

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

Injury No.: 05-089922

Employee: Texas Martin

Employers: 1) Workforce, Inc. (Settled)  
2) Ceramo (Dismissed)

Insurers: 1) ALEA North America c/o Gallagher Bassett (Settled)  
2) Liberty Mutual (Dismissed)

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 21, 2011, as supplemented herein.

**Discussion**

We agree with the administrative law judge that employee is permanently and totally disabled due to a combination of the last injury and his preexisting disabling conditions. We write this supplemental opinion because the administrative law judge did not make a finding as to the extent of disability resulting from the work injury considered alone. This is a crucial finding whenever considering Second Injury Fund liability for permanent total disability: “[i]n deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone.” *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003) (citation omitted), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

We find that employee sustained a 9.5% permanent partial disability of the body as a whole referable to the lumbar spine as a result of the primary injury.

Because we otherwise agree with the analysis, findings, and conclusions of the administrative law judge, we affirm the remainder of the award without supplementation.

**Conclusion**

We supplement the award of the administrative law judge with the foregoing finding. In all other respects, we affirm the award. The Second Injury Fund is ordered to pay to employee weekly payments of \$317.74, commencing on December 4, 2009, and thereafter for his lifetime, or until modified by law.

Employee: Texas Martin

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The award and decision of Administrative Law Judge Maureen Tilley, issued March 21, 2011, is attached hereto and incorporated herein to the extent 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 17<sup>th</sup> day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Texas Martin Injury No. 05-089922  
Dependents: N/A  
Employer: Workforce, Inc. (settled)  
Ceramo (dismissed)  
Additional Party: Second Injury Fund  
Insurer: ALEA North America c/o Gallagher Bassett (settled)  
Liberty Mutual (dismissed)  
Hearing Date: January 12, 2011 Checked by: MT/rf

**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 7, 2005.
5. State location where accident occurred or occupational disease was contracted: Cape Girardeau County.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Were employers insured by above insurers? Yes.

11. Describe work employee was doing and how accident occurred: The employee strained his back while he was moving propane tanks.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: low back, spine and body as a whole.
14. Nature and extent of any permanent disability: 9.5% of the body as a whole at the level of the lumbar spine.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$453.00
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$476.60
19. Weekly compensation rate: \$317.74
20. Method wages computation: Stipulation.
21. Amount of compensation payable: N/A
22. Second Injury Fund liability: See findings.
23. Future requirements awarded: See findings.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

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

## **FINDINGS OF FACT AND RULINGS OF LAW**

On January 12, 2011, the employee, Texas Martin, appeared in person and with his attorney, B. Michael Korte, for a hearing for a final award against the Second Injury Fund. The Employee had previously settled a claim for compensation with Workforce, Inc., and had dismissed an alleged employer, Ceramo, Inc. The Second Injury Fund was represented at the hearing by its attorney, Frank Rodman. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

1. Employer Workforce was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was insured by ALEA North American Ins. Co. c/o Gallagher Bassett.
2. Employer Ceramo was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was insured by Liberty Mutual.
3. On September 7, 2005, Claimant was an employee of Workforce and/or Ceramo working under the Missouri Workers' Compensation Act.
4. Both Employers had notice of Claimant's accident.
5. The claim was filed within the time allowed by law.
6. Claimant's average weekly wage was \$476.60. The rate of compensation for permanent total disability is \$317.74 per week.
7. Claimant's injury was medically causally related to the accident.
8. Employers previously furnished medical aid in the amount of \$453.00.
9. No temporary total disability benefits were paid.
10. The primary injury date was September 7, 2005.

