

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

Injury No.: 03-128437

Employee: David Martinez
Employer: NPC Acquisition Corp. d/b/a Bidco Sealants, Inc.
Insurer: Hartford Insurance Company of the Midwest
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 28, 2009. The award and decision of Administrative Law Judge Carl Strange, issued October 28, 2009, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 8th day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: David Martinez

Injury No. 03-128437

Dependents: N/A

Employer: NPC Acquisitions Corp. DBA Bidco Sealants, Inc.

Additional Party: Second Injury Fund

Insurer: Hartford Insurance Company of the Midwest

Hearing Date: August 15, 2009

Checked by: CS/kh

SUMMARY OF FINDINGS

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? October 30, 2003
5. State location where accident occurred or occupational disease contracted: St. Francois County, Missouri
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 happened or occupational disease contracted: In order to get a core box, the employee was standing on the ramp railing and leaning out. The ramp railings broke causing the employee to twist and fall onto the

concrete ramp and onto the floor injuring his head, right eyebrow, left shoulder, and body as a whole.

12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: left shoulder, right eyebrow and psychiatric condition (See Findings)
14. Nature and extent of any permanent disability: 80% referable to left upper extremity, 20% body as a whole referable to the employee's psychiatric condition, and 25 weeks of disfigurement. (See Findings)
15. Compensation paid to date for temporary total disability: \$18,811.80
16. Value necessary medical aid paid to date by employer-insurer: \$43,100.79
17. Value necessary medical aid not furnished by employer-insurer: See Stipulation 10
18. Employee's average weekly wage: \$382.50
19. Weekly compensation rate:
 - \$255.00 for temporary total disability
 - \$255.00 for permanent partial disability
20. Method wages computation: By Agreement
21. Amount of compensation payable:
 - 265.6 weeks of permanent partial disability and 25 weeks of disfigurement:
 - \$74,103.00
22. Second Injury Fund liability: Yes
 - Permanent total disability benefits from Second Injury Fund beginning November 9, 2012 (See Findings)
23. Future requirements awarded: Employer-insurer directed to pay future medical aid pursuant to Section 287.140 RSMo (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: Attorney Kenneth Seufert

FINDINGS OF FACT AND RULINGS OF LAW

On August 15, 2009, the employee, David Martinez, appeared in person and by her attorney, Kenneth Seufert, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, John Palombi. The Second Injury Fund was represented at the hearing by their attorney, Assistant Attorney General Gregg Johnson. 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. On or about October 30, 2003, NPC Acquisitions Corp. DBA Bidco Sealants, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Hartford Insurance Company of the Midwest.
2. On or about October 30, 2003, the employee was an employee of NPC Acquisitions Corp. DBA Bidco Sealants, Inc. and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about October 30, 2003, the employee sustained an accident or occupational disease during the course of his employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$382.50, his rate for temporary total disability, permanent total disability, and permanent partial disability is \$255.00.
7. The employee's injury is medically causally related to the work injury on or about October 30, 2003.
8. The employer has furnished \$43,100.79 medical aid to employee.
9. The employer has paid temporary total disability benefits for 73 3/7 weeks at a rate of \$255.00 per week for a total of \$18,811.80.
10. The employer-insurer shall reimburse the employee directly for his expenses for medication and Dr. Lum's medical bills totaling \$1,640.00.
11. The employee is permanently totally disabled and entitled to permanent total benefits beginning April 15, 2007.

