

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

Injury No. 03-101665

Employee: John Matthews
Employer: General Motors (Settled)
Insurer: Self-Insured (Settled)
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 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 April 27, 2015. The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued April 27, 2015, 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 20th day of January 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: John Mathews

Injury No. 03-101665

Dependents: None

Employer: General Motors (Settled)

Additional Party: Second Injury Fund

Insurer: Self-Insured (Settled)

Hearing Date: November 5, 2013

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: GCG/kr

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: March 1, 2003
5. State location where accident occurred or occupational disease was contracted: St. Charles 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 occurred or occupational disease contracted: Claimant injured his right leg and knee as stepped from a van onto a ramp in the course and scope of employment.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right knee
14. Nature and extent of any permanent disability: 19% PPD of right knee
15. Compensation paid to-date for temporary disability: Not Applicable
16. Value necessary medical aid paid to date by employer/insurer? Not Applicable

Employee: John Mathews

Injury No. 03-101665

- 17. Value necessary medical aid not furnished by employer/insurer? Not Applicable
- 18. Employee's average weekly wages: Undetermined
- 19. Weekly compensation rate: \$628.90 PTD/\$329.42 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: Settled

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
Weekly differential (\$299.48) payable by SIF for 30 and 3/7 weeks beginning
February 14, 2004 and, thereafter, \$628.90 for Claimant's lifetime.

TOTAL: SEE AWARD

23. Future requirements awarded: None

Said payments to begin as of the date of this Award and to be payable and be subject to modification and review as provided by law.

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

Evan Beatty

Employee: John Mathews

Injury No. 03-101665

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John Mathews

Injury No: 03-101665

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: General Motors (Settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party Second Injury Fund

Insurer: Self-Insured (Settled)

Checked by: GCG/kr

PRELIMINARIES

Hearing on the above-referenced case was held before the undersigned Administrative Law Judge on November 5, 2013 at the Division of Workers' Compensation in St. Charles County, Missouri. John Matthews ("Claimant") was present and represented by Evan J. Beatty. The liability of General Motors ("Employer") which was self-insured was previously settled. Assistant Attorney General, Jennifer Sommers represented the Second Injury Fund. Mr. Beatty requested a fee in the amount of 25%. The parties submitted post-trial briefs.

Stipulations:

The parties entered into the following stipulations:

1. On or about March 1, 2003, Claimant sustained an accident arising out of and in the course of his employment that resulted in injury to Claimant's right knee. The accident occurred in St. Charles County, Missouri.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in St. Charles County, Missouri.
4. Employer received the proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. The applicable rates of compensation are \$628.90 for permanent total disability benefits and \$329.42 for permanent partial disability benefits. Claimant reached maximum medical improvement on February 14, 2004 and therefore this will be the date that permanent total disability benefits would begin, if awarded.

Issues:

1. Liability of the Second Injury Fund, whether Claimant is permanently and partially disabled or permanently and totally disabled.

Employee: John Mathews

Injury No. 03-101665

SUMMARY OF EVIDENCE

Only evidence necessary to support this Award will be summarized. Any objections not expressly ruled on during the hearing or in this Award are now overruled. Certain exhibits offered into evidence may contain handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights had no impact on any ruling in this case.

Exhibits

Claimant offered the following exhibits which were received into evidence without objection:

- A. Stipulation for Compromise Settlement (02-155280) for 9% permanent partial disability of the left hand and wrist paid by Employer
- B. Stipulation for Compromise Settlement (03-101665) for 19% permanent partial disability of the right knee paid by Employer
- C. Medical records of Mineral Area Regional Medical Center
- D. Medical records of Dr. Glen Sherrod
- E. Medical records of Dr. Gregory Terpstra
- F. Medical records of Mineral Area Regional Hospital
- G. Medical records of Dr. Bharathi Raju
- H. Medical records of Dr. Jose Jimenes
- I. Medical records of Dr. H. Gunawardhana
- J. Stipulation for Compromise Settlement (89-064363) for 11.25% permanent partial disability of the BAW/Neck paid by Employer and 10% of the ankle, 10% of the wrist and 35% BAW low back and hip paid by the Second Injury Fund
- K. General Motors Plant Dispensary Records
- L. Deposition of Dr. David Volarich
- M. Deposition of Delores Gonzalez
- N. Deposition of Dr. Richard Anderson

The Second Injury Fund offered the following exhibits which were received into evidence without objection:

- I. Deposition of James England
- II. Deposition of John Matthews
- III. Social Security psychological report prepared by Dr. Toll

Claimant was born on January 28, 1961 and therefore at the time of the hearing was 52 years of age. He has been married for 31 years and has four children, all of which are emancipated. Until last year, he lived in a 16 x 80 trailer in Park Hills, Missouri but the trailer burned down last year and he now lives with his wife in a camper on his wife's cousin's property. Prior to the burning of the trailer, the trailer did provide handicap access for the last eight years with no steps and a railing on a ramp. The trailer also had a railing in the shower and

Employee: John Mathews

Injury No. 03-101665

hallway. Claimant was not responsible for any maintenance on the property. Claimant has a high school education which included two years of technical school while in high school concentrating in electrical. Claimant was never employed as an Electrician. Claimant's wife takes care of all household chores, grocery shopping, as well as, their finances.

Claimant was awarded Social Security Disability in 2004 and was also granted disability retirement from General Motors in 2004. His total income is approximately \$2600 a month. Claimant takes Percocet for pain eight times a day. Claimant's employment history includes performing odd jobs after high school. Following this for two or three years he worked at a Thoroughbred Farm as an assistant trainer. Claimant began work at General Motors on the assembly line in 1985 until his last date of employment in 2004. He worked in most areas of the plant including trim, body, finish and chassis. Claimant did not have any supervisory duties over other employees while at General Motors. He never worked nor does he have any experience with computers. He does not even own a cell phone. Claimant has not had any additional education.

