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

Injury No.: 07-133175

Employee: Sylvester Lewis

Employer: National Vendors/Crane Co. (Settled)

Insurer: Ace American Insurance Co. (Settled)

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

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.[1] We have read the briefs, heard the parties' arguments, reviewed the evidence, and considered the whole record. We find that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge by this supplemental opinion.

The Second Injury Fund urges us to grant to it a credit against its permanent total disability liability for periods during which employee was receiving unemployment compensation. The Second Injury Fund argues that allowing an individual to receive unemployment compensation benefits and permanent total disability benefits for the same period is not good public policy. We are not unsympathetic to the Second Injury Fund's argument. However, we are bound to apply the law as the legislature enacted it. To that end we must construe the provisions of the Workers' Compensation Law (Law) strictly.[2]

"Strict construction means that a statute can be given no broader application than is warranted by its plain and unambiguous terms. The operation of the statute must be confined to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. A strict construction of a statute presumes nothing that is not expressed."[3]

We find no language in the Law that allows us to deny permanent total disability benefits for periods during which employee received unemployment compensation. If we were to apply the Law as if it contained such language as urged by the Second Injury Fund, we would be extending the Law to matters not affirmatively pointed out by its terms in violation of the legislature's mandate that we construe the statute strictly.

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

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[1] Statutory references are to the Revised Statutes of Missouri (2007), unless otherwise indicated.
[2] See § 287.800 RSMo ("Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.").
[3] *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo. App. 2010) (internal citations omitted).

We approve and affirm 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.

The March 29, 2013, award and decision of Administrative Law Judge Linda J. Wenman is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

CONCURRING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

CONCURRING OPINION

I write this concurring opinion to voice my concerns with the outcome required in this case.

Section 287.170.3 states that "An employee is disqualified from receiving temporary total disability during any period of time in which the claimant applies and receives unemployment compensation." This is consistent with the definition of total disability (the "inability to return to any employment")[4] and the requirements under the Missouri Employment Security Law for receipt of unemployment benefits (claimant must be "able and available" to work).[5] Quizzically, the Missouri Workers' Compensation Law only prevents this double-dipping of benefits for temporary total disability (TTD) and unemployment compensation. No statutory provisions exist to address an employee's simultaneous receipt of permanent total disability benefits (PTD) and unemployment compensation.

Based on my understanding of the Workers' Compensation Law, I can see no reason why the legislature would have intended to allow a claimant PTD benefits and unemployment compensation for the same time period. Just like TTD, PTD is also awarded when an employee is unable to return to any employment. The major difference between the two is that TTD is awarded when the disability is temporary or up until the employee reaches maximum medical improvement, whereas PTD is awarded after the employee reaches maximum medical improvement.[6] It does not logically follow that an employee with an injury so disabling as to prevent them from working, with no reasonable expectation for improvement, should receive a full PTD award for the same period of time that claimant previously claimed they were able to work and received unemployment benefits.

This is not to say that I believe an employee in a case like this is necessarily trying to commit fraud by collecting both PTD and unemployment compensation. I recognize that in many cases, while a workers' compensation claim is pending, the claimant may still be earnestly trying to obtain employment. In fact, failed attempts to seek a job may contribute to an eventual finding of PTD which includes the time period for which the claimant received unemployment benefits.[7] However, it still does not follow that the claimant should receive the full amount of both benefits for the same time period.

In summary, I strongly believe the legislature should have included a provision similar to that in § 287.170.3 to address the simultaneous receipt of PTD and unemployment benefits. It is not good public policy to allow administrative determinations to be so

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[4] RSMo § 287.020.6

[5] RSMo § 288.040.1(2)

[6] "Medical maximum improvement" is a term used to describe "when an employee's condition has reached the point where further progress is not expected." *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 910 (Mo. App. E.D. 2008).

[7] See *Palmentere Bros. Cartage Service v. Wright*, --- S.W.3d ---, 2013 WL 4714307 *6 (Mo. App. W.D. 2013); *Reeves v. Midwestern Mortg. Co.*, 929 S.W.2d 293, 297 (Mo. App. E.D. 1996) (The fact that claimant tried to resume work after her injury "does not mitigate against finding that she was totally disabled".).

opposite from each other, such as when the Division of Employment Security finds a claimant/employee to be able and available to work while the Division of Workers' Compensation finds a claimant/employee to be permanently unable to work.

However, I reluctantly agree with the majority that under strict construction[8] and the Workers' Compensation Law as it stands today, the Commission does not have the authority to deny a PTD award during a time when the injured employee received unemployment compensation. Therefore, I must join in the decision to affirm the administrative law judge's award.

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James G. Avery, Jr., Member

[8] See *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo. App. 2010).

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Sylvester Lewis

Injury No.: 07-133175

Dependents: N/A

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

Employer: National Vendors / Crane Co. (settled)

Additional Party: Second Injury Fund

Insurer: Ace American Insurance Co. (settled)

Hearing Date: January 29, 2013

Checked by: LJW

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: November 7, 2007
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: Due to the repetitive nature of his work, Employee developed a right trigger thumb.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right thumb
14. Nature and extent of any permanent disability: 15% PPD referable to the right thumb at the 60 week level previously paid by Employer. PTD benefits from SIF.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? $5,247.13 previously paid by Employer.

