

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

Injury No.: 02-111874

Employee: Mark McCulloch
Employer: TASCO Construction
Insurer: Transportation Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: October 15, 2002

Place and County of Accident: Grain Valley, Jackson County, Missouri

The above-captioned 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 modifies the award and decision of the administrative law judge dated August 13, 2007 pursuant to §286.090 RSMo. This Commission adopts the Findings of Fact as set forth in the decision.

The Commission affirms all findings and conclusions of the administrative law judge, except for its analysis and award concerning temporary total disability owed to employee. The hearing record was conflicting regarding the amount of temporary total disability paid to employee. The parties agreed that the weekly amount that should have been paid was \$647.36, but that the weekly amount actually paid was only \$647.10. At one point, the attorney for employer/insurer indicated that employer had paid employee this incorrect amount, \$647.10, for 114 weeks (which would total \$73,769.40) (Tr. 7). At another point, the same attorney indicated that employer had paid employee a total of \$73,564.37 (Tr. 8).

We cannot reconcile these totals. It appears, however, that the administrative law judge based his award on the lower total: \$73,564.37. He furthermore held that employee reached maximum medical improvement on April 14, 2005; that employer had continued paying temporary total disability benefits through April 25, 2005; and that employer had, thus, overpaid the temporary total disability benefits by 11 days.

We must modify this portion of the award. Employee should have received temporary total disability benefits from October 16, 2002 (the day after his injury), through April 14, 2005 (the date he reached maximum medical improvement). This period encompasses 130 2/7th weeks. Accordingly, employee was entitled to receive a total of 84,341.76, if the proper weekly amount was paid. Since employer paid employee a lesser amount, it clearly did not overpay him. To the contrary, depending on whether it paid him \$73,564.37 or \$73,769.40 (114 X \$647.10), it underpaid him either \$10,777.39 or \$10,572.36.

The award and decision of Chief Administrative Law Judge Kenneth J. Cain, as modified, is attached hereto and incorporated by 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 7th day of May 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Mark McCulloch

Injury No. 02-111874

Dependents: N/A

Employer: TASC0 Construction

Insurer: Transportation Insurance Co.

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

Hearing Date: May 24, 2007

Checked by: KJC/lh

FINDINGS OF FACT AND RULINGS OF LAW

- 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 15, 2002.

5. State location where accident occurred or occupational disease was contracted: Grain Valley, Jackson 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: Employee, while in the course and scope of his employment as a construction laborer sustained an injury to his right knee and low back when he fell approximately 20 feet from some scaffolding while attempting to keep a wall under construction from falling.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: right knee and low back
14. Nature and extent of any permanent disability: Tear in right knee and aggravation of degenerative changes in low back.
15. Compensation paid to-date for temporary disability: \$73,564.36.
16. Value necessary medical aid paid to date by employer/insurer? \$171,530.13.
17. Value necessary medical aid not furnished by employer/insurer? Undetermined.
18. Employee's average weekly wages: \$970.55
19. Weekly compensation rate: \$647.36/\$340.12.
20. Method wages computation: By Agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: Undetermined.

Weeks for temporary total disability (temporary partial disability) 114 weeks paid at rate of \$647.10 for period October 16, 2002 to April 25, 2005. Employee reached maximum medical improvement on April 14, 2005. Benefits also should have been paid at rate of \$647.36. Employer made an overpayment of 11 days but underpaid 26 cents per each week paid.

160 weeks for permanent partial disability from employer @ \$340.12 per week = \$54,419.20

N/A weeks of disfigurement

N/A permanent total disability benefits from employer

22. Second Injury Fund liability: Yes.

Weeks of permanent partial disability from Second Injury Fund - N/A

Permanent total disability benefits from Second Injury Fund: Yes

Weekly differential \$307.24 payable by Second Injury Fund for 160 weeks beginning April 15, 2005 and, thereafter \$647.36 for Claimant's lifetime.

TOTAL: Undetermined

23. Future requirements awarded: Undetermined

Said payments to begin April 15, 2005, 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Dan Brown.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mark McCulloch Injury No. 02-111874

Dependents: N/A

Employer: TASCO Construction

Insurer: Transportation Insurance Co.

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

Hearing Date: May 24, 2007

Checked by: KJC/lh

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

- the nature and extent of the disability sustained by the Employee;
- liability of the Employer for additional temporary total disability benefits;
- liability of the Employer for future medical benefits; and,
- liability of the State Treasurer as Custodian of the Second Injury Fund for compensation.