ISSUES:

1. Future Medical Aid
2. Liability of the Employer
3. Liability of the Second Injury Fund

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Report of Bruce Schlafly, M.D. dated January 31, 2006;

- B. Curriculum Vitae of Bruce Schlafly, M.D.;
- C. Correspondence from Ken Seufert to Bruce Schlafly, M.D.;
- D. Medical Records of
 - 1. Scott A. VanNess, D.O.;
 - 2. Richard Howard, D.O.;
 - 3. James Emanuel, M.D.;
 - 4. Mitchell Rotman, M.D.; and
 - 5. Farmington Sports and Rehabilitation Center.
- E. Medical Records of Daniel Phillips, M.D.;
- F. Operative Report dated March 17, 2004;
- G. Report of Mitchell Rotman, M.D. dated November 29, 2004;
- H. Medical Records of James P. Emanuel, M.D. dated January 11, 2005;
- I. Operative Report dated February 2, 2005;
- J. Medical Records of James P. Emanuel, M.D. dated October 17, 2006;
- K. Report of James England dated November 14, 2006;
- L. Report of James England dated August 22, 2007;
- M. Curriculum Vitae of James England;
- N. Correspondence from Ken Seufert to James England;
- O. Records from North County High School dated 1982 to 1983;
- P. Records from North County High School dated 1971 to 1983;
- Q. WAIS-R Report dated November 6, 2006;
- R. WRAT3 Report dated November 6, 2006;
- S. Test 2 Reading Comprehension;
- T. Report of Wayne Stillings, M.D.;
- U. Curriculum Vitae of Wayne Stillings, M.D.;
- V. Correspondence from Ken Seufert to Wayne Stillings, M.D.;
- W. Exhibit List;
- X. Deposition of Bruce Schlafly, M.D.;
- Y. Deposition of Wayne Stillings, M.D.;
- Z. Deposition of James England;
- AA. Correspondence from Ken Seufert to Donald Murphy;
- BB. Physicians Statement of Ability to Work by Laurence Lum, D.O.;
- CC. Supplemental Medical Records;
- DD. Records of Southeast Missouri Community Treatment Center, Inc.;
- EE. Walmart Pharmacy Records;
- FF. Medical Bill of Laurence Lum, D.O.; and
- GG. CD of Left Shoulder with Hardware.

Employer-Insurer's Exhibits

- 1. Deposition of Gregg Evan Bassett, M.D.; and
- 2. Deposition of James Emanuel, M.D.

Second Injury Fund Exhibits:

- I. Deposition of Robert F. Morgan, M.D.;
- II. Curriculum Vitae of Robert F. Morgan, M.D.; and
- III. Report of Robert F. Morgan, M.D.

FINDINGS OF FACT:

Based on the testimony of David Martinez (“employee”) and the medical records and reports admitted, I find as follows:

At the time of the hearing, the employee was 44 years old and lived in Park Hills at his current address for the past twenty years. He is currently married to Glenda Martinez and has three adult children and two grandchildren. In 1983, the employee graduated North County High School. Although he received his diploma, the employee was in special education classes throughout high school and was far behind his peers (Employee Exhibits O & P). Following his graduation, the employee worked in law care, at a green house, and at a grocery store.

In 1988, the employee began working for NPC Acquisitions Corp. DBA Bidco Sealants, Inc. (“employer”). The employee’s primary job was a roller where he would apply spacers and cores and then roll the sheet metal up with the use of a machine. Additionally, he would also cut up batches, clean floors, clean machines, and box up fiber strings. The employee left the employer for a short time to work at Killark, a big factory in St. Louis. After three days, the employee quit since he could not complete the paperwork and the amount of people made him nervous. After a few months, the employee returned to employment with the employer.

On October 30, 2003, the employee was working for the employer and went to retrieve a box of the cores to do his job. The core boxes were stacked in the space between the wall and ramp. In order to get a box, the employee had to stand on the ramp railing and lean out. At that time, the ramp railings were made of wood and broke under the employee’s weight. As a result, the employee twisted and fell onto the concrete ramp and onto the floor injuring his head, right eyebrow, and left shoulder. The employee was immediately taken to Parkland Health Center in Bonne Terre for treatment. While at the emergency room, the employee provided the details of the work accident and was given sutures and medication. Additionally, the employee was taken off work and followed up with Dr. Laurence Lum on the next day. Dr. Lum examined the employee and kept the employee off work for another week. After the employee returned to work, he was able to work for three or four days until he had to return to the emergency room at Mineral Area Regional Medical Center on November 14, 2003. At that time, the emergency room doctor noted that the employee has obvious deformity of left shoulder and has reported pain in shoulder is getting worse (Employee Exhibit CC).

