opinion of Dr. Chabot, who treated and saw the Claimant on numerous occasions in a clinical setting, is more persuasive than that of Dr. Volarich on this ultimate point. Dr. Volarich's analyses were less well-grounded in the both the pre-accident and post-accident facts. Comments from Dr. Chabot regarding the apparent inconsistencies between the Claimant's presentation and his complaints of debilitating symptoms are also noteworthy. Likewise, at hearing the Claimant did not present as an individual in distress. To

the contrary, the Claimant sat at length, and was quite animated throughout the proceedings, regularly using both arms freely for emphasis while speaking.

Claimant's courtroom demeanor and testimony warrants comment. His testimony surely reads as articulate explanations of his construction sites, equipment operation or work techniques in the concrete business. He was cheerful and very interested in his case and seem to follow the question-and-answer format with ease. This marked verbal ability dovetails with his success as a long-term employee and his supervisory skills. Claimant supervised crews, performed grade work on large scale urban projects, determined equipment needs for given projects and accepted voucher receipts for the rock and concrete deliveries on his projects. Each of these duties represents distinct managerial abilities. These duties take on additional significance when the size of Ahal, and its urban-scale projects, is considered. Unfortunately, none of the experts detailed the meaning of this skill set. Claimant's presentation at trial was impressive.

Mr. England couched his opinion on unemployability in the alternative depending on whether one accepts Dr. Volarich's restrictions or those of Dr. Chabot. It seems reasonable that he can interpret the medical records, work history and skill set to determine independently which expert's restrictions best reconcile with the balance of the record and, ultimately whether Claimant is employable. Nevertheless, his manner is forthright and his opinion follows the finding of which expert is most persuasive. Apparently, Mr. England did not consult Claimant after the Dr. Chabot surgery on 5/22/06 which surgery Claimant states afforded him much greater relief than before, including better sleep. This fact alone might influence which set of restrictions he would embrace. Given the finding that Dr. Chabot's restrictions are better supported by the evidence, Mr. England's alternative opinion that claimant is employable is accepted.

Primary Injury

Claimant presented undisputed medical evidence of injury and treatment, including two cervical surgeries, which forms the basis for very serious PPD liability. The two surgeries actually represent the second and third lifetime surgeries to Claimant's neck. Thus, upon sustaining the rather volatile accident, Claimant already exhibited at PPD relative to the C5-6 fusion and eight years subsequent deterioration which was described as spurring and severe stenosis in the radiographic evidence immediately preceding Employer's first tender of surgical care. This entailed a C6-7 discectomy and extending the fusion to the C7 level. Employer's second surgery (third overall) entailed extending the fusion the other direction to C3 level.

A twice-operated neck imposed upon a previously operated and degenerated cervical spine makes improbable a prognosis for return to moderate or heavy manual labor positions. The fusing of the vertebral joints virtually suspends useful range of motion and seems to warrant conventional restrictions (and reasonable guarding) from virtually all overhead work and all heavy labor. This evidence suggests PPD relative to the current injury in the range of 45 percent (180 weeks). Claimant's overall PPD of the cervical spine is easily articulated to be in the range of 65 to 75 percent.

SIF Liability

Claimant presented un rebutted evidence of significant pre-existing PPD not every instance of which may be

said to synergize with the primary injury. The prior neck claim settled for 25% PPD (or 100 weeks). The right knee, including ACL reconstruction settled for 30% PPD (48 weeks). Each of these synergize with the primary injury, whether by upper-lower body imbalance, creating instability for lifting or toting, or by the combination of additional dermatome involvement in the cervical spine whereby guarding of the neck prevents substantial exertion of the upper extremities, especially overhead. Nevertheless, Claimant's continued ability to ambulate freely as demonstrated at trial and by his unusual hunting trips, including supervision of his son, together with his high verbal ability, and lack of a disabling pain syndrome, tends to prove serious PPD rather than PTD.

Insufficient evidence was presented that the other SIF allegations actually synergize with the current PPD. Section 287.220.1 RSMo (2000). The left elbow and left wrist pathologies were never subsequently treated and did not limit Claimant's pre-accident activity as explained above. Similar analysis applies to the right knee. Thus, Claimant's increased overall PPD exceeds the simple sum of the primary and pre-existing PPD by a factor of twenty percent. Thus, under the statute, the synergistic affect results in an additional 65.6 weeks of PPD from the SIF.

Mr. England, the vocational expert retained by the Claimant, concedes that given Dr. Chabot's restrictions there should be some types of sedentary level employment that Claimant could perform. Further, vocational testing conducted by Mr. England indicated that from an intellectual standpoint, the Claimant should be able to pursue a variety of alternative employment areas, despite his lack of a high school diploma. The various functional capacity evaluations that Claimant underwent indicate that he should be able to perform at a sedentary or light physical demand level.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within n the whole record, Claimant is found to have sustained a forty-five percent PPD as a result of the reported injury and an additional 65.6 weeks PPD from the SIF as a result of the combination between the primary injury and the pre-existing PPD of the neck and right knee. An additional 6 weeks is awarded for neck scar disfigurement described at trial.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Lucas Boling
Acting Director
Division of Workers' Compensation

[1] The following cases were overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003): *Sullivan, Sifferman, Reiner, Ransburg, Eimer, and Smith*.

[2] The administrative law judge actually lists employee's right knee in this finding, but it is clear from the record that the administrative law judge was actually referring to employee's left knee.