Claimant's first significant injury was in 1976 while playing football when he fractured his left hip requiring surgery. For the next 18 months, he was non-weight bearing, in a wheel chair for four to six months and then crutches and a cane for the remainder of the time. From that point forward until the last injury, Claimant was in constant pain in his hip worsened with standing, walking, descending and ascending stairs, as well as, riding in a car. He stated his pain levels were between a 6 to 8/9. Up through the date of the last injury, he continued to take up to four or more Motrin or Ibuprofen a day. Every job at General Motors made his symptoms worse including turning left, walking up and down the line or standing on the concrete floor. Stooping and kneeling would also aggravate his symptoms. He had problems keeping up with the line and it slowed him down. The problems in the hip eventually created problems with his back. As a result of the hip and other physical problems prior to the last injury which resulted in his missing time from work, he was disciplined on several occasions and lost several jobs while at General Motors to the point of being suspended for weeks at a time. This happened on multiple occasions. His current symptoms in his hip are similar to what they were on the last date of injury on March, 2003 including a sharp and throbbing pain, as well as, an achy pain in his hip which is made worse by certain movements. Claimant continues to walk with a limp and the left leg is approximately 2 inches shorter as a result of the surgery. His symptoms are also aggravated by weather. As a result of his hip condition along with other physical problems over the years, he has taken Darvocet, Demerol and Percocet whenever possible.

In 1987, Claimant injured his left ankle. He was diagnosed with a sprain and treated with an air cast and kept off work. On February 24, 1987 it was noted that there was pain at the insertion at the plantar fascia onto the calcaneus and he was placed into a soft heel cup. On July 14, 1987 he had tenderness laterally below the malleolus and pain on resisted dorsiflexion and diagnosed status post ankle strain. Up to the date of the last injury, Claimant continued to be in constant pain which was worsened with activity including walking and standing. The ankle would give way with normal walking, especially on inclines. Problems from the ankle slowed him down while at General Motors and effected activities including walking, turning and inclines on the assembly line.

Employee: John Mathews

Injury No. 03-101665

In 1987 Claimant suffered an injury to his low back. He was initially diagnosed with an acute lumbar strain but an x-ray showed a possible T12 compression fracture. Dr. Berkin on August 17, 1988 noted tenderness at L3 through L5 with some loss of range of movement of the lumbar spine. Claimant was in constant pain which worsened with activities at General Motors including lifting, walking, standing and overhead work. He did at one point try epidural injections which provided only temporary relief. As a result of pain in his back he would miss several days of work a month leading up to the last injury. The pain in his back affected his sleep and he indicated he could not lift more than 10 pounds without aggravating his symptoms. While performing jobs on the line, he indicated he had to be careful. He would ask for breaks at times at work and would go to the plant medical department. Surgery at one point on the back was recommended. He indicated one particular job he did required him to lift consoles weighing just 15 to 20 pounds and he had to ask for help. Leading up to the last injury and ongoing through the date of the hearing, he has pain and numbness which radiates into his legs and is worsened with activity. He has tried chiropractic care but it only made the symptoms worse. He admitted it did slow him down at work.

In 1987, Claimant injured his right hand and wrist which required surgery and he was diagnosed with carpal tunnel syndrome. The surgery only provided temporary relief. Through the date of the last injury he continued to have throbbing pain, tingling and numbness in his right hand and wrist. This restricted him from the use of hand tools while at work and his symptoms were worsened almost with any use of the right hand while at General Motors. He testified the job which resulted in the worse aggravation of his symptoms was on the motor line and eventually he was provided a restriction from doing that job. With different jobs he would have to use hammers or wedge tools in the trim department which also aggravated his symptoms. He would attempt to compensate by using his left hand. Through the date of the last injury and up to the date of the hearing, he has loss grip strength and notices this when just opening bottles or doors. It has also resulted in problems with fine motor skills. He has problems buttoning his shirt or using safety pins or buckles. This continued to wake him up at night and again he admitted it slowed him down at work.

In 1988, Claimant injured his neck and left shoulder. On February 13, 1989 Dr. Jones noted pain and tingling in the left arm and he had pain with abduction and external rotation. There was also a loss of sensitivity in the left hand. Dr. Jones diagnosed a brachial plexus traction injury and ordered an EMG. On February 24, 1989 Dr. Jones felt the EMG showed a C6 radiculopathy and told Claimant to limit use of the left arm. On April 5, 1989 Dr. Phillips diagnosed a traumatic myofascial pain syndrome of the left shoulder and neck and injected the trigger points. On April 20, 1989 Dr. Jones ordered physical therapy and restricted Claimant from working above shoulder level. Claimant underwent physical therapy for a couple of months. On July 11, 1989 Claimant was continuing to complain of trapezius and scapular pain and he was started on Indocin and restricted from use of power tools. On September 10, 1990 Dr. Berkin noted tenderness from C4 through C6 into the paraspinal muscles with some spasm in the left side of the neck and loss of range of motion. Claimant also saw a chiropractor for pain. Claimant indicated the physical therapy actually made his symptoms worse. He was also suffering from headaches and blurred vision. He had the headaches every day.

Employee: John Mathews

Injury No. 03-101665

In 1996, Claimant was diagnosed with an irregular heartbeat which he probably had since childhood. He would experience dizziness and blurred vision on an everyday basis. This affected his ability to concentrate. An ablation procedure was performed but it did not help the condition. Through the date of the last injury, he continued to complain of headaches, blurred vision and dizziness. He admitted this slowed him down at work and he has continued to take medications. He was also diagnosed with Diabetes in 2004. Claimant felt he had had this for some time and didn't know it, which added to his symptoms he was having with his heart.