After following up with Dr. Lum and having an MRI completed, the employee was referred to Dr. Scott VanNess who examined him on December 17, 2003. Dr. VanNess diagnosed brachial plexopathy as a result of traction neuropraxia and subsequent axillary nerve palsy and deltoid atrophy of the left shoulder. In addition to placing the employee on light duty restriction, sedentary work, right handed work only avoiding any climbing or use of the left arm, Dr. VanNess referred the employee to physical therapy and to Dr. Howard for an upper extremity second opinion. On his next visit, Dr. VanNess deferred all further treatment to Dr. Howard (Employee Exhibit D, Part 2).

On January 19, 2004, Dr. Richard Howard examined the employee, noted the MRI was unremarkable, diagnosed the employee with Left C5-6 brachial plexus palsy with partial recovery, and ordered an EMG/Nerve Conduction Study (Employee Exhibit D, Part 3). The EMG/Nerve Conduction Study was completed by Dr. Daniel Phillips on February 2, 2004, and was consistent with left brachial plexopathy involving predominately the left axillary and suprascapular distributions. Additionally, Dr. Phillips noted that there was mild left median neuropathy across the carpal tunnel. A repeat EMG/Nerve Conduction Study was completed on March 2, 2004, and showed no evidence of suprascapular reinnervation (Employee Exhibit E). Later that day, Dr. Howard reviewed the study and recommended doing a nerve transfer for a suprascapular nerve most likely with a branch of the spinal accessory and then neuritization of his axillary nerve with the triceps branch. Further, Dr. Howard noted that it is unlikely that he will be able to return to the same job that he performed previously, although not impossible (Employee Exhibit D, Part 2).

Dr. Richard Howard operated on the employee on March 17, 2004, and performed an exploration of brachial plexus and neurotization of the suprascapular nerve with a branch of the spinal accessory and neurotization of the axillary nerve with a branch of the radial nerve to the triceps. The post operative diagnosis was left C5 nerve root avulsion (Employee Exhibit F). Following the first operation, the employee returned to physical therapy and was observed to have significant muscle atrophy throughout the left shoulder joint and parascapular region along the supraspinatus, infraspinatus, deltoid musculature, and teres musculature (Employee Exhibit D, Part 6). After several follow up visits, Dr. Howard noted that the employee is not showing any function in the deltoid and cannot hold his arm out at all. As a result, Dr. Howard referred the employee to Dr. Rotman for a second opinion regarding further treatment recommendations (Employee Exhibit D, Part 3). On November 29, 2004, Dr. Mitchell B. Rotman examined the employee and recommended proceeding with a shoulder fusion (Employee Exhibit G). At the request of the employer-insurer, a second independent medical examination was performed by Dr. James Emanuel on January 11, 2005. Dr. Emanuel opined that the employee's current condition is directly and causally related to his injury of October 30, 2003, and that the left shoulder fusion would be an appropriate option (Employee Exhibit H).

On February 2, 2005, Dr. Howard performed the left shoulder fusion noting that the employee has an unstable painful shoulder which is a flail shoulder due to his complete C6 palsy (Employee Exhibit I). During the operation, Dr. Howard inserted several screws and plates (Employee Exhibit GG). After several follow up visits and more physical therapy, Dr. Howard found that the employee was at maximum medical improvement on July 14, 2005. He released the employee back to work and placed him on permanent restrictions of lifting no more than fifty pounds and no overhead use of his arm. Although the employee continued to complain of soreness and pain following his return to work, Dr. Howard opined on August 8, 2005, that some of his complaints were just going to be permanent and that the employee does not require any other treatment (Employee Exhibit D, Parts 3 & 6).