Employee: Sylvester Lewis Injury No.: 07-133175

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: Sufficient to produce rates listed below.

19. Weekly compensation rate: $400.00 / $389.04

20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

9 weeks of permanent partial disability from Employer Previously paid by Employer

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
Weekly differential of $10.96 payable by SIF for 9 weeks beginning March 5, 2010, and $400.00 thereafter for Claimant's lifetime

TOTAL: TO BE DETERMINED

23. Future requirements awarded: N/A

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 in favor of the following attorney for necessary legal services rendered to the claimant: David Plufka

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Sylvester Lewis	Injury No.: 07-133175
Dependents:	N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	National Vendors / Crane Co. (settled)	
Additional Party:	Second Injury Fund	
Insurer:	Ace American Insurance Co. (settled)	Checked by: LJW

PRELIMINARIES

A Second Injury Fund hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on January 29, 2013. The case was taken under submission with receipt of post-trial briefs on March 8, 2013. Attorney David Plufka represented Sylvester Lewis (Claimant). Assistant Attorney General Dustin Mayer represented the Second Injury Fund (SIF).

On April 28, 2010, Claimant and National Vendors / Crane Company (Employer) reached a settlement regarding the issue of Employer's liability for permanent partial disability. The stipulation represented 15% PPD referable to the right thumb at the 60 week level.

Prior to the start of the hearing the parties identified the issues for disposition in this case as the liability of SIF for permanent total disability (PTD) or permanent partial disability (PPD) benefits.[1] The parties stipulated Claimant reached maximum medical improvement (MMI) for his right thumb injury on September 11, 2008, and Claimant last worked for Employer on November 6, 2009. Claimant offered Exhibits A-P, and SIF offered no exhibits. SIF's objection to Exhibit P was overruled. The remaining exhibits were admitted into the record without objection. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be summarized.

1. Claimant is 55 years old, a high school graduate, and worked his entire career (approximately 31 years) for Employer. Claimant began work as a material handler for Employer during November 1978, and his work duties as a material handler involved repetitive and heavy lifting. During 2004, Claimant worked for Employer as a vending machine cabinet maker, which was easier work, but involved the use of pressure guns. At the end of his career with Employer,

[1] At trial, SIF also put in dispute the issue of SIF liability for PTD/PPD benefits if the primary injury was due to an occupational disease. In its post-trial brief SIF withdrew this issue for disposition.

Claimant worked as a bench-sub which was much easier and slower work, but reduced his pay. Claimant bid for the bench-sub work because it allowed him to sit down and stop his work as needed. Claimant's employment with Employer ended on November 6, 2009, when Employer moved its business out of state. Claimant drew unemployment benefits until February or March 2012, except for a period from February 2011 until June 2011.[2]

2. **Primary Injury -** During November 2007, Claimant began to experience triggering of his right thumb. The right thumb injury was found to be work related due to Claimant's frequent use of pressure tools. On June 18, 2008, Claimant was evaluated by Dr. Rotman, an orthopedist, and a right thumb cortisone injection was provided. On July 30, 2008, after the cortisone injection failed, Claimant underwent a right trigger thumb release performed by Dr. Rotman.[3] On November 25, 2008, Dr. Rotman placed Claimant at maximum medical improvement (MMI) in regard to his right trigger thumb.[4] Dr. Rotman rated the disability at 5% PPD referable to the thumb. On April 28, 2010, Claimant settled his case with Employer for 15% PPD referable to the right thumb at the 60 week level. As of hearing, Claimant continues to experience aching in his right thumb.

3. **Preexisting Injuries -** Claimant has a convoluted and complicated preexisting injury/medical condition history. His rated preexisting conditions include: a) left shoulder and elbow; b) lumbar spine; c) cervical spine; d) bilateral wrists and hands; and e) right shoulder.

a) Left shoulder and elbow – During **early 2004**, while working as a material handler for Employer, Claimant developed left shoulder and elbow pain. Initially, Claimant was diagnosed with a left shoulder strain and left lateral epicondylitis, and Claimant was provided conservative medical treatment. When the conservative treatment failed, Claimant was referred to Dr. Rotman for further treatment. Dr. Rotman obtained a MRI of Claimant's left shoulder that demonstrated a partial thickness tear on the undersurface of the left rotator cuff and impingement syndrome. Dr. Rotman opined Claimant's left elbow symptoms were due to arthritis. Dr. Rotman elected to proceed with conservative care and a left shoulder cortisone injection. At Claimant's next office visit, Dr. Rotman injected Claimant's left elbow. Dr. Rotman performed surgery after Claimant failed to obtain sustained relief from the shoulder and elbow injections.