Claimant also has a history of psychiatric problems including a hospitalization with psychiatric problems dating back to the 1980's. Claimant was diagnosed with bipolar disorder when he was hospitalized at St. Anthony's Hospital for approximately 30 days. He was having mood swings and depression and was treated with psychiatric medication. Post his release from the hospital, he continued to receive outpatient psychiatric care. Up through the date of the hearing, Claimant indicated he felt strange, miserable and irritable. He had problems sleeping and avoided crowds. He continued to take antidepressant medication but this caused drowsiness and affected his ability to focus. Claimant testified the physical problems he was having made his depression worse. Because of his psychiatric problems, he would miss time at work as much as a day every couple of weeks. He had problems with co-workers, the speed of the line and change in job procedures. Because of his missing time from work, he was disciplined as previously stated. He continued to see a psychiatrist while working at General Motors every two weeks. His current level of treatment has been reduced to psychiatric evaluation one every three months. His psychiatric problems have affected his personal relationships with family and friends and he tends to isolate himself. He noted while at General Motors it was difficult to stay on task because of his psychological problems and frustrations with dealing with his psychological difficulties.

Claimant suffered a work-related injury for which he filed a Claim for Compensation in 2002 to his left hand and wrist. On February 1, 2002 the plant medical department noted a positive Tinels and Phalens in the left wrist. An EMG/NCS was done on February 4, 2002 showing a mild left carpal tunnel syndrome with denervation potentials in the left C7 nerve root. Dr. Sherod diagnosed left carpal tunnel syndrome. A repeat EMG/NCS on March 5, 2002 showed minimal denervation in the left abductor pollicis brevis suggestive of mild left carpal tunnel syndrome. Through the date of the last injury and ongoing, Claimant continued to complain of pain and swelling, as well as, numbness and tingling in the left hand and wrist. He indicated surgery was recommended at one point. While at work, Claimant noticed problems with picking up bolts and washers and this affected his job performance.

Claimant's last injury at General Motors was to his right knee and was the subject of the primary claim in Injury Number 03-101665. Claimant was diagnosed with degenerative meniscal disease and an MRI on April 7, 2003 showed degenerative changes of the posterior horn of the lateral meniscus, tear of the posterior horn of the medial meniscus and marked lateral tracking of the patella. On April 25, 2003, Dr. Harris performed an arthroscopic evaluation injecting the knee and then performing a lateral retinacular release, debridement of the synovium of the anterior compartment and a chondroplasty of the patella. On July 29, 2003, Claimant noted pain at work with pivoting and squatting and effusion was noted. Dr. Harris aspirated and injected the knee with steroids. Then again on September 24, 2003 there was swelling in the

Employee: John Mathews

Injury No. 03-101665

knee and Claimant's primary physician aspirated and injected the knee again. On September 20, 2003 Dr. Harris started Claimant on Viox. On November 25, 2003 Claimant needed another aspiration and injection in the knee and on January 22, 2004 Dr. Harris again injected Claimant's knee. Claimant indicated when he went back to work he would go to medical on a regular basis to lie down. He stated he couldn't squat and the knee would give way feeling as if it was unstable. He remained in constant pain in his knee. Claimant noted this slowed him down up to the last date he worked.

Claimant testified as to why he was placed on disability retirement at General Motors. It was noted that he was the member of the union and therefore the collective bargaining agreement enabled him to keep his job over the years. Claimant testified following the knee injury in combination with all of his other physical problems and psychological problems he could no longer perform his job and keep up with the line either physically or mentally. On cross-examination, Claimant indicated he had an increase of psychological problems in the beginning of 2004 because of pain from his physical problems and change in medications.

Opinion Evidence:

Dr. Volarich examined Claimant at the request of Claimant's attorney on November 9, 2009. (Cl. Ex. L, Pg. 6, 7) Dr. Volarich took a history regarding Claimant's injury to his right knee in March, 2003. (Cl. Ex. L, Pg. 12) Dr. Volarich testified regarding the operative note which indicated Claimant had patellofemoral mistracking which required a lateral release, debridement of the synovian of the anterior compartment which was causing impingement between the patella and medial femoral condyle, as well as, a chondroplasty of the patella because the cartilage on the surface of the patella was roughened up, chipped and flaking away. (Cl. Ex. L, Pg. 13) It was Dr. Volarich's opinion all the operative findings were related to Claimant's work injury at General Motors in March, 2003. (Cl. Ex. L, Pg. 13) Dr. Volarich also noted Claimant was under medical care for his right knee until February, 2004. (Cl. Ex. L, Pg. 14) Dr. Volarich opined Claimant's continuing complaints regarding swelling and aching, as well as, problems standing, sitting and walking, especially on concrete, as well as, going up and down steps were consistent with his mechanism of injury in March, 2003. (Cl. Ex. L, Pg. 15) On physical examination Dr. Volarich found 2/4 crepitus in the patellofemoral joint, 1/4 patellar mistracking and 1/4 swelling in the prepatellar bursa.

Dr. Volarich also took a history regarding Claimant's pre-existing disabilities, the first of which was the injury to the left hip in 1976 which required surgery. (Cl. Ex. L, Pg. 16) Dr. Volarich noted Claimant continued to have problems when he started work at General Motors and his work activities aggravated his hip "a lot". (Cl. Ex. L, Pg. 17) Dr. Volarich indicated Claimant continued to take non-steroidal anti-inflammatory medications and other analgesics such as Darvocet, Lorcet and Percocet. He also noted Claimant walked with a limp as a result of the fracture. Claimant would also move slowly and carefully. (Cl. Ex. L, Pg. 17) On physical examination, Dr. Volarich found a 15% loss of motion in his right hip due to back pain and a 30% loss of motion in his hip in all planes. The Patrick Faber test was positive in the hip and pain occurred at extremes of motion. There was also a click when Claimant tried to do a frog leg type maneuver.