After his release from Dr. Howard, the employee returned to Dr. Lum for follow up care for pain management and depression which he continued until the date of the hearing (Employee Exhibit CC). On January 31, 2006, the employee was examined by Dr. Bruce Schlafly at the request of his attorney. As a result of his examination, Dr. Schlafly did not recommend any

further surgeries and opined that the employee will require future medical care with prescription medication for pain control. Dr. Schlafly also recommended sedentary work and placed restrictions on the employee of no performing work with the left arm at the level of the chest or higher, no lifting of greater than ten pounds with the left arm, and no climbing ladders. With regard to the work injury of October 30, 2003, Dr. Schlafly rated the employee at eighty percent permanent partial disability of the left upper extremity at the level of the shoulder with an additional twenty percent permanent partial disability of the body as a whole referable to the upper back. Additionally, Dr. Schlafly noted that the employee's long term prognosis for working at the factory is poor and that the employee may be permanently totally disabled, but he would defer to a vocational rehabilitation counselor (Employee Exhibit A). At his deposition, Dr. Schlafly testified that the work injury of October 30, 2003 was not only the substantial factor, but also the primary factor in the employee's need for future medical treatment, his permanent partial disability, and his restrictions (Employee Exhibit X, Page 31).

The employee returned for another independent medical evaluation with Dr. Emanuel on October 17, 2006. Following his examination of the employee, Dr. Emanuel noted that he agrees with Dr. Schlafly with regards to his current work and work restrictions. Further, he recommended additional restrictions of no repetitive use of the left arm even at waist height, no lifting of any weight from waist to chest height, no crawling, no pushing or pulling greater than fifty pounds on a cart, and no pushing or pulling of greater than ten pounds without a cart (Employee Exhibit J). At his deposition, Dr. Emanuel noted that the employee does not necessarily require a pain management expert to follow him, but that the medications he was taking was appropriate. Further, Dr. Emanuel noted that if the employee was still having pain then the medical prescriptions and doctor follow ups would be medically necessary (Employer-Insurer Exhibit 2, Pages 22-24).

On November 14, 2006, the employee was evaluated by James England, a vocational rehabilitation counselor. Mr. England administered the Wide-Range Achievement Test - Revision 3, the reading comprehension portion of the Adult Basic Learning Examination – Level 1, and the Wechsler Adult Intelligence Scale revised. The employee scored at the first grade level on word recognition, beginning of fourth-grade level on arithmetic, third grade fifth month on reading comprehension, a verbal IQ of 73, a performance IQ of 77, and a full-scale IQ of 74 (Employee Exhibits K, Q, R & S). After his examination, Mr. England opined that the employee would not be able to successfully compete for alternative employment in the open labor market. Mr. England further noted that the employee would not be able to even perform sedentary work on a consistent basis due to a combination of his physical problems and pre-existing limited intellectual ability and poor academic abilities as a whole. Consequently, Mr. England stated that the employee was a good candidate for Social Security Disability benefits (Employee Exhibit K). At his deposition, Mr. England indicated that the employee could do retail sales, cashiering, and a wide variety of service employment if he had just the shoulder restrictions (Employee Exhibit Z).

The employee quit work on April 14, 2007 due to his inability to properly perform his work and the associated pain as a result of the work. On June 25, 2007, Dr. Lum filled out a physician's statement of ability to work or disability and noted that the employee will be on chronic pain medication for life (Employee Exhibit BB). The employee formally made a request

for all medically necessary treatment and pain management medications by his attorney's letter dated July 12, 2007 and requested a written response to the letter (Employee Exhibit AA). Mr. England's letter on August 22, 2007, reiterated his belief that the employee was permanently and totally disabled as a result of a combination of pre-existing problems and the work related injury (Employee Exhibit L).