The following issue was identified:

1. Liability of the Fund for permanent total disability.

### **EXHIBITS**

The following exhibits were offered and admitted into evidence:

#### Employee's Exhibits

- |   |                                                                 |
|---|-----------------------------------------------------------------|
| A | Curriculum Vitae of Dr. David T. Volarich                       |
| B | March 13, 2009 complete medical report of Dr. David T. Volarich |
| C | Curriculum Vitae of Gary Weimholt, M. S. CDMS                   |
| D | June 8, 2009 report of Gary Weimholt, M. S. CDMS                |
| E | March 11, 2010 Deposition of Dr. David T. Volarich              |
| F | June 22, 2010 Deposition of Gary Weimholt                       |
| G | Certified records of Baylor Dept. Of Orthopaedic Surgery        |
| H | Certified records of Fannin Street Imaging                      |

- I Certified records of The Methodist Hospital
- J Certified records of Presbyterian/Presbyterian Kaseman
- K Records of St. Francis Medical Center
- O Exhibit J CONDENSED: certified records of Presbyterian/Presbyterian Kaseman
- P Exhibit I CONDENSED: certified records of The Methodist Hospital

The Second Injury Fund did not offer any exhibits.

Employee submitted exhibits A through P. Exhibits A through K, O and P were admitted. Exhibits L, M, and N were uncertified records and were objected to as to their hearsay nature. Based on the evidence presented, I find that Exhibits L, M, and N are hearsay will not be admitted into evidence.

## **FINDINGS OF FACT**

### **PRIMARY INJURY**

On September 7, 2005 the employee as working at Ceramo. He obtained the job through Workforce, a temporary employment agency. On that day, he operated a forklift to move dumpsters and pallets of ceramic pots. He was required to change out the propane fuel tank on the forklift as part of the job. He disconnected an empty tank from the forklift and took it across the work area. He put down the empty tank and picked up a full tank which weighed approximately 40 to 60 pounds. While placing the filled tank on the forklift, he twisted his low back.

### **MEDICAL TREATMENT**

On September 8, 2005, the employee presented with pain complaints in his posterior left shoulder and low back pain on the right side with no radiculopathy. Dr. Straubinger took a history from the employee of extensive prior low back treatment which included multiple surgeries. Dr. Straubinger also noted the employee had chronic low back pain which existed prior to the primary injury and employee told him of a previously scheduled appointment with the Veteran's Administration (VA) facility in St. Louis. Employee told him he was routinely seen at the Marion, Illinois VA facility leading up to the work injury. Employee was taking prescribed narcotic pain medication at the time of the primary injury.

On September 9, 2005, employee returned to Dr. Straubinger. Dr. Straubinger compared prior VA x-rays to the ones from the day before and no differences were noted. Dr. Straubinger diagnosed a low back strain, superimposed on significant pre-existing degenerative disc disease, which was stable and resolving. He recommended the employee continue with his treatment regimen through the VA and found no need for further treatment for the primary work injury.

The employee settled the primary work injury claim at 9.5% of the body as a whole (BAW) for his low back.

**PRE-EXISTING ISSUES**

The employee stated he had been treating with the VA for an extended period of time leading up to the primary work injury. The employee stated he underwent a lumbar fusion in 1979 by Dr. Czerlip and a 1981 revision surgery. He thought he received a lifting restriction, but was unsure whether it was temporary or permanent. He said he received Social Security Disability for 11 years (1979-1990) and returned to work in 1990 for an oil field company owned by Bill Whitfield. He worked for that company for 14 years and served as a “gofer” for the owner, picking up his laundry and delivering paperwork to various people. He stated he always had low back pain and used a heating pad, took hot showers, and was able to lie down as needed.

Additional testimony of Employee

Other pre-existing conditions involved his neck, bilateral knees, and right shoulder. He said he underwent neck fusion surgeries in 1974 and 1976, right shoulder surgeries in 2003 and 2004, and surgeries on his right knee in the 1980s. He submitted various pre-existing medical records which reflected some of that treatment. However, he did not submit any VA medical records.

The employee never returned to work after the work-related accident and did not claim unemployment benefits or look for work. He is currently receiving social security disability benefits.

The employee has never worked in an office, has no typing or keyboarding skills, and has no experience using a computer or other office machines. His education ended in the 11<sup>th</sup> grade; he tried and failed to obtain a GED.

The employee does not believe that he is able to return to any of his former occupations, to any light duty that Workforce might offer, or to any other occupation.