Employee: John Mathews

Injury No. 03-101665

Dr. Volarich next evaluated Claimant's left ankle which was injured in 1987. (Cl. Ex. L, Pg. 17) Dr. Volarich noted the treatment for a severe ligament strain was similar to a non-displaced fracture. (Cl. Ex. L, Pg. 18) Dr. Volarich opined severe strain injuries and partial tears of the ligaments about the ankle joint cause more problems than a fracture because they don't heal and that the ligaments have a poor blood supply. Once the ligament is torn, if it is not surgically repaired, you have a loose ankle. (Cl. Ex. L, Pg. 18) Dr. Volarich noted Claimant's ongoing difficulties at work at General Motors involving the left ankle which included problems standing and walking which would exacerbate his pain. He also noted Claimant felt weak on the left side. Claimant had problems walking, especially up inclines because the ankle would end to give way. (Cl. Ex. L, Pg. 19)

With regard to his physical examination of Claimant's gait, he noted Claimant moved slowly with a stuttering type gait and Claimant listed somewhat to the left side and there was a limp favoring the left lower extremity. Claimant was unable to toe or heel walk because of left lower extremity pain. Claimant was unable to stand on each foot for any more than a second or two. When Claimant attempted to squat he had considerable difficulties standing back up right, complaining of back, hip, knee and ankle pain. Claimant also complained of weakness throughout the lower extremities when pushing off to try to stand back upright to an erect position. Dr. Volarich provided restrictions regarding Claimant's lower extremities which included limiting repetitive stooping, squatting, crawling, kneeling, pivoting, climbing, and all impact maneuvers. Claimant should be cautious navigating uneven terrain, slopes, steps and ladders. Claimant can weight bear to tolerance including standing or walking.

Dr. Volarich next evaluated Claimant's back regarding the injury in 1987. Dr. Volarich noted the x-ray on September 28, 1987 showing an old compression deformity at T12. (Cl. Ex. L, Pg. 19) Dr. Volarich opined that even if you do not have a herniated disc but rather a soft tissue injury, the injury can linger and become a permanent condition. (Cl. Ex. L, Pg. 19) He indicated patients develop myofascial pain syndrome which is a chronic soft tissue pain in the muscles and fibrosis tissues. He testified these are more difficult to treat than other conditions that can be surgically repaired. (Cl. Ex. L, Pg. 19, 20) Dr. Volarich noted Claimant's ongoing complaints involving his back which included pain on a regular basis, numbness from his low back to his posterior thighs to above knee levels and then across anteriorly from the shin to the ankles which was an L5 distribution. Dr. Volarich opined that the complaints along the L5 distribution was related to the problem which began in 1987. (Cl. Ex. L, Pg. 21)

Dr. Volarich next discussed Claimant's diagnosis of right carpal tunnel syndrome in 1987, which was surgically repaired. (Cl. Ex. L, Pg. 21) Dr. Volarich felt Claimant did not have a very good result from the surgery and he was still weaker with his grip, as well as, difficulties with dexterity and continuing numbness and tingling which would awaken him three or four nights a week. (Cl. Ex. L, Pg. 21, 22) He also noted Claimant would drop small objects and although he worked without restrictions, he moved more slowly and carefully. (Cl. Ex. L, Pg. 22)

Dr. Volarich took a history regarding Claimant's injuries to his neck and left shoulder in 1988. (Cl. Ex. L, Pg. 22) He noted the diagnosis of C6 radiculopathy per the EMG and

Employee: John Mathews

Injury No. 03-101665

diagnosis of a minor brachial plexus injury. (Cl. Ex. L, Pg. 22) Dr. Volarich testified Claimant continued to work through the pain and he “just dealt with it”. (Cl. Ex. L, Pg. 23)

On physical examination of the neck, Dr. Volarich noted loss of range of motion in all directions with the worse pain occurring with bilateral side bending. Palpation in the neck elicited pain throughout the paraspinal muscles. Physical examination of the lumbar spine also revealed significant loss of range of motion on right lateral and left lateral flexion. Pain was increased particularly with extension. Palpation elicited pain from L1 through S1 and trigger points were identified at the sciatic notches bilaterally. Claimant had a positive straight leg raise test with considerable back pain. Examination of the left shoulder revealed a 15% loss in motion and impingement testing remained moderately positive. Dr. Volarich found 1/4 crepitus, as well as, 1/4 atrophy of the deltoid rotator cuff.

Dr. Volarich also evaluated Claimant’s heart condition which was first diagnosed in 1996. (Cl. Ex. L, Pg. 23) Dr. Volarich related Claimant’s diagnosis of Wolfe-Parkinson-White syndrome and possible mitrovalve prolapses. (Cl. Ex. L, Pg. 23) Dr. Volarich indicated Wolfe-Parkinson-White syndrome is an abnormality of the conduction system in the heart where the heart rate accelerates rapidly causing incomplete filling of the ventricles and incomplete contraction and that basically because the heart is beating so fast it’s not pumping efficiently. (Cl. Ex. L, Pg. 23, 24) Dr. Volarich testified people with this condition will have symptoms of dizziness, headaches, shortness of breath, as well as, chest pain. Dr. Volarich noted Claimant’s need to continue to take medications for this condition. (Cl. Ex. L, Pg. 24) Dr. Volarich indicated Claimant gave a history that he would often feel dizzy and lightheaded and his condition was aggravated by work activity. (Cl. Ex. L, Pg. 27, 28) Dr. Volarich indicated any strenuous activities including forceful pushing or even psychological stress will result in stimulating the heart rate. (Cl. Ex. L, Pg. 25)

Dr. Volarich evaluated Claimant’s left hand and wrist regarding the injury he suffered at work in 2002. Dr. Volarich reviewed the EMG/NCS done on March 5, 2002 revealing minimal denervation of the left abductor pollicis brevis which was consistent with mild left carpal tunnel syndrome. (Cl. Ex. L, Pg. 9) Dr. Volarich also noted Claimant’s ongoing symptoms in his left hand and wrist which were consistent with a diagnosis of carpal tunnel syndrome. (Cl. Ex. L, Pg. 11) On physical examination, Dr. Volarich conducted provocative testing which was positive for left carpal tunnel syndrome and adduction and opposition of both thumbs was limited to 15 to 20%.