On March 10, 2008, Dr. Wayne A. Stillings examined the employee and opined that the October 3, 2003 work injury is a substantial factor in causing the employee to suffer a mood disorder with an associated twenty percent permanent partial psychiatric disability and a pain disorder with an associated twenty percent permanent partial psychiatric disability. With regard to pre-existing psychiatric disabilities, Dr. Stillings noted a five percent permanent partial psychiatric disability for parent-child relational problem, a ten percent permanent partial psychiatric disability for social phobia, a twenty percent permanent partial psychiatric disability for mild mental retardation, and a five percent permanent partial psychiatric disability for avoidant personality traits. Dr. Stillings then opined that the employee was permanently and totally disabled from gainful employment on a psychiatric basis a result of a combination of the pre-existing and work related psychiatric problems (Employee Exhibit T). At his deposition, Dr. Stillings further testified that the employee would need further psychiatric treatment for the work injury to prevent deterioration in his clinical psychiatric condition specifically directed at his mood disorder (Employee Exhibit Y, Page 31).

The employer-insurer sent the employee to see Dr. Evan Bassett for an independent medical evaluation of his mental condition on June 28, 2008. Dr. Bassett opined that the work injury was a substantial factor in the employee's development of a major depressive disorder. Further, Dr. Bassett noted that the employee will benefit from treatment with antidepressant medication and that his depressive symptoms are potentially manageable by an informed attentive primary care physician, psychiatrist, or pain management physician. With regard to pre-existing psychiatric disabilities, Dr. Bassett noted a five to ten percent impairment due to the employee's learning disorder. Dr. Bassett opined that the employee had a five to ten percent impairment for the October 30, 2003 injury related depression (Employer-Insurer Exhibit 1).

On March 5, 2009, Dr. Robert F. Morgan reviewed the employee's records at the request of the Second Injury Fund. Following his review he opined that the employee was permanently and totally disabled as a result of the October 30, 2003 work related injury (Second Injury Fund Exhibit III). At his deposition, Dr. Morgan did not feel that the mild retardation explained why the employee was totally disabled (Second Injury Fund Exhibit I).

On April 7, 2009, the employee sought treatment at Southeast Missouri Community Treatment Center, Inc. At that time, the employee's medication was adjusted. At his follow up visit on June 4, 2009, the employee's medication was again adjusted (Employee Exhibit DD). According to the employee at the hearing, this treatment has been provided by Dr. Jintendra M. Patel at the employee's cost. Additionally, the follow up maintenance treatment by Dr. Lum and a large number of prescriptions were also paid by the employee (Employee Exhibits EE & FF). At the time of the hearing, the employer-insurer stipulated to paying for the employee's out of pocket expenses in Employee Exhibits EE & FF.

At the time of the hearing, the employee continued to take medication for treatment of the work related injury in the form of Percocet, Cymbalta, Cyclobenzaprine, Trazadone, and Ibuprofen. The employee has constant pain which is aggravated by any movement, vibration, or impact. As a result of his problems, the employee no longer goes fishing, hunting, bowling, or performs any yard work. Most of the employee's day is spent watching television, staying in his bedroom, and listening to the radio. With regard to disfigurement, the employee has a two inch scar below his eyebrow with a dime sized scar above his eyebrow. In addition to the top part of his left arm having a significant scar that runs down the back of his arm, the employee also has significant noticeable atrophy from his elbow up his arm.

APPLICABLE LAW:

- Under Section 287.140.1., “the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury”. Further, the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select his own physician at his own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. *Emert v Ford Motor Company*, 863 S.W. 2d 629 (Mo.App. 1993); *Shores v General Motors Corporation*, 842 S.W. 2d 929 (Mo.App.1992) and *Hendricks v Motor Freight*, 520 S.W. 2d 702, 710 (Mo.App.1978).
- The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is “possible” that the claimant will need future medical treatment. *Modlin v Sunmark, Inc.*, 699 S.W. 2d 5, 7 (Mo.App.1995). The cases establish, however, that it is not necessary for the claimant to present “conclusive evidence” of the need for future medical treatment. *Sifferman v Sears Roebuck and Company*, 906 S.W. 2d 823, 838 (Mo. App.1995). To the contrary, numerous cases have made it clear that in order to meet their burden, claimants are required to show by a “reasonable probability” that they will need future medical treatment. *Dean v St. Lukes Hospital*, 936 S.W. 2d 601 (Mo.App.1997). In addition, employees must establish through competent medical evidence that the medical care requested, “flows from the accident” before the employer is responsible. *Landers v Chrysler Corporation*, 963 S.W. 2d 275, (Mo.App.1997).
- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:

“All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has 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 to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial

disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, 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 shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for."