At the hearing, Mr. Mark McCulloch (hereinafter referred to as Claimant) testified that he was born on July 1, 1957, and that he was 49-years-old. He stated that he could not read or write. He stated that he was placed in special education classes in school. He stated that he earned his high school diploma through a work program and that he last attended classes in the 6th or 7th grade.

Claimant testified that as an adult he had failed in several attempts to learn how to read and write. He stated that he was mentally and physically abused by his father. He stated that his work experience was as a laborer and that his wife completed the job application forms for him.

Claimant testified that due to his injuries he could no longer do any of his past labor jobs. He stated that all of his jobs

required an ability to stand, lift, bend, walk and jump.

Claimant testified that he was injured at work on October 15, 2002, while employed by TASC0 Construction. He stated that the injury occurred when a wall under construction began to fall and he jumped from some scaffolding in an effort to grab the wall and in the process fell 20 to 30 feet to the ground below. He stated that he injured his right knee and low back in the accident.

Claimant testified that his right knee immediately “locked up” and that he could not move his back after he landed on the ground. He stated that his Employer instructed him to drive himself to the hospital and to not return to work until he was “100 percent”. He stated that his wife drove him to the doctor’s office. He stated that he could hardly move or walk by the time he reached the doctor.

Claimant testified that Dr. Downs performed surgery on his right knee and that Dr. MacMillan did a three-level fusion on his back. He stated that he was later advised that the back surgery had failed.

Claimant complained that his right knee still felt as though it was going to “blow up”. He stated that he could no longer feel his toes or heel. He stated that his back pain radiated to his knee. He stated that he could not sleep. He stated that he took pain pills about every four hours. He also stated that after his back surgery he began to experience problems with his right leg and knee giving way, leading to falls.

Claimant complained of emotional problems. He complained of feeling inadequate. He complained that he could only sit and stand for 15 to 25 minutes. He stated that he had to periodically lie down. He stated that he could lift about 30 pounds.

Finally, Claimant alleged that he had not experienced any right knee or low back problems prior to the October 2002 accident at work. He stated that he had not filed any workers’ compensation claims or lawsuits for personal injuries prior to October 2002.

On cross-examination by his employer, Claimant admitted that Dr. MacMillan had released him from treatment. He admitted that Dr. MacMillan only restricted him to no lifting over 20 pounds and no squatting or bending. He admitted that he had not looked for work since the release from treatment. He also stated, however, that his family doctor was now prescribing the medications previously recommended by Dr. MacMillan.

Claimant admitted that his inability to read and write had affected his ability to get certain jobs. He admitted that on one occasion he was fired from a job due to his inability to follow directions.

On cross-examination by the Second Injury Fund, testified that the treatment did not improve his back or knee. He alleged that that his pain medication had caused memory problems and an inability to concentrate. He stated that he had to lie down about four times per day. He stated that he had not received any counseling prior to October 2002.

The medical evidence consisted of the deposition testimony of Drs. P. Brent Koprivica, M.D., Theodore Sandow, M.D., Patrick Hughes, M.D., and Jeffery MacMillan, M.D. and various reports and records. Dr. Koprivica, testifying on Claimant’s behalf, indicated that he had examined Claimant on April 16, 2005. Pages 6 through 9, 14 through 17, 22 through 25, 30 through 33, 38 through 41, 46 through 49 and 54 through 57, however, were missing from his deposition.

Dr. Koprivica outlined Claimant’s treatment and stated that Claimant was positive in three of five areas on testing for exaggerated or inappropriate pain behaviors. He admitted that Claimant had non-anatomic neurologic findings. He concluded, however, that Claimant was not over-reacting. He also concluded that Claimant was rendered permanently and totally disabled due to physical and emotional injuries Claimant sustained in the October 2002 accident at work.

On cross-examination by Claimant’s employer, Dr. Koprivica admitted that he was not an orthopaedic surgeon. He admitted that his internship was in emergency medicine. He admitted that he had no formal training as a psychologist. He acknowledged Claimant’s signs of symptom magnification. He admitted that Claimant had a solid fusion. He

admitted that he had no way of knowing how long Claimant had the degenerative disc disease and disc leaking.