Dr. Volarich also took a history regarding Claimant’s psychiatric diagnosis of bipolar disorder and depression. On his mental status evaluation Dr. Volarich felt Claimant was depressed as his affect was flat and he had difficulty talking to Claimant because of Claimant’s lack of concentration and poor eye contact. He noted Claimant tended to ramble and not answer the question asked of him.

On pages 15 and 16 of his report, marked as deposition exhibit II, Dr. Volarich lists all of the physical restrictions for all of the various body parts including the primary injury to the right knee, as well as, the pre-existing disabilities to his left ankle, left hip, back, neck and his upper extremities including the hands and wrists, as well as, his left shoulder.

Employee: John Mathews

Injury No. 03-101665

Dr. Volarich took a history regarding Claimant's current medication which includes Lorcet, a narcotic pain medication, Lorazepam, an anti-anxiety medication, Lyrica for nerve pain, Cymbalta for depression, Geoden for bi-polar disorder, Lamictal, which is used to treat mood disorders, Meloxicam, an anti-inflammatory, as well as, Humulin Insulin for which he undergoes 5 shots a day to control his blood sugars. (Cl. Ex. L, Pg. 26, 27).

Dr. Volarich provided disability ratings for both the primary and pre-existing disabilities. For the right knee involved in the primary claim, he rated the disability at 35% permanent partial disability. (Cl. Ex. L, Pg. 36) With regard to the pre-existing disabilities he rated the left hand and wrist at 15%, 35% of the left hip, 5% of the left ankle, 20% of the low back, 30% of the right hand and wrist, 20% of the body as a whole referable to the cervical spine and 20% permanent partial disability of the body as a whole referable to the heart or cardiovascular condition. (Cl. Ex. L, Pg. 36, 37) Dr. Volarich also felt there was additional disability as a result of the diagnosis of bi-polar disorder which pre-dated February, 2002. (Cl. Ex. L, Pg. 37)

It was Dr. Volarich's opinion that the March 31, 2003 injury to the right knee combined with all of Claimant's prior disabilities to create a greater overall disability. (Cl. Ex. L, Pg. 37, 38) Dr. Volarich also felt Claimant will continue to need ongoing medical care for his pain syndrome. (Cl. Ex. L, Pg. 38)

Dr. Volarich discussed the relationship between depression and/or bi-polar disorder and the effect this can have on a person's pain. (Cl. Ex. L, Pg. 39) Volarich opined that he has had patients with depression and bi-polar disorder and their perception of pain is completely different than somebody without those conditions. (Cl. Ex. L, Pg. 39) He testified typically patients with those underlying psychological conditions will have more pain and more complaints. (Cl. Ex. L, Pg. 39) Dr. Volarich further opined his physical restrictions were based not only on his functional limitations but the limitations due to pain as well. (Cl. Ex. L, Pg. 40)

Dr. Volarich provided the opinion that Claimant is permanently and totally as a direct result of the work-related injury leading up to March, 2003 to the right knee in combination with his pre-existing medical conditions, as well as, his psychiatric disorder. (Cl. Ex. L, Pg. 41) Dr. Volarich included the psychiatric diagnosis because it is directly related to the impact it has on Claimant's pain and functional ability which is reflected in his restrictions. (Cl. Ex. L, Pg. 41)

Dr. Richard Anderson is a board certified psychiatrist. (Cl. Ex. N, Pg. 5) Dr. Anderson evaluated Claimant on February 13, 2009 at Claimant's attorney's request. (Cl. Ex. N, Pg. 6, 7) Dr. Anderson recounted Claimant's psychiatric history back to approximately 1989 when he was hospitalized in St. Anthony's Hospital for a diagnosis of bi-polar disorder, which is a severe mood illness which includes changes in mood and ability to function. (Cl. Ex. N, Pg. 9) Claimant has continued to take psychiatric medication since 1989. (Cl. Ex. N, Pg. 9) Dr. Anderson discussed the psychiatric medications Claimant was taking including Geoden, Cymbalta and Lyrica which will be taken at dosages in the mid to high range for the treatment of bi-polar disorder and depression and because he was taking multiple medications suggested he was not adequately controlling his symptoms with one mood medicine alone. (Cl. Ex. N, Pg. 10,

Employee: John Mathews

Injury No. 03-101665

11) Dr. Anderson felt Claimant appeared mildly although not extremely depressed. (Cl. Ex. N, Pg. 11) Dr. Anderson explained bi-polar disorder can include psychotic symptomology.

Dr. Anderson conducted a Beck Depression Inventory which found Claimant was suffering from a mild level of depression. (Cl. Ex. N, Pg. 13) Dr. Anderson did state though with regard to depression that is something that can wax and wane depending on what is happening in a particular day. (Cl. Ex. N, Pg. 13) The results of the MMPI-II showed the clinical scales were elevated for depression and psychological distress and indicated Claimant was suffering from some level of depression and anxiety. (Cl. Ex. N, Pg. 13, 14) Dr. Anderson diagnosed Claimant with bi-polar disorder dating back to the 1980's and generalized anxiety disorder. (Cl. Ex. N, Pg. 14) He provided a global assessment of functioning with a score of 45 which clearly is less than the score most patients receive who are able to function at home and at work. He stated patients reporting good improvement with bi-polar disorder generally score between a 70 to 80. (Cl. Ex. N, Pg. 14) Dr. Anderson was asked on direct-examination whether Claimant's physical issues leading up to 2003 and then the March, 2003 injury to his right knee affected his overall psychiatric issues. (Cl. Ex. N, Pg. 15) Dr. Anderson testified it is possible someone can have bi-polar disorder and continue to work and with the additive of the physical problems Claimant has it can represent an amount of difficulty, especially with bi-polar illness, can add to the other stresses which may make it impossible for a person to continue working on a full-time basis. (Cl. Ex. N, Pg. 15)