- 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.

- 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).

RULINGS OF LAW:

Issue 1. Future Medical Aid

The medical evidence unequivocally supports a finding that the employee needs additional medical treatment to cure and relieve him from the effects of his October 30, 2003 work related injury. Both Dr. Bassett and Dr. Stillings agree that the employee will require or benefit from medication and treatment of his psychiatric conditions in order to cope with his level of disability from the work related injury. Further, each indicated that it may even be life long. In cases where Dr. Bassett's opinion conflicts with Dr. Stillings, I find Dr. Stillings' opinion to be more credible based on the evidence presented at trial including Dr. Bassett's contradictory rationale of placing the employee at maximum psychiatric improvement and then stating that "If Mr. Martinez was to receive treatment for his depression, we could expect, at most, this 10% permanent partial psychiatric impairment due to depression to decrease to 5%" (Employer-Insurer Exhibit 1, Deposition Exhibit 2, Page 5). If the employee was at maximum psychiatric improvement, his disability would not decrease with additional treatment. If it did, the employee would not be at maximum medical improvement. With regard to the employee's left upper extremity, all three doctors, namely Dr. Schlafly, Dr. Emmanuel, and Dr. Lum all agree that the employee will continue to need future medication as a result of the October 30, 2003 work related injury. Additionally, I find that the employee will need the hardware in his shoulder monitored by an orthopedic surgeon on an as needed basis.

The main issue of contention between the employee and the employer-insurer is future control of the employee's medical treatment. At the time of the hearing, the employer-insurer stipulated to paying for all of the employee's previously incurred medical treatment and prescriptions that the employee had incurred as a result of treating on his own. The employee clearly requested that the employer-insurer reimburse him prior to the hearing (Employee Exhibit AA). Even the employer-insurer's doctors indicated that the employee needed additional treatment and medication, the employer-insurer clearly failed to respond at their own peril and should not be rewarded for their conduct. Consequently, I find that the employer-insurer waived its right to select the treating physician by failing or neglecting to provide necessary medical aid. The employer-insurer is therefore directed to furnish additional medical treatment related to the

employee's October 30, 2003 work related psychiatric condition, left upper extremity, and hardware pursuant to Section 287.140 RSMo. Based on the waiver of the right to select the treating physician, the medical treatment should be furnished at the direction of the employee and in accordance with the recommendations of Dr. Schlafly, Dr. Lum, and Dr. Stillings.

Issue 2. Liability of the Employer

At the time of the hearing, the employee argued that either the employer or the Second Injury Fund was liable for permanent and total disability benefits. The parties even stipulated that the employee was entitled to permanent benefits beginning April 15, 2007. In this case, there is only one vocational expert opinion offered. Mr. James England, a vocational rehabilitation counselor, opined that the employee would not be able to successfully compete for alternative employment in the open labor market or even be able to even perform sedentary work on a consistent basis due to a combination of his physical problems and pre-existing limited intellectual ability and poor academic abilities as a whole. The Second Injury Fund offered the opinion of Dr. Robert F. Morgan in support of their position that the employee was permanently and totally disabled as a result of the October 30, 2003 work related injury. Mr. England is clearly more qualified and credible in this case to offer the opinion regarding the employee's basis for permanent total disability and even testified at his deposition about some sedentary jobs that the employee could perform if he didn't have his pre-existing conditions (Employee Exhibit Z, Page 42). Despite the severity of the last injury, I find the opinions of Mr. James England more credible than the opinions of Dr. Robert F. Morgan based on the evidence. Consequently, I find that the employer-insurer is not liable for permanent total disability benefits.