On September 15, 2004, Claimant underwent a left shoulder arthroscopy, subacromial decompression, and a left elbow ulnohumeral arthroplasty with partial resection of the olecranon and distal humerus and coronoid bone spurs. In the operative note, Dr. Rotman noted Claimant had a 40% partial tear of the underside of the rotator cuff involving a "nickel-sized" area just posterior to the biceps tendon, and Dr. Rotman debrided the fraying with a shaver.[5] Dr. Rotman opined he did not feel the tear was significant enough to warrant an open procedure. Dr. Rotman then proceeded with a left shoulder decompression. At Claimant's first post-operative office visit, Dr. Rotman noted "it was a little less than 50% [the tear] and considering that we had to do

[2] From February 16, 2011 until June 14, 2011 Claimant received TTD benefits from Employer due to additional medical care provided.
[3] During surgery, Dr. Rotman also aspirated a right volar radial wrist ganglion.
[4] The parties stipulated Claimant reached MMI on 9/11/08, but the medical records indicate Claimant was placed at MMI on 11/25/08. On 9/11/08 Dr. Rotman released Claimant to full duty. (Exhibit B)
[5] The operative note does not indicate the rotator cuff tear was repaired.

ulno humeral arthroplasty, I didn't want to do anything more aggressive on his shoulder." **By November 18, 2004**, Claimant was continuing to report "a lot of discomfort from his shoulder and elbow." **On December 30, 2004**, Dr. Rotman noted the following:

> Mr. Lewis also had a little bit of co-planing in his AC joint at the time of surgery and is status post ulno humeral arthroplasty. He still has a lot of complaints. He has had troubles getting back to work. He has complaints of pain across the top of his shoulder. He complains that he has hardly any strength in his left arm and he can't really lift anything. His left shoulder and elbow have been bothering him a lot since his return back to work full duty. He feels that he hasn't been able to gain much pain relief, despite the surgery. He has been wearing a Dynasplint on his elbow. (Exhibit B)

Dr. Rotman opined he felt there was "nothing much more to do for his elbow," and elected to provide a cortisone injection for Claimant's left shoulder complaints although Dr. Rotman noted "I don't feel the pain is coming from that area." **On February 10, 2005**, Claimant reported to Dr. Rotman that "he continued to have a lot of complaints with regards to his left shoulder." Dr. Rotman indicated the last shoulder injection "didn't help at all." Dr. Rotman opined Claimant's pain "seems to be more related to his neck." Dr. Rotman found Claimant's current complaints were related to cervical spine radiculopathy at C5-6 due to degenerative changes present on x-ray and a cervical spine MRI. Dr. Rotman found Claimant to be at MMI in regard to his left shoulder and elbow, rated the left shoulder at 6% PPD and the left elbow at 7% PPD, and discharged Claimant from care. Following his medical release Claimant was no longer physically able to resume work as a material handler, and became a cabinet maker which required less lifting.

During 2006, Claimant continued to experience left shoulder and arm complaints, was unable to keep up with his job duties as a cabinet maker, and he was "down-graded" to a bench-sub position. The work of a bench-sub was easier, but Claimant had to take a cut in pay. The bench-sub position had no set production, required only lifting five pounds, and Claimant could stop work as needed to rest.

Dr. Rotman next saw Claimant **during June 2008**, when he was authorized to provide medical care for Claimant's trigger thumb. **On August 12, 2008**, Dr. Rotman noted Claimant's left shoulder was causing him "a lot of pain now." Dr. Rotman stated:

> For the shoulder, it seems to be a problem for him. He will need to talk to his company about that. He would require another MRI scan and would have to be done with a gadolinium arthrogram to see if the partial lesion has turned into a full thickness tear which would require a formal repair. (Exhibit B)

On November 25, 2008, Dr. Rotman saw Claimant for his trigger thumb, but noted "he has a lot of complaints from many of his other issues," and "those claims are still pending." **On April 14, 2009**, Claimant was seen by Dr. Rotman regarding follow-up for bilateral carpal tunnel syndrome

(CTS), and Dr. Rotman noted "he has a lot of issues with his other conditions including both shoulders." Dr Rotman further noted:

> I explained to Mr. Lewis that I had not been authorized to treat his shoulders or even look at them this time through his work. I would be happy to see him through his private health insurance although he states that anything through his private health insurance has been denied due to these multiple claims of his.
> (Exhibit B)

During this time period, Claimant's 2004 workers' compensation claim regarding his left shoulder and elbow remained open as Claimant continued to seek medical treatment for these body parts.

On May 13, 2010, Dr. Rotman wrote to Claimant's then attorney and noted:

> . . . Then there was a concern about his shoulders. I performed an arthroscopic debridement of his left shoulder in the past and ulnohumeral arthroplasty of his elbow, but was not authorized at that point to continue any treatment with regards to his shoulders. The only reference to his shoulders in the recent records was a note from 8/12/08 where he talked about his left shoulder causing a lot of pain. In the past he was noted to have the 40% partial rotator cuff tear that was debrided at the time of decompression and was still having some discomfort from it. I suggested then that he would require another MRI scan with a gadolinium arthrogram to see if his partial lesion had progressed.
>
> At this point if he is still having significant complaints of left shoulder pain, I would suggest that he have an MRI gadolinium arthrogram of his left shoulder. The need for that MRI gadolinium arthrogram would be related to obviously the need for the first surgical procedure when I found a 40% tear. I do not see that there is any history of recurrent or second injury to his left shoulder in my records. Therefore, I would relate it back to January 2004 as the prevailing factor . . ..
> (Exhibit B)