Dr. Sandow, a board certified orthopaedic surgeon, also testified on Claimant's behalf. He stated that he had examined Claimant on August 6, 2003 and July 6, 2004. He too acknowledged Claimant's contradictory findings and the signs of symptom magnification. He did not question Claimant's veracity.

Dr. Sandow admitted that in his opinion the October 2002 accident did not cause all of Claimant's back problems. He admitted that the test results showed that Claimant's lateral recessed stenosis, bulging disc and degenerative disc disease preexisted the accident at work. He concluded that the accident at work made the conditions symptomatic.

In his written report, Dr. Sandow concluded that Claimant had sustained a permanent partial disability of 50 percent to the body as a whole as a result of the injuries Claimant sustained in the October 2002 accident at work and that Claimant could no longer do "labor intensive" work.

On cross-examination by Claimant's employer, Dr. Sandow admitted that there were discrepancies in Claimant's straight- leg raising test results. He acknowledged the discrepancies in his findings and those of Dr. MacMillan's. He stated that the discrepancies in the findings and test results could have resulted from good and bad days experienced by Claimant.

Claimant also deposed Dr. Hughes, a board certified psychiatrist, who had evaluated Claimant on September 28, 2005 at Claimant's employer's request. Dr. Hughes noted Claimant's complaint of "significant back pain".

Dr. Hughes testified that although none of Claimant's medical records revealed any evidence of psychiatric distress, Dr. Butts, a psychologist, who performed an independent examination, had reported a number of mental status type difficulties. He also questioned the efficacy of Dr. Butts' rendering a disability rating when the psychologist believed that Claimant still needed treatment.

Dr. Hughes further questioned the evidence relied upon by Dr. Butts. He noted that Dr. Butts did not consider all the test results. He stated that Dr. Butts did not include in his report any test results, other than "some peculiar kind of numerical listing of elevated scales on the MMPI". He stated that he was not aware of any other psychologist relying on those types of scales. He stated that he could not even be certain as to what Dr. Butts had meant or concluded. He stated that Dr. Butts' written conclusions, opinions, and interpretations "while pretty vague" at least suggested significant psychiatric problems.

Dr. Hughes concluded that Claimant was sincere. He stated that he found no suicidal ideation. He concluded that Claimant did not have a psychological or psychogenic pain disorder. He stated that Claimant had chronic neuropathic pain without any associated psychological problems. He stated that, "it looks like failed back syndrome to me".

Finally, Dr. Hughes concluded that Claimant had no psychiatric disability. He acknowledged Claimant's complaints of back pain, but indicated that he had never heard of anyone being permanently and totally disabled entirely from back pain. He stated that an orthopedic or neurosurgeon should render an opinion on Claimant's alleged permanent total disability.

On examination by Claimant's employer, Dr. Hughes stated that he disagreed with Dr. Butts' opinion that Claimant suffered from a "dysthymic" and an anxiety disorder. He stated there was no evidence that Claimant suffered from long term depression problems as required by the phrase "dysthymic disorder". He stated that an ability to read was required to take the MMPI and MCMI-III test.

Claimant also offered into evidence the deposition testimony of Stanley Butts, Ph.D., a clinical psychologist. Dr. Butts testified that he practiced in the area of depression and that he had a special interest in neuropsychology. He stated that neuropsychology encompassed illiteracy and learning disorders or disabilities.

Dr. Butts testified that he evaluated Claimant on May 12, 2005 at Claimant's request. He stated that his evaluation consisted of the interview, and a review of Claimant's school records and test results from the MMPI and MCMI-III.

He concluded that Claimant was mentally retarded. He stated that Claimant's mental retardation or learning disability pre-existed the October 2002 accident at work. He concluded that Claimant's mental retardation had resulted in a permanent partial disability of 20 percent to the body as a whole. He stated that Claimant had sustained an additional 55 percent permanent partial disability to the body as a whole due to psychological problems.

Dr. Butts stated that the MCMI-III test showed that Claimant had a moderately severe mental disorder. He stated that the MMPI test results showed that Claimant had severe problems. He stated that the tests indicated that Claimant was depressed and preoccupied with pain thoughts. He also stated that the tests showed that Claimant felt helpless and like a failure. He concluded that Claimant was permanently and totally disabled as a result of the injuries Claimant sustained in the October 15, 2002 accident at work.