The employee testified that he is currently limited and restricted by his pain and stiffness. His back pain increases with bending or twisting, and pain radiates to his left buttock, hip, thigh and calf.

The employee testified that he rarely climbs the stairs in his home, needs to change positions frequently between sitting and standing, limits his lifting to about 10 pounds or less, and is able to walk only about two blocks, even with his cane. He attempts to relieve his symptoms with hot showers, heating pads and ice packs, in addition to numerous prescriptions furnished to him by the Veterans Administration.

The employee testified that he is limited to watching television in the mornings, and needs to lie down occasionally. He needs help from his wife to get in and out of his bathtub, and sits while taking showers. His wife assists him with putting on his socks and shoes and he dresses slowly. He does no yard work, dishwashing, cleaning, vehicle maintenance, or building repairs. He sleeps poorly and his driving is limited. He continues to receive treatment for his

injuries from the Veterans Administration.

The employee never returned to work after the work-related accident and did not claim unemployment benefits or look for work. He is currently receiving social security disability benefits.

The employee received an honorable discharge after his military service in Vietnam, and has previously worked as a truck driver, in lumber yards, as a security guard, pumping gas, sweeping floors, in a meat department wrapping meat and on an assembly line at Mary Lee's, in addition to working for the employer Workforce at Ceramo, and for Bill Whitfield as a personal assistant.

The employee has never worked in an office, has no typing or keyboarding skills, and has no experience using a computer or other office machines. His education ended in the 11<sup>th</sup> grade; he tried and failed to obtain a GED.

The employee does not believe that he is able to return to any of his former occupations, to any light duty that Workforce might offer, or to any other occupation.

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#### Dr. David Volarich

At the request of the employee's attorney, Dr. David Volarich performed an independent medical examination and evaluation of the employee on March 13, 2009.

Dr. Volarich is a board-certified radiologist, and is currently licensed to practice medicine by the State of Missouri.

As part of his review of medical records supplied to him by the employee's attorney, Dr. Volarich noted that X-rays taken at St. Francis Medical Center of the employee's low back on the day after the work-related accident demonstrated moderate posterior wedging at the L5 level in the employee's lumbar spine, with a 40% loss of the L5 vertebral body height. Dr. Volarich also noted that lumbar spine x-rays taken September 14, 2002, demonstrated an apparently solid fusion of the employee's lumbar spine with no compression deformity, a finding which Dr. Volarich believes "contrast starkly" with the x-rays taken the day after the work-related accident.

Dr. Volarich made the following observations regarding the employee's pre-existing medical conditions:

Low back: On 9/17/79, he underwent surgical decompression with the removal of the posterior elements of L5, exploration of the nerve roots of L5 and S1 on the left and a fusion of L4 to the sacrum with bone from the iliac crest. On 1/18/81, he was re-admitted for neurolysis and revision of the fusion of L4 to the sacrum. On 10/8/81, he was readmitted for treatment of a failed fusion of L4 in the sacrum. He underwent revision of the fusion of L5 to S1 with another iliac crest bone graft.

Right knee: On 5/18/73, he underwent anterior and posterior exploration of the medial aspect of his right knee with removal of the medial meniscus for persistent knee pain and "clicking". On 2/9/82, he underwent a right knee arthroscopy with repair of a medial collateral ligament. On 4/8/97, he underwent a right knee arthroscopy with patellofemoral chondroplasty and debridement of the medial and lateral meniscal remnants.

Left knee: On 6/21/78, open medial menisectomy on his left knee for intractable left knee pain after jumping off a truck. On 4/4/00, he underwent left knee arthroscopy with partial medial menisectomy, debridement of the patellofemoral and medial compartments with synovial biopsy. Following this procedure, his pain in his left knee worsened considerably and his advanced degenerative joint disease progressed.