Dr. Anderson rated Claimant's disability at 100% psychiatric disability dating back to the 1980's but that Claimant was able to function with the bi-polar disorder for 15 to 20 years. (Cl. Ex. N, Pg. 16) It was further Dr. Anderson's opinion that it is possible to have a 100% psychiatric disability but part of which may have either been started by or exacerbated by or continue with other non-psychiatric problems such as physical injury and some of those can lead to a psychiatric inability to work. (Cl. Ex. N, Pg. 17)

On cross-examination, Dr. Anderson indicated Claimant told him he could not complete a full day's work because of mental problems. (Cl. Ex. N, Pg. 18)

Delores Gonzalez has been a vocational rehabilitation counselor for 39 years. (Cl. Ex. M, Pg. 5) Ms. Gonzalez reviewed all the medical information dealing with Claimant's treatment prior to her evaluation and talked with Claimant telephonically on September 22, 2010. (Cl. Ex. M, Pg. 8, 9) She also reviewed a report from a counselor in her office Barbara Parker, who had met with Claimant on March 16, 2010. Unfortunately Ms. Parker is now deceased. (Cl. Ex. M, Pg. 9) Ms. Gonzalez also reviewed the depositions of Dr. Volarich and Dr. Anderson. (Cl. Ex. M, Pg. 11) Ms. Gonzalez was asked regarding the effect Claimant's age, being 51, if that has an impact on his employability and she testified it has a significant impact on employability. (Cl. Ex. M, Pg. 12) She referenced a study by Boston University in connection with the Bureau of Labor Statistics which found people over the age of 50 who lost their jobs would only have a 23% change at finding employment and the 23% is only considering able-bodied individuals and not someone who is disabled. (Cl. Ex. M, Pg. 13) Age also has an effect on individuals who have fewer years left to work and are not as technologically savvy as younger people and would have difficulty learning new skills and performing tasks because of age related issues. (Cl. Ex. M, Pg. 13) Ms. Gonzalez also noted the fact Claimant does not have a valid driver's license and

Employee: John Mathews

Injury No. 03-101665

his wife does all the driving. (Cl. Ex. M, Pg. 13) Ms. Gonzalez noted Claimant is reading at the second grade level which she indicated Claimant thought was because of his inability to focus and concentrate on what he is reading which was consistent with others she has evaluated who were taking Lyrica and other medications Claimant is taking. (Cl. Ex. M, Pg. 14) Ms. Gonzalez also noted someone such as Claimant, who is taking Percocet, have problems with drowsiness and focusing. (Cl. Ex. M, Pg. 15) Ms. Gonzalez discussed Claimant's work history which included the last 20 years at General Motors Corporation which is classified as medium unskilled work and means Claimant does not have any skills to transfer to other jobs. (Cl. Ex. M, Pg. 17) Also, with the medications Claimant is on and the problems he has focusing and concentrating and with his memory, he would probably not be able to learn new skills. (Cl. Ex. M, Pg. 17) Ms. Gonzalez further stated Claimant does not have any skills either educationally or vocationally which would aid him with regard to future employability. (Cl. Ex. M, Pg. 18)

Ms. Gonzalez testified because of Claimant's approaching advanced age, his lack of education and his functional limitations, no employer is going to be reasonably expected to hire Claimant in his condition. (Cl. Ex. M, Pg. 20) Ms. Gonzalez further testified the right knee injury alone in March, 2003 did not render Claimant permanently and totally disabled. Ms. Gonzalez also noted Claimant had been able to function in spite of his diagnosis of bi-polar disorder in the 1980's leading up to 2003. (Cl. Ex. M, Pg. 13) It was Ms. Gonzalez's opinion Claimant was unemployable because of a combination of all of his disabilities which included the right knee plus everything that pre-existed the disability to his right knee. (Cl. Ex. M, Pg. 22)

James England is a vocational rehabilitation counselor who testified on behalf of the Second Injury Fund. (SIF Ex. I, Pg. 5, 7). Mr. England reviewed the medical records along with the doctor's reports and a copy of the deposition of Dr. Volarich and Claimant. (SIF Ex. I, Pg. 7, 8). Mr. England noted Claimant's history that he began working at General Motors in 1985 but that there were a lot of times he was dismissed for not being able to do the whole job and he was in and out of having problems doing his job for a long time and he stopped working for General Motors because he couldn't physically do it anymore. (SIF Ex. I, Pg. 10). Mr. England opined Claimant would not have any transferable skills from prior employment. (SIF Ex. I, Pg. 11). Mr. England recounted the restrictions provided by Dr. Anderson and Dr. Volarich. (SIF Ex. I, Pg. 11 - 13) It was Mr. England's opinion Claimant would be totally disabled based on his understanding of his functional problems even if we take out things other than just the Diabetes and psychiatric issues and therefore he would be totally disabled regardless of carpal tunnel or knee issues. (SIF Ex. I, Pg. 13, 14). He felt his Diabetes and psychiatric issues in combination would negate Claimant's ability to maintain any kind of work activity. (SIF Ex. I, Pg. 14)