On cross-examination by Claimant's employer, Dr. Butts admitted that he used the AMA Guidelines, 2d Edition to rate Claimant's disability at 55 percent to the whole person. He admitted that the AMA Guidelines had been updated with more recent editions, which he did not consider in rating Claimant's alleged disability. He admitted that in his opinion Claimant had self-esteem problems prior to the October 2002 accident due to Claimant's illiteracy. He stated that he found no evidence that Claimant was depressed prior to the accident at work. He further admitted, however, that there was no evidence that Claimant had a major depressive disorder at the time of his evaluation of him. He also admitted that his diagnosis of mental retardation was based on Claimant's school IQ scores. e also H

On cross-examination by the Second Injury Fund, Dr. Butts stated that mental retardation was not actually classified as a learning disability. He stated that Claimant's IQ scores were borderline mentally retarded. He stated that in his opinion Claimant's permanent total disability was due to the pain, depression and anxiety, which followed the October 2002 accident at work.

Claimant's employer offered into evidence the deposition testimony of Dr. MacMillan, a board certified treating orthopedic surgeon. Dr. MacMillan testified that he received his undergraduate degree from Harvard and his medical degree from the University of Pennsylvania. He stated that he specialized in spine and trauma cases.

Dr. MacMillan testified that following his initial evaluation of Claimant in September 2003, he did not recommend surgery because the objective findings were out of proportion to Claimant's complaints. He stated that Claimant did not have all the classic signs that would be expected from someone with severe back pain due to degenerative disc disease. He stated that Claimant did not have a lot of disc space narrowing.

Dr. MacMillan further testified that the objective test results did not support Claimant's complaints. He stated that the MRI showed that Claimant only had some mild degenerative changes. Thus, he stated that Claimant was not "the kind of individual that you felt great about going in and doing surgery on". He stated that eventually it felt like they were being backed into a corner because nothing short of surgery had relieved Claimant's complaints.

Dr. MacMillan testified that he strongly discouraged Claimant and his wife from considering surgery as an option, although the diskogram "seemed" to show that Claimant had more degenerative disc disease than revealed by the MRI. He stated that he explained to Claimant and Claimant's wife the low probability of a positive result from the surgery. He stated that he explained the low probability of Claimant being able to return to a gainful job much less a labor type job following surgery. He stated that in October 2004 he performed an anterior three level fusion on Claimant's lumbar spine.

Dr. MacMillan testified that the results from the surgery were pretty much what he had expected. He stated that Claimant may have improved a little with the surgery, and that afterwards Claimant's complaints still appeared to be primarily of a subjective nature.

Dr. MacMillan testified that he used the AMA guides in rendering his impairment rating. He stated that based on the AMA guides, he concluded that Claimant had sustained a 25 percent impairment to the whole person due to the low back injury and a 5 percent impairment to the extremity due to the right knee injury. He concluded in the April 14, 2005 report that Claimant had reached maximum medical improvement.

Dr. MacMillan also concluded that Claimant's right knee problems were a chronic condition and that Claimant would require some baseline level of chronic care for his right knee. He stated that he did not foresee any need for additional treatment for Claimant's low back. Finally, Dr. MacMillan testified that Claimant had permanent work restrictions and that Claimant was restricted to light physical demand jobs in accordance with the Department of Labor's Dictionary of Occupational Titles.

Dr. MacMillan characterized light physical demand work as frequent lifting of up to 10 pounds and occasional lifting of up to 20 pounds. He stated that Claimant did not believe that he could do a job for a full eight- or ten-hour day and that therefore, he had referenced a part-time light duty job. He stated that while Claimant would benefit from a work conditioning program if Claimant wanted to return to work, Claimant was not interested in such a program.

On cross-examination by Claimant, Dr. MacMillan testified that he performed approximately 60 discectomies and fusions per year. He admitted that Claimant's initial MRI had some objective findings. He admitted that Claimant's annular tear and right leg atrophy were objective findings. He stated, however, that in the vast majority of cases an annular tear in a disk was asymptomatic. He stated that about 75 percent of people with such tears had no symptoms related to the tear. He also stated that a symptomatic annular tear would cause back pain, but no radicular pain or problems, such as those alleged by Claimant. He indicated that Claimant had chosen a disabled lifestyle.

The depositions of Michael Dreiling and Bud Langston, vocational experts, were also admitted into evidence. Mr. Dreiling, testifying on Claimant's behalf, indicated that he had evaluated Claimant on June 7, 2005. He stated that he did not do any vocational testing due to Claimant's illiteracy. He stated that Claimant's IQ scores were suggestive of mental retardation.