Right shoulder: On 7/97, slipped on a patch of oil in a grocery store in Houston, and on 7/8/97, he underwent right shoulder arthroscopy with distal clavicular excision, acromioplasty, debridement of the glenoid labrum and mini right open rotator cuff repair. In 1999, he was chasing a robber in a store in Houston and attempted to stop him with his right arm and sustained another injury to his right shoulder. On 7/13/99, he underwent right shoulder arthroscopy with arthroscopic debridement and revision of a rotator cuff tear.

In 1967 while in the military, he fell down approximately 50 stairs. He sustained an injury to his neck.

He was involved in a truck accident in 11/72 and sustained an injury to his neck and subsequently, on 3/10/74, underwent C5-6, and C6-7 fusions with iliac crest bone grafting.

Dr. Volarich reviewed voluminous medical records, interviewed the employee and performed a physical examination of the employee as part of his independent evaluation. Dr. Volarich's objective findings upon examination of the employee for his work-related injuries and pre-existing conditions included:

- Asymmetric bulk of the upper extremities and atrophy;
- Weakness in motor testing;
- A limp favor the left leg;
- Difficulty bearing weight on the left leg;
- Inability to perform certain gait maneuvers;
- Various diminished ranges of motion of both the cervical and lumbar spines;
- Muscle spasm;
- Surgical scars consistent with the Employee's history of prior surgeries;
- Positive signs upon impingement testing;
- Positive signs upon Phalen's testing;
- Positive signs upon provocative testing.

Dr. Volarich diagnosed and rated the following injuries and disabilities as a result of the work-related accident:

- 20% of the body as a whole due to compression fracture at L5 with 40% loss of vertebral height, and aggravation of the employee's lumbar radicular syndrome with worsening left leg radiculopathy.
- 15% of the body as a whole at the cervical spine due to aggravation of the employee's cervical radicular syndrome with worsening left upper extremity radiculopathy.

Dr. Volarich also diagnosed and rated multiple pre-existing disabilities, including, but not limited to:

- 50% of the body as a whole at the level of the lumbosacral spine based, in part, upon the employee's prior surgeries.
- 35% of the body as a whole at the level of the cervical spine to the employee's prior surgeries.
- 45% of the right upper extremity at the level of the shoulder based, in part, upon the employee's prior surgeries.
- 5% of the right upper extremity at the level of the hand based, in part on the employee's prior surgery.
- 65% of the left lower extremity at the level of the knee based, in part, upon the employee's prior surgeries.
- 75% of the right lower extremity at the level of the knee based, in part, upon the employee's prior surgeries.

According to Dr. Volarich, the employee's pre-existing disabilities are hindrances or obstacles to his employment or re-employment, a synergistic enhancement has occurred in which

the combined totality of the employee's disability is greater than the sum of its parts, the degree or percentage of disability caused by the combination of the employee's work-related and pre-existing disabilities is substantially greater than that which would have resulted from the work-related injury considered alone and by itself, and the amount of the employee's disability resulting from the combination of the work-related and pre-existing disabilities is greater than the sum or the amount of those disabilities when each disability is considered separately.

Dr. Volarich is reasonably certain that the employee is permanently and totally disabled as result of the combination of his work-related and pre-existing disabilities.

Dr. Volarich noted that medical records indicate that the Employee was felt to be stable on September 9, 2005. He noted that the Employee was at maximum medical improvement as of the date of his independent evaluation.

Dr. Volarich recommended numerous permanent physical restrictions for the Employee, including:

With regard to work and other activities referable to the spine:

- Limit all bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks to an as needed basis.
- Do not handle any weight greater than 10-15 pounds, and limit this task to an occasional basis assuming proper lifting techniques.
- Do not handle weight over his head or away from the body, nor carry weight over long distances or uneven terrain.
- Avoid remaining in a fixed position for any more than about 20 minutes at a time including both sitting and standing.
- Change positions frequently to maximize comfort and rest when needed including resting in a recumbent fashion.

With regard to work and other activities referable to the spine prior to 9/6/05:

- Limit repetitive bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks to an as needed basis.
- Do not handle any weight greater than 35 pounds, and limit this task to an occasional basis assuming proper lifting techniques.
- Do not handle weight overhead or away from the body, nor carry weight over long distances or uneven terrain.
- Avoid remaining in a fixed position for any more than about 60 minutes at a time including both sitting and standing.
- Change positions frequently to maximize comfort and rest when needed.