Although the employer-insurer is not liable for permanent total disability benefits, the employer-insurer is still liable for permanent partial disability and disfigurement. With regard to the work injury of October 30, 2003, Dr. Schlafly rated the employee at eighty percent permanent partial disability of the left upper extremity at the level of the shoulder with an additional twenty percent permanent partial disability of the body as a whole referable to the upper back. No other conflicting credible opinions were offered. Based on this evidence, I find that the employee has an 80% permanent partial disability of his left upper extremity at the 210 week level related to the October 30, 2003 work related injury. This equals 185.6 weeks of disability for his left upper extremity. The employer-insurer is therefore directed to pay to the employee the sum of \$255.00 per week for 185.6 weeks for a total award of permanent partial disability to his left upper extremity and upper back of \$47,328.00.

With regard to his psychiatric disability, Dr. Wayne A. Stillings opined that the October 3, 2003 caused the employee to suffer a mood disorder with an associated twenty percent permanent partial psychiatric disability and a pain disorder with an associated twenty percent permanent partial psychiatric disability. Based on the evidence and my above findings regarding credibility, I find that the employee has a total of 20% permanent partial psychiatric disability of the body as a whole at the 400 week level related to the October 30, 2003 work related injury and not including any pre-existing psychiatric condition. This equals a total of 80 weeks of disability for his psychiatric condition. The employer-insurer is therefore directed to pay to the employee

the sum of \$255.00 per week for 80 weeks for a total award of permanent partial disability referable to his psychiatric condition of \$20,400.00.

In addition to his permanent partial disability, the employee is seriously and permanently disfigured based on the two scars above and below his eyebrow and the scar and atrophy on his left arm. Based on these scars, I find that the employee is entitled to 25 weeks for disfigurement. The employer-insurer is therefore directed to pay to the employee the sum of \$255.00 per week for 25 weeks for a total of \$6,375.00 for disfigurement.

The total amount awarded against the employer-insurer for permanent partial disability and disfigurement is equal to \$74,103.00. Based on the evidence and stipulation of the parties, I find that the employee reached his maximum level of medical improvement and the end of the healing period on April 14, 2007. The employer-insurer's permanent partial disability payments would therefore have commenced on April 15, 2007, and will continue for 290.6 weeks through November 8, 2012. As of October 13, 2009, the employer-insurer's current amount owed is 130 2/7 weeks at a rate of \$255.00 per week for a total of \$33,222.86.

Issue 3. Liability of the Second Injury Fund

Based on the evidence and my above findings, the Second Injury Fund is clearly liable for permanent total disability benefits. The employee's pre-existing psychiatric conditions and the primary injury clearly combined to make the employee permanently and totally disabled. With regard to the employee's pre-existing psychiatric disabilities, Dr. Stillings opined that the employee had a five percent permanent partial psychiatric disability for parent-child relational problem, a ten percent permanent partial psychiatric disability for social phobia, a twenty percent permanent partial psychiatric disability for mild mental retardation, and a five percent permanent partial psychiatric disability for avoidant personality traits. At his deposition, Dr. Stillings opined that pre-existing and primary psychiatric conditions synergistically combined to make the employee permanently and totally disabled. Consequently, I find that as of October 23, 2003, the employee had a preexisting disability to his body as a whole as a result of his above psychiatric conditions of a total of 40%. I further find that these preexisting disabilities were a hindrance or obstacle to the employee's employment or reemployment and that the employee's preexisting disabilities and his last primary injury of October 23, 2003 combined synergistically causing the employee to be permanently and totally disabled.

Since the employee's permanent partial disability rate (\$255.00) is the same as the agreed rate of compensation for permanent total disability, the Second Injury Fund is liable for the full amount of the permanent total disability benefits commencing November 9, 2012. The Second Injury Fund is therefore directed to pay to the employee the sum of \$255.00 per week commencing on November 9, 2012, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of the employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is restored to his regular work or its equivalent as provided in Section 287.200.2.

ATTORNEY'S FEE:

Kenneth Seufert, 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.

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation

Date: _____

A true copy: Attest:

Ms. Naomi Pearson