On June 15, 2010, Dr. Rotman expressed the same opinion in a letter to Employer's defense attorney, and requested authority to reexamine Claimant. **On November 29, 2010**, Employer sent Claimant to Dr. Emanuel for a second opinion. Dr. Emanuel opined Claimant remained symptomatic following the 2004 injury and surgery, and recommended additional left shoulder surgery. The examination and diagnostic testing requested by Dr. Rotman was finally authorized, and **on February 16, 2011**, Dr. Rotman performed a second surgery on Claimant's left shoulder. During the second surgery, Dr. Rotman converted the partial thickness tear to a complete tear and repaired the tear approximately **seven years** after the original injury. **On June**

14, 2011, Dr. Rotman placed Claimant at MMI, discharged him from care, and placed no work restriction in regard to Claimant's left shoulder. Dr. Rotman did not re-rate Claimant's left shoulder disability. In regard to employability, Dr. Rotman noted:

> At four months, he is ready to return to his full activities at work. Presently, though, he has issues that are most likely going to prevent him from looking for work since at this time since he is applying for disability. (Exhibit B)

On April 12, 2012, Claimant settled his **2004 claim** with Employer for 30% PPD referable to his left shoulder, and 22.5% PPD referable to his left elbow. As of the date of hearing, Claimant continues to experience difficulty with the left shoulder and elbow. Claimant testified he is unable to lift items overhead, or pick items up with his left arm extended. He experiences daily shoulder/arm pain that increases with exertion. Pain in the shoulder causes difficulty sleeping, and he has decreased range of motion with the left shoulder/arm. Claimant testified his left shoulder problems never improved after the 2004 surgery, but Employer would not authorize additional medical care until 2011.

b) Lumbar spine – During 2005, Claimant developed low back pain after lifting his grandson. X-rays of the lumbar spine demonstrated degenerative disc disease. During February 2006, after coughing, Claimant developed low back pain. A lumbar spine MRI was obtained and demonstrated a disc protrusion at L2-3, and disc bulges at L3-4 and L4-5. Following the conclusion of conservative medical treatment, Claimant complained of intermittent low back pain and left medial thigh numbness. Claimant also experienced difficulty bending, pushing, and pulling at work, and gave up sports that involved running and jumping.

c) Cervical spine – On February 10, 2005, Claimant presented to Dr. Rotman with left trapezius and left arm pain that Dr. Rotman felt was related to his cervical spine. A cervical spine x-ray taken that day demonstrated degenerative changes at C5-6, and a cervical spine MRI was suggested. On March 15, 2005, Dr. Rotman reviewed Claimant's MRI scan that demonstrated osteophyte spurring from C3-6 with spur compression and foraminal narrowing at C5-6. Claimant was advised his cervical spine condition was not work related and he was referred to a neurosurgeon. Between May and July 2005, Claimant was treated by a neurosurgeon and underwent two successful epidural steroid injections. On July 7, 2005, Claimant reported "significant improvement" and denied neck pain. EMG/NCV studies were negative for cervical radiculopathy. Claimant had no further treatment for his neck until 2012.[6]

d) Bilateral wrists/hands – On May 27, 2005, Claimant was evaluated by a neurosurgeon for his neck, and EMG/NCV studies were ordered that included both upper extremities. The studies indicated no evidence suggestive of bilateral CTS. **On May 22, 2006**, Claimant visited his primary care physician complaining of bilateral wrist, hand, and finger pain that had started in 2005. Claimant was requesting a referral to a hand specialist. Claimant's physician diagnosed questionable carpal tunnel syndrome (CTS), ordered repeat EMG/NCV

[6] During 2012, Claimant was seen in pain management by Dr. Smith. A new cervical spine MRI was obtained that demonstrated further degenerative changes C3-7 with hypertrophic changes that abutted the spinal cord. Claimant underwent ablation therapy. These events occurred *after* Claimant was rated by Dr. Volarich and *after* he was evaluated by Mr. England.

studies, and referred Claimant to an orthopedist. **On May 30, 2006**, Claimant underwent EMG/NCV studies that now demonstrated mild right CTS. The next medical mention of CTS occurs on **June 17, 2008** during a medical examination by Dr. Rotman. On that date, Dr. Rotman noted:

> . . . He also has numbness and tingling in his hand. The numbness and tingling are actually bilateral, right greater than left. I believe he has had nerve studies a few years ago that showed carpal tunnel on the right, but nothing much on the left. There were no repeat nerve studies taken. The main concern today and the reason he was sent here for evaluation is the triggering of his right thumb. . . I believe litigation is still pending on his other issues including the carpal tunnel. . . . He may have carpal tunnel syndrome, but I have not reviewed his previous studies and certainly he would require new nerve studies since it has been a few years since he had them. It also appears that he may have carpal tunnel on the left. This is a future concern, however. I would recommend that he have new nerve studies to confirm that. . .. (Exhibit B)

On July 17, 2008, Dr. Rotman noted Claimant was unable to obtain the EMG/NVC due to pending litigation. Dr. Rotman further noted:

> I would be happy to perform a nerve study under private health insurance but even that is a problem for him because of litigation.