With regard to work and other activities referable to the lower extremities:

- Avoid all stooping, squatting, crawling, kneeling, pivoting, climbing, and all impact maneuvers.

- Be cautious navigating uneven terrain, slopes, steps, and ladders especially when handling weight; handle weight to tolerance.
- Limit prolonged weight bearing including standing or walking to 30 minutes or to tolerance. Place a pad on any surface upon which he may kneel.

With regard to work and other activities referable to the right shoulder,

- Avoid all overhead use of the right arm and prolonged use of the right arm away from the body, especially above chest level.
- Minimize pushing, pulling and particularly traction maneuvers with the right upper extremity.
- Do not handle weights greater than about 5 pounds with the right arm extended away from the body or overhead, and limit these tasks to as needed or as tolerated.
- Handle weight to tolerance with right arm dependent, assuming proper lifting techniques, but, in general, limit lifting to 15-20 pounds with the right arm alone.

With regard to work and other activities referable to the right hand, limitations were not required.

### Gary Weimholt

Gary Weimholt, a certified vocational rehabilitation consultant performed an independent vocational evaluation of the employee on December 17, 2008, at the request of the employee's attorney. Mr. Weimholt considered the employee's vocational characteristics, capabilities and barriers to employment, and is reasonably certain that the following factors, conditions and characteristics affect the employee's ability to access and to compete in the open competitive labor market:

- The Employee has less than a high school level of education.
- He has no alternative skill sets for sedentary work such as computer literacy, typing or keyboard skills.
- His reading and arithmetic scores are below the high school or 9<sup>th</sup> grade level.
- The Employee has not performed work that results in transferable job skills to either Light or Sedentary work.
- Based upon the physical restrictions recommended by Dr. Volarich, the Employee is limited in his ability to perform work as follows:
  1. In regard to his spine, the full range of Light work.
  2. His limitations to his spine prior to 9/06/05 limit him from the full range of Medium work.
  3. His limitations to his lower extremities limit him to mostly a sedentary level of work, with the need to be able to control his work environment by alternative standing, sitting and walking, and having additional rest periods.
  4. The employee has no work experiences that would result in transferable job skills within his narrow range of physical abilities, or to either skilled or semi-skilled work at the Light or Sedentary level of work. In the

absence of transferable job skills, there is no other work that is available to the employee in the open competitive labor market.

5. In view of the employee's ongoing pain and discomfort, Mr. Weimholt does not believe that he could effectively compete against other workers or perform work where good work habits and managing time wisely are required, or be able to manage his time wisely at work.
  6. The employee also lacks other skills sets, such as computer literacy or typing and keyboard skills that would be required in less physical kinds of jobs, or customer service type work.
  7. Light assembly or production type of work would exceed the employee's abilities for sustained standing and fast paced production.
  8. The employee would not receive accommodations necessary to become employed by a new employer.
  9. The employee is 63 years of age and does not possess any vocational strength or attribute that would allow him to be a viable candidate for any job at this age, given his limitations and multiple problems.
- Based upon his first-hand knowledge of the employee obtained through his vocational assessment and evaluation, the medical opinions, and his professional experiences in the field of vocational rehabilitation and disability management, Mr. Weimholt is reasonably certain that the employee has a total loss of access to the open competitive labor market and is totally vocationally disabled from employment. In his opinion, there is no reasonable expectation that an employer, in the normal course of business, would hire the employee for any position, or that he would be able to perform the usual duties of any job that he is qualified to perform. The employee is not a candidate for vocational rehabilitation or re-training.
  - It is Mr. Weimholt opined that the employee's total loss of access to the open competitive labor market is the result of the employee's low back injuries from the work-related accident, in combination with his pre-existing lumbar spine, cervical spine, and lower extremity problems.