Mr. Dreiling testified that he considered Claimant's medical records and the depositions, and Claimant's educational records, illiteracy, and lack of vocational skills. He concluded that there were no jobs that Claimant could perform. He stated that based on the opinions of Drs. Koprivica and Sandow and Dr Butts, the psychologist, Claimant's inability to work was due solely to Claimant's October 2002 injuries at work.

On cross-examination by Claimant's employer, Mr. Dreiling stated that Claimant was not a candidate for vocational retraining due to Claimant's illiteracy. He stated that Claimant's illiteracy had affected Claimant's earnings capacity prior to the accident at work. He stated that Claimant's illiteracy significantly limited the types of jobs Claimant could do. He stated that absent the illiteracy, Claimant would be able to work under the restrictions given by Dr. MacMillan.

Mr. Langston, testifying on Claimant's employer's behalf, stated that he had 20 years of experience as a vocational rehabilitation consultant. He stated that he did not personally evaluate Claimant. He indicated that he reviewed Claimant's medical reports and restrictions, Mr. Dreiling's vocational evaluation, Dr. Butts' records, Claimant's school records and Claimant's work history. He admitted that Dr. Koprivica's restrictions "basically" removed Claimant from "the majority of the labor market". He stated that there would be a very limited number of jobs that Claimant could do based on Dr. Koprivica's restrictions.

Mr. Langston indicated that Dr. Butts believed that Claimant could no longer do his "usual and customary labor jobs". He stated, however, that there were jobs that Claimant could do involving less exertion based on the findings in Dr. Butts' report.

Mr. Langston testified that based on the restrictions given by Dr. MacMillan Claimant could do light physical demand level jobs such as light assembly and light subassembly work. He stated that those jobs would allow Claimant to sit, stand or walk as needed and that no heavy lifting would be required. He admitted, however, that Claimant's inability to read and write would affect Claimant's vocational opportunities. He admitted that many of the jobs falling within the restrictions given by Dr. MacMillan would need to be eliminated due to Claimant's illiteracy.

On cross-examination by Claimant, Mr. Langston testified that the ratio of the work he performed for defendants as opposed to claimants or injured workers was 3 to 1. He stated that about 99 percent of his practice was now litigation

and only 1 percent involved work as a vocational consultant for purposes of rehabilitation.

Mr. Langston admitted that when he considered Claimant's illiteracy and the restrictions given by Drs. Koprivica and Butts there were no jobs that Claimant could perform. He admitted that many light assembly and subassembly jobs required the ability to read and write and that Claimant would be unable to perform those jobs. He admitted that the ability to read and write was generally required for jobs with a sit/stand option. He admitted that in his opinion when Claimant's preexisting mental retardation or learning disability was considered along with the restrictions given by Dr. MacMillan that there no jobs that Claimant could perform.

Claimant's wife, Ms. Susan McCulloch and Ms. Cindy Nield, a friend, provided corroborating testimony. Ms. Nield testified that she had known Claimant for over nine years. On cross-examination, she admitted that Claimant still goes gambling at one of the riverboats. She admitted that Claimant alternated between sitting and standing while gambling.

The remaining exhibits, including the voluminous medical reports and records were essentially cumulative of the testimony and the other evidence. A medical report from October 15, 2002, the date of the injury at work stated that Claimant denied any previous trauma or injuries to his low back. The report, however, stated that Claimant provided a history of prior right knee pain and of problems with his right knee giving out periodically.

The medical records showed that on May 23, 2000, Claimant had complained of bilateral low back pain. On April 11, 2003, Dr. Downs noted Claimant's subjective complaints of low back and knee pain and noted that Claimant was limited by his guarded actions. He stated that Claimant alleged that his union had told him that he could get "total disability". The doctor further indicated that there "is nothing that I can see objectively though he has significant back and leg pain".

Dr. MacMillan in a letter dated November 11, 2003, and addressed to a Vickie Johnson, R.N. of CNA Insurance Company, referred to an allegation made by Ms. Johnson that Claimant had been referred to him for "court directed treatment". The doctor stated that he was not aware that the court had directed any such treatment.