On November 25, 2008, Dr. Rotman noted:

> If he ever gets authorized to treat his carpal tunnel I would be happy to see him back again, otherwise, he is discharged at this time.

Ultimately, Claimant was finally authorized by Employer to be provided medical treatment for his bilateral CTS. **On March 18, 2009**, Claimant underwent a right CTS release performed by Dr. Rotman. **On April 1, 2009**, Claimant underwent a left CTS release also performed by Dr. Rotman. **On June 18, 2009**, Dr. Rotman placed Claimant at MMI for his bilateral CTS releases. Dr. Rotman rated Claimant's disability at 5% PPD referable to each wrist and noted Claimant had residual complaints of numbness and tingling. Dr. Rotman noted:

> At this point, I am not too particularly concerned with his complaints as they should improve with time. He had carpal tunnel symptoms for quite a long time and therefore, it will take just as long for them to resolve. . ..

Claimant settled his case with Employer **on April 28, 2010**, for 17.5% PPD referable to each wrist. As of hearing, Claimant continues to experience bilateral hand stiffness, tingling, and aching with exertion. Claimant also complains of hand pain if he uses vibratory tools. Claimant testified his symptoms have not increased since his release from medical treatment.

e) Right shoulder – During 2005, Claimant injured his right shoulder while working. He was diagnosed with a right rotator cuff strain, but never received authorized medical treatment or sought treatment on his own.

4. **On August 31, 2011**, Claimant was examined by Dr. Volarich, who is board certified in nuclear medicine, occupational medicine, and as an independent medical examiner. Dr. Volarich's examination and record review covered Claimant's injuries and treatment from **2004–2011**. Upon physical examination, Dr. Volarich noted the following abnormal findings: bilateral shoulder weakness; weakness of the left bicep muscle; bilateral weakness of the forearms; increased low back pain with toe, heel, and tandem walking; low back pain with squatting; restricted cervical spine range of motion; palpated cervical spine trigger point; decreased lumbar spine range of motion; palpated pain over the sacroiliac joints; palpated right sacroiliac joint trigger point; positive straight leg raise; decreased bilateral shoulder range of motion; bilateral positive shoulder impingement testing; bilateral shoulder crepitus; bilateral shoulder clicking and popping with circumduction; bilateral atrophy of the deltoid and rotator cuff muscles; left elbow swelling; pain to palpation over the left olecranon process and lateral epicondyle; slightly decreased bilateral wrist range of motion; positive compression provocative testing over the bilateral carpal tunnels; and positive bilateral thenar atrophy.

Dr. Volarich diagnosed the **primary injury** as right thumb triggering, status-post A-1 pulley release with right wrist ganglion cyst. Dr. Volarich diagnosed the **preexisting injuries** as follows: status-post left shoulder arthroscopic debridement of the rotator cuff, bursectomy, excision of the coracoacromial ligament and acromioplasty in 2004; status-post repeat acromioplasty, labrum debridement, rotator cuff repair, and repeat subacromial decompression in 2011; status-post left elbow arthroplasty including partial resection of the olecranon with distal humerus and coronoid process bone spur excisions in 2004; cervical spine protrusions C3-6 with radicular right shoulder pain 2005; right shoulder impingement not evaluated or treated; bilateral hand paresthesias 3/31/05; status-post endoscopic CTS releases related to the 5/22/06 injury; and L2-3disc protrusion with L3-5 disc bulges.

Dr. Volarich rated the primary injury at 30% PPD referable to the right thumb and 15% PPD referable to the right wrist ganglion. Dr. Volarich rated the preexisting injuries/conditions as follows: 45% PPD referable to the left shoulder following two surgical repairs; 35% PPD referable to the left elbow; 30% BAW PPD referable to the cervical spine; 30% PPD referable to the right shoulder impingement; 25% BAW PPD referable to the lumbar spine; 35% PPD referable to each wrist for the 2005 paresthesias and 2006 CTS.

Dr. Volarich applied 17 physical restrictions involving the affected body parts rated, and recommended Claimant be evaluated by a vocational expert to determine if Claimant is capable of employment within the restrictions given. Dr. Volarich further opined if a vocational expert was unable to identify a job for which Claimant was suited then Claimant would be PTD due to a combination of his primary and preexisting injuries.

5. On October 31, 2011, Claimant was interviewed by Mr. James England, a vocational rehabilitation counselor. Mr. England's evaluation and record review covered Claimant's injuries and treatment from **2004 – 2011**. During the course of Claimant's evaluation, Mr. England administered the Wide-Range Achievement Test, which demonstrated Claimant read at

a high school level and performed math at the 5th grade level. Based on the educational testing, Mr. England opined Claimant's educational skills would be adequate for a variety of entry-level jobs. After reviewing Claimant's vocational history, Mr. England opined Claimant had no transferable vocational skills outside of a medium level of exertion. Mr. England noted Employer had accommodated Claimant's physical needs until he was no longer capable of sedentary work. Finally, Mr. England considered any physician imposed restrictions, and Claimant's description of his current daily functioning that included the inability to sleep more than 4-5 hours, and the need to lie down during the day due to neck and back pain. In addition to Dr. Volarich's medical evaluation, Mr. England noted Claimant was evaluated for independent medical evaluations by Dr. Berkin on November 23, 2005 and May 16, 2007, Dr. Cantrell on June 26, 2007, and by Dr. Poetz on January 25, 2008. Mr. England considered all of the independent medical evaluations when forming his opinion regarding Claimant's employability. Regarding Claimant's employability, Mr. England opined as follows:

> Certainly considering Dr. Poetz's restrictions or Dr. Volarich's restrictions along with Mr. Lewis's description of his typical, day-to-day functioning I do not see how he would be able to sustain any work activity on a consistent, full-time basis. Even sedentary light work typically involves repetitive use of the upper extremities and being able to get through the day on a repetitive basis without being able to recline periodically.
>
> (Exhibit O, Depo Exhibit B)

From a vocational standpoint, Mr. England opined Claimant was PTD due to a combination of his various medical problems and multiple surgical procedures, and Claimant would not benefit from vocational rehabilitation services.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues related to liability of SIF

As a starting point, to establish SIF liability Claimant must demonstrate that either 1) a preexisting partial disability combines with a disability from a subsequent injury to create PTD, or 2) two disabilities combine to result in a greater disability than that which would have resulted from the last injury alone. *Gassen v. Lienbengood*, 134 S.W.3d 75 (Mo.App. W.D. 2004), citing *Karoutzos v. Treasurer of State*, 55S.W.3d 493 (Mo.App. 2001). Claimant seeks compensation from SIF under the first category. If the last injury standing alone did not cause the employee to become PTD, the inquiry turns to potential liability for PTD by Second Injury Fund. Claimant's last injury was a surgical right trigger thumb. I find the last injury alone did not render Claimant PTD. The Second Injury Fund is implicated in all cases of permanent disability where there has been *previous disability*, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the

last injury alone. §287.220.1 *RSMo.*[7] In other words, Claimant must provide evidence to support a finding that he had preexisting permanent 'disability.' *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206 (Mo.App. E.D. 1999).

Section §287.220.1 RSMo directs that the degree of preexisting disability be determined by "the degree or percentage of employee's disability that is *attributable* to all injuries or conditions existing *at the time the last injury was sustained*" (emphasis added). See also *Garcia v. St. Louis County and Treasurer of Missouri as Custodian of Second Injury Fund*, 916 S.W.2d 263 (Mo.App.1995) quoting *Frazier v. Treasurer of Missouri as Custodian of Second Injury Fund*, 869 S.W.2d 152 (Mo.App. 1993). Further, Claimant must establish that his preexisting disability was *an actual or measurable disability* (emphasis added) at the time of the last injury, and the condition/injury was of such seriousness to constitute a hindrance or obstacle to employment or reemployment. *Id.@ Gassen, Messex*. Because Claimant had not concluded medical treatment at the *time of the last injury*, whether Claimant had *actual or measurable* preexisting *disability* regarding his left shoulder/elbow and bilateral hands is the threshold question in the case at bar. Claimant argues he did, and SIF argues he did not.

Claimant's primary injury occurred on 11/7/07. The evidence presented demonstrated Claimant's treatment for all of his preexisting injuries/conditions began and ended as follows:

Left shoulder and elbow: began 2004 – ended 6/14/2011

Lumbar spine: began 2005 – ended 2005

Cervical spine: began 2005 – ended 7/5/07, but resumed in 2012

Bilateral wrists/hands: began May 2005 - ended 6/18/09

Right shoulder: began and ended in 2005

Claimant argues that his preexisting injuries/conditions were *disabilities* on the date of his last injury on 11/7/07, but the percentage or the full extent of his disabilities *attributable* to each preexisting injury/condition could not be fully appreciated on 11/7/07, because he was still seeking and/or under medical treatment for these conditions.[8] Claimant also asserts the conditions/injuries for which he was actively seeking treatment, his left shoulder and bilateral wrists, were due to acute injuries present on 11/7/07, and were not progressive type injuries prone to degeneration and subsequent deterioration. SIF disagrees, asserts the disability to Claimant's left shoulder and bilateral wrists should be excluded as the extent of disability to both could not be measured on 11/7/07. SIF noted Claimant's medical expert, Dr. Volarich, testified during deposition he could not measure Claimant's disability for either the left shoulder or wrists before medical treatment concluded, and the treatment for both concluded well after the primary right thumb injury. (Exhibit N, pg.17).

[7] Unless otherwise indicated all statutory citations are to RSMo 2010. The 2005 amendments to Chapter 287 RSMo require the statutory application of strict construction.

[8] It should be noted that Claimant's medical treatment regarding his left shoulder and wrists was delayed for years due to tactics employed by the Employer/Insurer and out of the control of Claimant.