## **APPLICABLE LAW**

### **Permanent Total Disability:**

- Section 287.020.7 RSMo. provides as follows:

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

- The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner*

*v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App.1992). Total disability means the “inability to return to any reasonable or normal employment”. *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834 (Mo.App.1993).

### **Second Injury Fund Liability:**

- Section 287.220.1 RSMo., requires that, in order to have Second Injury Fund liability, a claimant must have “a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or obtaining reemployment if the employee becomes unemployed.
- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and 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 employee at the time of the last injury is liable is less than 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” hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

- Under Section 287.220.1 RSMo., the Second Injury Fund has no liability and the employer is responsible for full, permanent total disability benefits if the last injury “considered alone and of itself” results in permanent total disability. *Roller v Treasurer of the State of Missouri*, 935 S.W.2d 739 (Mo.App.1996) and *Maas v Treasurer of the State of Missouri*, 964 S.W.2d 541 (Mo.App.1998).
- To determine whether a pre-existing condition rises to the level of being a hindrance or obstacle to employment or re-employment, the “proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition” *Knisley v. Charleswood Corporation*, 211 S.W. 3d 629, 637 (Mo. App. E.D. 2007, emphasis added).
- The purpose of the Second Injury Fund is to encourage employment of disabled workers. If the employee has a pre-existing condition “which renders them more susceptible to a

greater degree of disability” compared to workers without this condition, the employer is motivated to discriminate *Wuebbeling v. West County Drywall*, 898 S.W.2d 615 (Mo. App. E.D. 1995, emphasis added).

## **RULINGS OF LAW:**

### ***Issue 1. Permanent total disability against the Second Injury Fund***

Both the testimony of the employee and the medical and vocational evidence support a finding that the employee is permanently and totally disabled as a result of a combination of his pre-existing back injury (which resulted in a lumbar fusion and revision surgery), neck injury, bilateral knee injuries, right shoulder injury, and right hand and low back sprain caused by the September 7, 2005 accident.

The first step in this analysis is to determine whether the employee is able to compete in the open labor market, and is permanently and totally disabled. If he is totally disabled, the Second Injury Fund is only liable if the total disability is a result of a combination of his pre-existing back, neck, bilateral knees, right shoulder injuries and right hand and the primary injury to his low back. If the last injury alone was sufficient to cause the employee’s total disability, then the Second Injury Fund is not liable for permanent total disability.

On the issue of whether the employee is permanently and totally disabled, there are a number of factors that make it clear that he is no longer capable of competing in the open labor market.

The Employee testified that he is currently limited and restricted by his pain and stiffness. His back pain increases with bending or twisting, and pain radiates to his left buttock, hip, thigh and calf. The employee testified that he rarely climbs the stairs in his home, needs to change positions frequently between sitting and standing, limits his lifting to about 10 pounds or less, and is able to walk only about two blocks, even with his cane. He attempts to relieve his symptoms with hot showers, heating pads and ice packs, in addition to numerous prescriptions furnished to him by the Veterans Administration.

The employee further testified that he is limited to watching television in the mornings, and needs to lie down occasionally. He needs help from his wife to get in and out of his bathtub, and sits while taking showers. His wife assists him with putting on his socks and shoes and he dresses slowly. He does no yard work, dishwashing, cleaning, vehicle maintenance, or building repairs. He sleeps poorly and his driving is limited. He continues to receive treatment for his injuries from the Veterans’ Administration.

Based on all the evidence presented, I find that the employee was a credible witness.

Mr. Weimholt, a vocational expert, opined that the employee has a total loss of access to the open competitive labor market and is totally vocationally disabled from employment. In his opinion, there is no reasonable expectation that an employer, in the normal course of business, would hire the employee for any position, or that he would be able to perform the usual duties of any job that he is

qualified to perform. He further opined that the employee is not a candidate for vocational rehabilitation or re-training.

Based on the evidence presented, I find that Mr. Weimholt's opinion, regarding the employee's employability in the open labor market, credible.

The evidence supports a conclusion that the employee is permanently and totally disabled.

The credible testimony of the employee and the corroborating evidence makes it clear that he is no longer employable in the open labor market.