On cross-examination Mr. England admitted he did not personally interview Mr. Mathews and therefore did not have any opportunity to review with him his ongoing complaints leading up to his last injury involving his right knee at General Motors in 2003. (SIF Ex. I, Pg. 14). He also did not have an opportunity to evaluate Claimant on how he would present in a job interview which is important in any type of vocational evaluation or placement. (SIF Ex. I, Pg. 15). Mr. England also did not review the depositions of Dr. Anderson or Delores Gonzalez. (SIF Ex. I, Pg. 15). Mr. England testified he is familiar with the collective bargaining agreements in the auto industry which protect someone's employability in spite of any disability they may have. (SIF Ex. I, Pg. 17). Further, it is certainly much easier for someone to maintain employment

Employee: John Mathews

Injury No. 03-101665

when they are part of a collective bargaining agreement as opposed to an Employee at Will or if he lost his employment to try to find new employment. (SIF Ex. I, Pg. 17, 18). On Cross-examination, Mr. England reiterated Claimant's history he left his employment at General Motors because he was unable to continue to physically perform the work there. (SIF Ex. I, Pg. 18). This was important because he did not specifically mention his bi-polar disorder, only that he could not physically perform his job. (SIF Ex. I, Pg. 18). Mr. England opined Claimant's disabilities to his back, neck, left shoulder, upper extremities, including the hands and wrists, left hip, left ankle, right knee and diagnosis of Wolfe-Parkinson-White were all physical problems presenting a hindrance or obstacle to his employment. (SIF Ex. I, Pg. 18, 19). Mr. England stated it is ultimately his opinion Claimant is unemployable in the open labor market. (SIF Ex. I, Pg. 21).

FINDINGS OF FACT & RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observations, expert medical and vocational testimony, and all other exhibits received into evidence, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. W.D.2002); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo. App. E.D. 1999) (citing *Cook v. Sunnen Prods. Corp.*, 937 S.W.2d 221, 223 (Mo. App. E.D. 1996). However, the employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995); *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1974).

PERMANENT TOTAL DISABILITY

Claimant suffered a work-related injury on or about March 1, 2003 which resulted in further aggravation, increase in severity and frequency of pain and further functional limitation. Based on the testimony of Claimant, the medical evidence and other evidence, I find claimant suffered a permanent partial disability of 19% of the right knee as a result of the injury on or about March 1, 2003. This injury is not totally disabling in and of itself.

In computing permanent and total disability in the situation where claimant suffers from a previous disability, the ALJ... first determines the degree of disability as a result of the last injury. *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo. App. E.D. 1995). The ALJ ... then determines "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..." § 287.220.1, RSMo. Cases have repeatedly held the nature and extent of the preexisting disability is measured as of the date of the primary injury. See, i.e. *Gassen v. Lienbengood* 134 S.W.3d 75, 80 -81 (Mo. App. W.D. 2004), citing *Carlson v. Plant Farms*, 952 S.W.2d 369, 373 (Mo. App. 1997) and

Employee: John Mathews

Injury No. 03-101665

§287.220.1. (“In order to calculate Fund liability, the [fact finder] must determine the percentage of the disability that can be attributed solely to the preexisting condition *at the time of the last injury.*”) [T]he claimant must establish that an actual or measurable disability existed at this time. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo. App. 1999) *Id*; *see also Tidwell vs. Kloster Co.*, 8 S.W.3d 585, 589 (Mo. App. 1999).

The central issue to be decided in this matter is the nature and extent of permanent partial disability or permanent total disability and liability of the Second Injury Fund. Under Missouri Workers’ Compensation Act, “total disability is defined as the inability to return to any employment not merely the inability to return to the employment in which the employee was engaged at the time of the accident.” Section 287.020.7 RSMo. However, the test for permanent total disability is whether he or she is able to competently compete in the open labor market given his condition and situation. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206 (Mo. App. E.D. 1999). Specifically, the pivotal question is whether an employer can reasonably be expected to hire this employee, given his present physical condition and reasonably expect him to successfully perform the work. *Gordon v. Tri-State Motor Transit Company*, 908 S.W.2d 849, 853 (Mo. App. SD 1995). As far as the Second Injury Fund liability is concerned, Section 287.220.1 RSMo. states that when a previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combined would result in permanent and total disability, employer at the time of the injury is liable only for the disability which results in the last injury considered by itself and the Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability. *Searrcy v. McDonald Douglas Aircraft Company*, 894 S.W.2d 173, 177-178 (Mo. App. 1995). Any pre-existing injury which could be considered a hindrance to employee’s competition for employment in the open labor market should trigger Second Injury Fund liability. *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997).

Determining permanent total disability based on the above cited case law requires a sequential analysis of finding whether Claimant is permanently and totally disabled and then whether that liability rests with the employer based on the last injury alone or it is the responsibility of the Second Injury Fund for the remainder of the compensation based on a combination of the primary injury to the right knee and pre-existing disability to the left hip, left ankle, back, neck, left shoulder, right hand and wrist, left hand and wrist, heart condition and psychological impairment. Typically, in determining whether someone is permanently and totally disabled there are certain vocational factors to consider which are a person’s age, education, work history, transferable skills and their residual functional capacity. In this matter, Claimant has several adverse vocational factors in terms of potential employment. First of all, he is 52 years of age with only a high school education. Based on testimony from Delores Gonzalez and citing statistical information from a study done at Boston University, as well as, the Department of Labor, Claimant is considered to be approaching advance age which creates a number of employability problems. Under the Boston University study, a person above the age of 50 only has a 23% chance of finding a new job if they have had to leave their former employment and this is without any type of physical disability. What makes this even more difficult for Claimant is his lack of education and who he would be competing against for jobs he would qualify for from an educational standpoint on the open labor market. He would be competing against able-bodied 20 and 30 year olds for those positions. Unfortunately, Claimant

Employee: John Mathews

Injury No. 03-101665

could not present himself in a job application or interview as being able to physically perform jobs he would qualify for commensurate with his level of education.