Strict statutory construction requires if the statutory provision in question is unambiguous it be read in its entirety giving a plain and ordinary meaning to the words as written. While I agree with Claimant that the statute requires looking at the amount of disability *attributable* to each preexisting injury/condition, the statute also requires that *that* degree of disability be measured *at the time the last injury was sustained*. Therefore, I find the extent of Claimant's preexisting disabilities must be measured as of November 7, 2007. SIF contends because Dr. Volarich could not determine the extent of Claimant's disability to his left shoulder and wrists, these conditions should be excluded. I disagree based on other admissible evidence contained in the record. Multiple other medical experts whose opinions are in evidence demonstrated and certified PPD prior to November 7, 2007.

Contained with Mr. England's deposition is Mr. England's written report on which he based his opinion. Included within the report are references to the reports of multiple physicians who provided Claimant treatment, consultations, or rating evaluations of disability present at various times during his treatment. Mr. England's report was received into evidence at the deposition over a hearsay objection of SIF "to the extent the report relies on the independent medical evaluations of Dr. Poetz and Dr. Hoffman." (Exhibit O, pg. 8) Section 490.065.3 RSMo., permits an expert to consider facts not in evidence when forming an inference or opinion. However, a two-step approach is used to determine the admissibility of the expert's opinion. *Whitnell v. State of Missouri*, 129 S.W3d 409 (Mo.App. E.D. 2004) citing *State Board of Healing Arts v. McDonagh*, 123 S.W. 3d 146 (Mo. banc 2003); *Bruflat v. Mister Guy, Inc.*, 933 S.W.2d 829 (Mo.App. W.D. 1996) (*overruled by Hampton v. Big Boy Steel*). First, the facts or evidence must be of a type reasonably relied on by other experts in the field in forming opinions or inferences on the subject, and second, the trier of fact must independently decide if the facts and data relied on by the expert meet a minimum standard of reliability (otherwise reasonably reliable). *Id.* Further, the hearsay evidence relied upon need not be independently admissible. *State v. Rowe*, 838 S.W.2d 103 (Mo. App. 1992). I find the evidence and facts Mr. England relied upon that included Dr. Poetz and multiple other physicians are the type reasonably relied upon by the vocational field, and I find the facts and data relied upon by Mr. England are foundationally reasonably reliable. SIF's deposition objection is overruled.

The medical evaluation closest to the date of Claimant's primary injury occurred within 2½ months of November 7, 2007, and was conducted by Dr. Poetz on January 25, 2008.[9] Mr. England's report provided the following information regarding Claimant's condition on the date of Dr. Poetz's examination:

> Robert P. Poetz, D.O., saw him on 01/25/08 for evaluation of work-related injuries that occurred on or about January 2004, January 2005, February 24, 2005, and March 2005 while employed with Crane National Vendors. Mr. Lewis complained of constant pain and limited movement in his neck, a burning sensation in his shoulders that increased and caused shooting pain in his arms when he raised his arms, reached, or lifted. He got sharp pain in his elbows, left worse than right, and his hands swelling and he got shakiness in his fingers and pain in his wrists, right more

[9] This time period was 2 ½ months after the date of Claimant's primary injury, but before Claimant reached MMI for the primary injury on November 25, 2008.

> than left. His thumbs had recently starting locking on him. . ..
>
> Diagnoses regarding January 2004 included left shoulder partial rotator cuff tear, left shoulder arthroscopy subacromial decompression, left elbow arthritic bone spurring secondary to overuse syndrome, and status post left elbow ulnohumeral arthroplasty (partial resection of olecranon and distal humerus and coronoid bone spurs). Diagnosis preexisting was cervical degenerative disc disease. Other diagnoses include cervical strain with disc protrusions C3-4 and C4-5, January 2005; right shoulder sprain, February 24, 2005; and bilateral carpal tunnel syndrome, March 2005. The doctor [Dr. Poetz] thought the prognosis was guarded due to the length of time elapsed since the injuries and continuance of pain in all areas of symptomology.
> (Exhibit O, Depo Exhibit B, pg. 9)

Claimant seeks permanent total disability benefits from the Second Injury Fund. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled in part). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled in part). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled in part). Determining 'disability' is the province of medical experts, and in the instant case multiple medical experts found 'disability' due to Claimant's various injuries. Determining 'employability' is within the province of vocational experts.

In reaching his opinion regarding Claimant's employability, Mr. England noted the restrictions placed by Dr. Poetz were "very similar" to those placed by Dr. Volarich.

> He [Dr. Poetz] recommended warm moist pack, range of motion exercises, and Cox II nonsteroidal anti-inflammatory medication. Dr. Poetz advised him to avoid heavy lifting and strenuous activity; to avoid prolonged sitting, standing, walking, stooping, bending, squatting, twisting, or climbing; to avoid overhead use of upper extremities; to avoid excessive and repetitive use of upper extremities; to avoid use of equipment that created torque, vibration, or impact to the upper extremities; to avoid any activity that exacerbated symptoms or was known to cause progression of the disease process. The doctor said if he [Claimant] remained symptomatic at the cervical spine he should undergo a cervical myelogram and post myelogram CT scan followed by surgical intervention if indicated. He said Mr. Lewis had had no treatment for the right shoulder and should undergo an x-ray and steroid injections. If there was no response, he should undergo