I therefore find that based on the employee's age, education, work history, and current physical condition, the employee is no longer able to compete in the open labor market and is permanently and totally disabled.

Dr. Volarich performed an independent medical evaluation on the employee. Dr. Volarich diagnosed and rated the following injuries and disabilities as a result of the work-related accident:

- 20% of the body as a whole due to compression fracture at L5 with 40% loss of vertebral height, and aggravation of the Employee's lumbar radicular syndrome with worsening left leg radiculopathy.
- 15% of the body as a whole at the cervical spine due to aggravation of the employee's cervical radicular syndrome with worsening left upper extremity radiculopathy.

Dr. Volarich also diagnosed and rated multiple pre-existing disabilities, including, but not limited to:

- 50% of the body as a whole at the level of the lumbosacral spine based, in part, upon the employee's prior surgeries.
- 35% of the body as a whole at the level of the cervical spine to the employee's prior surgeries.
- 45% of the right upper extremity at the level of the shoulder based, in part, upon the employee's prior surgeries.
- 5% of the right upper extremity at the level of the hand based, in part on the employee's prior surgery.
- 65% of the left lower extremity at the level of the knee based, in part, upon the employee's prior surgeries.
- 75% of the right lower extremity at the level of the knee based, in part, upon the employee's prior surgeries.

Dr. Volarich opined that the employee's pre-existing disabilities are hindrances or obstacles to his employment or re-employment. He stated that a synergistic enhancement has occurred in which the combined totality of the employee's disability is greater than the sum of its parts. He further stated that the degree or percentage of disability caused by the combination of the employee's work-related and pre-existing disabilities is substantially greater than that which

would have resulted from the work-related injury considered alone and by itself. He also stated that the amount of the employee's disability resulting from the combination of the work-related and pre-existing disabilities is greater than the sum or the amount of those disabilities when each disability is considered separately.

Based on all of the evidence presented, I find Dr. Volarich's opinion, regarding permanent total disability, credible.

The Second Injury Fund did not offer to submit any exhibits into evidence. Furthermore, the Second Injury Fund did not call any witnesses to testify.

Based on this evidence, I find that the last injury alone was not sufficient to cause the employee to be permanently and totally disabled.

In conclusion, based on all of the evidence presented, I find that the employee had a pre-existing back injury (which resulted in a lumbar fusion and revision surgery), neck injury, bilateral knee injuries, right shoulder injury and right hand that were a hindrance or obstacle to his employment or re-employment.

I also find that the employee's pre-existing conditions combined synergistically with the employee's September 7, 2005 injury to his back and body as a whole to create a greater disability than the sum of the individual disabilities. As a result of the combination of the September 7, 2005 injury and the pre-existing injuries, the employee is no longer able to compete in the open labor market and is permanently and totally disabled.

I further find that the last injury alone with a date of injury of September 7, 2005, would not have rendered the employee permanently and totally disabled without the pre-existing injuries.

Dr. Volarich determined that the employee was at his maximum level of medical improvement on March 13, 2009. The employee was therefore at MMI, and at the end of his healing period on that date.

The employer-insurer's liability for permanent partial disability would therefore have commenced on March 13, 2009, and would have continued 38 weeks through December 4, 2009. Those benefits would have been payable at the rate of \$317.74 per week. Since the permanent partial disability and permanent total disability rates are the same, the Second Injury Fund's obligation to pay permanent total disability benefits does not start until December 4, 2009. The Second Injury Fund is therefore directed to pay to the employee the sum of \$317.74 per week commencing on December 4, 2009, and said weekly benefits shall be payable for the lifetime of the employee pursuant to Section 287.200.1 RSMo., unless such payments are suspended during a time in which the employee is restored to her regular work or its equivalent as provided in Section 287.200.2 RSMo.

**ATTORNEY'S FEE**

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

**INTEREST**

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

Employee: Texas Martin

Injury No. 05-089922

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

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Maureen Tilley  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Naomi Pearson  
*Division of Workers' Compensation*