From a functional standpoint there is little doubt an employer would not reasonably be expected to hire Claimant given his functional limitations. The only physician in this matter to examine all of Claimant's disabilities was Dr. Volarich. Dr. Volarich had the opportunity to not only review medical records pertaining to all of Claimant's pre-existing disabilities and the last injury to his right knee but also was able to conduct a physical examination of all of the various body parts including his left ankle, left hip, back, neck, left shoulder, right hand and wrist, left hand and wrist and heart in order to assess each of the disabilities and provide an opinion regarding the disability as well as what physical restrictions would be placed on Claimant.

Prior to the last injury in March, 2003 to the right knee, Claimant had a myriad of physical problems. He fractured his hip in the mid 1970's and was unable to weight bear for approximately 18 months. Understandably, he continued to have problems with regard to the hip, not only in the change of his gait because the left leg was now 2 inches shorter, but he continued to experience pain. He also continued to take medication on an everyday basis including prescribed pain medication as well as anti-inflammatory over the counter medications. This was aggravated by his work while working at General Motors on pretty much every job which required some type of weight bearing and slowed him down. This was further aggravated by an injury to his left ankle and the ligament injury, although it did not require surgery, continued to present ongoing problems. Again, the left ankle bothered him with any type of weight bearing on the job. All of this, along with an injury to his low back, probably aggravated his low back. He suffered from pain in the low back which would radiate into his lower extremities. This again slowed him down at work. He also suffered an injury to his neck and left shoulder. This required medical care and continuing symptoms through the date of the last injury. A prior claim was filed with regard to the diagnosis of right carpal tunnel syndrome which required surgery. Claimant really did not notice much improvement from the surgery and continued to have pain, numbness and tingling in the right hand and wrist. This was especially aggravated by any use of his upper extremities or specifically hand tools. While at General Motors he was restricted from performing certain jobs because of this condition, along with the left shoulder. Claimant was also diagnosed in the late 1990's with a heart condition which Claimant felt had existed for some time. As Dr. Volarich explained, this affected any and all activities which require exertion. Claimant also had another injury to his left upper extremity which was the subject of a claim filed in 2002 for a diagnosis of left carpal tunnel syndrome. He did not have surgery but the complaints in his left hand and wrist regarding pain, numbness and tingling continued through the date of the last injury. The final pre-existing diagnosis relates to the diagnosis of bi-polar disorder and depression. Claimant was hospitalized in the 1980's for this condition and continued under the care of a psychiatrist, as well as, taking prescription medications from that point forward through the date of the last injury.

It is important to note Claimant testified he was missing time from work as a result of all of the above conditions and not one in particular. This occurred through the date of the last injury. Either because he could not perform a job or as a result from missing time from work, he was suspended on multiple occasions but as a result of the collective bargaining agreement his job was protected and he was able to continue his employment at General Motors. While

Employee: John Mathews

Injury No. 03-101665

Claimant may have been afforded job security as a result of the union collective bargaining agreement, it is impossible to make a finding that employment in a union job is *per se* accommodated employment. Claimant made every attempt to continue to work but, as he stated following the right knee injury, it reached a point he was physically unable to continue. At the point he reached maximum medical improvement with regard to the right knee, he was granted disability retirement by the Employer, General Motors.

It has been proposed by the testimony of Mr. England and argued because of Dr. Anderson's rating of 100% psychiatric disability, that it was the psychiatric disability alone which made him permanently and totally disabled or in combination with his Diabetes. This is not supported by the evidence. Throughout his entire employment at General Motors, he was able to work and function on some level even though he was suffering from depression and bipolar disorder. Also, there is a clear relationship between his psychological disability and his physical injuries as testified to by both Dr. Volarich and Dr. Anderson. There is an aggravation of both the psychological and physical condition as a result of the interaction between both. The physical condition aggravates the psychological condition and the psychological condition creates in Claimant, as it does with others, a heightened perception of pain.

It was not the last injury alone to the right knee that is the reason Claimant is permanently and totally disabled. It also cannot be argued that separating one condition, the psychological impairment, was the reason Claimant is permanently and totally disabled. He had worked with that condition for almost 20 years and also given the impact his physical injury and impairment had on his psychological condition, the two cannot be separated.

The un rebutted testimony of all of the experts is that Claimant is permanently and totally disabled. The personal observations of Claimant while testifying made it even clearer, with the physical and psychological distress he is under; it is not likely an employer would reasonably be expected to hire Claimant. The credible evidence presented by the testimony of Claimant, as well as, that of Dr. Volarich is that the permanent and total disability is as a result of the combination of his prior physical impairment, psychological impairment and the last injury to his right knee.

As a result of the finding that Claimant is permanently and totally disabled and since the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itself, it is the Second Injury Fund's responsibility to pay the remainder of the compensation that would be due for permanent total disability. Claimant reached maximum medical improvement on February 14, 2004 as stipulated to by the parties. Claimant has met his burden and is permanently and totally disabled as a result of the combination of his pre-existing injuries and conditions, and the primary injury to his right knee occurring on or about March 1, 2003. The Second Injury Fund is therefore liable for permanent total disability benefits commencing on February 14, 2004. As a result of the finding Claimant sustained a 19% permanent partial disability of the right knee as a result of the last injury, the Second Injury Fund shall be responsible for payment to Claimant for the weekly differential of \$299.48 for 30 and 3/7 weeks beginning on February 14, 2004 and \$628.90 per week thereafter for life.

Employee: John Mathews

Injury No. 03-101665

Said payments to begin as of the date of this award and to be payable and be subject to modification and review as provided by law.

The compensation award to the Claimant shall be subject to a lien in the amount of 25% of all payment hereunder in favor of the following attorney for necessary legal services rendered to Claimant: Evan J. Beatty.

Made by: _____

Grant C. Gorman
Chief Administrative Law Judge
Division of Workers' Compensation