> an MRI of the right shoulder followed by surgical intervention if indicated. If the symptoms increased at his left shoulder, he should undergo a repeat MRI of the left shoulder followed by additional surgery if indicated. The doctor recommended steroid injections at the bilateral wrists, and if there was no response he should undergo repeat nerve conduction studies followed by surgical intervention if indicated. Permanent partial disability ratings were provided. (Exhibit O, Depo Exhibit B, pg. 9)

Mr. England opined, if he assumed *either* Dr. Poetz or Dr. Volarich's restrictions, along with Claimant's description of his current day-to-day functioning, even sedentary to light work would require use of his upper extremities, and sedentary work would not allow for the ability to rest periodically. Mr. England acknowledged he assessed Claimant's daily ability to function as Claimant presented on October 31, 2011, and he did not specifically ask Claimant about his daily functioning in 2007, however, Claimant testified credibly his primary and preexisting conditions did not change between 2007 and 2011. Mr. England opined Claimant would be unable to sustain work activity on a consistent, full-time basis, and he was PTD due to a combination of his multiple injuries. (Exhibit O, pg.12) The trier of fact determines whether medical evidence is accepted or rejected, and the trier may disbelieve uncontradicted or unimpeached testimony. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W. 2d 525, 527 (MO banc 1993). As Mr. England based his opinion on the restrictions of *either* Dr. Poetz or Dr. Volarich, I find the opinion of Mr. England to be credible and persuasive.

SIF argues Claimant continued to work after he reached MMI from the primary injury, and he collected unemployment benefits (UE benefits) after his job ended, which is contrary to being permanently disabled. Claimant reached MMI from the primary injury on November 25, 2008. Claimant testified he stopped working for Employer when it left the state on November 6, 2009, almost one year after reaching MMI. While all this is true, Claimant also continued to work in the most accommodated position Employer had and continued to pursue medical treatment for his left shoulder and hands. Once his job ended, although he held himself out to be ready, willing, and able to work (as required for UE benefits), Claimant was never able to find a job. Claimant testified no employer would hire him with his physical problems, and he offered evidence demonstrating 57 job contacts he made from December 2009 through May 2010[10] without resulting in a single job offer. (Exhibit P) Even though a claimant might be able to work for brief periods of time or on a part-time basis, it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995). Holding oneself out as ready, willing, and able to work is a factor to consider, but is not dispositive of employability. Due to the heavily accommodated position provided by Employer before and after the period Claimant reached MMI from the primary injury, I do not find this work demonstrated Claimant was employable in the open labor market.

I find Claimant is PTD due to a combination of his November 7, 2007 injury and his preexisting conditions. Given Claimant's limitations, it would be unreasonable to expect any employer to hire Claimant, or to expect Claimant to successfully perform new work duties. Claimant is permanently and totally disabled due to the combination of his last work injury and

[10] This period covered the time *after* Claimant's carpal tunnel releases, but *before* his repeat left shoulder surgery.

his preexisting disabling conditions measured at the time of his last work injury, and SIF shall pay PTD benefits as prescribed by law.

The remaining issue involves when Claimant's PTD benefits should begin. Awarded PTD benefits traditionally begin the day after the injured worker reaches MMI from the primary injury. This is the date the employer/SIF PPD differential begins. In the case at bar, Claimant reached MMI from the primary injury on November 25, 2008, but continued to receive a salary from Employer until November 6, 2009 and then received UE benefits. Additionally, during the period Claimant received UE benefits, those benefits stopped from February 16, 2011 until June 14, 2011 while Employer paid TTD benefits after Claimant's second left shoulder surgery.

I do not find Claimant's receipt of UE benefits to impact when his PTD award begins. Section 287.170.3 RSMo directs that "an employee is disqualified from receiving *temporary total disability* during any period of time in which the claimant applies and receives unemployment compensation." The statute only references TTD benefits. It does not reference 'PTD' benefits or use the words 'total disability.' Had the legislature wanted to include benefits other than TTD, it would have listed those benefits.

Claimant's post MMI salary and his period of TTD benefits received in 2011 do impact when his PTD benefits begin. Claimant earned salary from Employer until November 6, 2009, so the earliest his PTD benefits could begin would be November 7, 2009.[11] However, if Claimant's PTD benefits began on November 7, 2009, he would be receiving PTD benefits during the period he also received additional TTD benefits. Claimant received 17 weeks of additional TTD benefits during the period February 16, 2011 until June 14, 2011. Accordingly, I find Claimant's PTD benefits start with his differential payment on March 5, 2010 (11/7/2009 + 17 weeks) for a period of nine weeks, and then he is to receive weekly payments of $400.00 weekly thereafter.

CONCLUSION

Claimant is found to be permanently and totally disabled as of March 5, 2010. Employer paid nine weeks of permanent partial disability. SIF will pay weekly differential of $10.96 during the period of PPD. Following the nine weeks of PPD paid by Employer, SIF shall provide Claimant with permanent and total disability benefits of $400.00 weekly for Claimant's lifetime. As Claimant has been found PTD, the remaining issue of SIF liability for PPD is moot. Claimant's attorney is entitled to a 25% lien.

Date: _____ Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

[11] The assumption is a worker is paid through his last day of employment.