Dr. MacMillan also referenced a letter he had received from an Ada Johnson at the insurance company, which stated that "we are looking for an aggressive treatment plan with an expected end date". In addition, he questioned the insurance company's interpretation of the medical records. The insurance company apparently argued in its letter to the doctor that Claimant had chronic back pain. Dr. MacMillan stated that a single reference to bilateral low back complaints did not constitute a history of chronic back pain as alleged by the insurer.

Finally, Dr. MacMillan noted that the insurance company had argued that the MRI results showed a chronic history of degenerative processes in Claimant's low back. Dr. MacMillan stated that an MRI does not show any history. He stated that an MRI only showed what was present on the day of the study. He noted that the MRI findings did not confirm the insurance company's allegation that Claimant had only sustained an acute sprain or strain in the accident.

LAW

After considering all the evidence, including the medical depositions, reports and records, the vocational experts' depositions, the psychologist's deposition, the other exhibits and observing the appearances and demeanor of Claimant and the other witnesses at the hearing, I find and believe that Claimant met his burden of proving that he was permanently and totally disabled. I find that he proved that he was rendered permanently and totally disabled due to a combination of the disability he sustained in the October 2002 accident at work and his preexisting mental retardation.

I find that Claimant proved that his preexisting mental retardation was a disability and a hindrance or obstacle to his obtaining employment or reemployment. I find that he proved that he sustained a permanent partial disability of 20 percent to the body as a whole as a result of his preexisting mental retardation.

I find that Claimant proved that he sustained a permanent partial disability of 40 percent to the body as a whole due to the right knee and low back injuries he sustained in the October 2002 accident at work. At a rate of \$340.12 per

week for 160 weeks, his employer is liable for \$54,419.20. His employer is ordered to pay that amount to Claimant.

Claimant also proved that he reached maximum medical improvement from the injuries he sustained in the October 2002 accident at work effective with April 14, 2005 as noted by Dr. MacMillan, the treating orthopedic surgeon, in the report on that date. Claimant proved that he became permanently and totally disabled effective with April 15, 2005. Therefore, the Second Injury Fund was liable for benefits based on the difference between the permanent total disability rate of \$647.36 per week and the permanent partial disability rate of \$340.12 per week or \$307.24 per week for the first 160 weeks subsequent to April 15, 2005. Effective with the expiration of the first 160 weeks subsequent to April 15, 2005, the Second Injury Fund shall be liable for permanent total disability benefits in the amount of \$647.36 per week and it shall remain so liable for such benefits for so long as Claimant remains so disabled.

Finally, Claimant proved that he still needed medical treatment to cure and relieve him from the effects of his right knee and low back injuries. His employer is ordered to provide such reasonable and necessary treatment and to continue to provide such treatment for so long as Claimant remains in need of it.

Claimant did not prove that he sustained any psychiatric or psychological injuries in the October 2002 accident. Thus, his employer is not liable for any treatment Claimant maintains that he needs for such conditions.

Claimant, and by agreement of the parties, did prove that his employer paid temporary total disability benefits at the rate of \$647.10 per week and that the proper rate was \$647.36 per week. Claimant's employer is hereby ordered to pay all temporary total disability benefits at the proper rate owed, or 26 additional cents for each week owed. The evidence also showed, however, that while Claimant's employer paid such benefits until April 25, 2005, Claimant reached maximum medical improvement effective with April 14, 2005. Therefore, Claimant's employer is entitled to a credit for the 11 days.

Case law provides that the employee has the burden of proving all material element of his claim. Fischer v. Arch Diocese of St.Louis-Cardinal Ritter, Inst., 793 S.W.2d 195 (Mo. App. E.D. 1990); Griggs v. A.B. Chance, Co., 503 S.W.2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 936 S.W.2d 917 (Mo. App. S. D. 1997). Claimant met his burden of proof as set out above.

There were conflicting medical opinions in the case. Dr. Koprivica, who testified on Claimant's behalf, concluded that Claimant was rendered permanently and totally disabled solely by the physical and psychological injuries Claimant sustained in the October 2002 accident at work. Dr. Sandow, who also testified on Claimant's behalf, concluded that Claimant had sustained a permanent partial disability of 50 percent to the body as a whole due to the injuries Claimant sustained in the October 2002 accident at work. He stated in his report that Claimant would not be able to return to a labor intensive occupation.

An inability to return to a labor intensive occupation, however, did not of necessity mean that Claimant was rendered permanently and totally disabled. Similarly, contrary to what Dr. Koprivica found, Claimant did not prove that he sustained any psychiatric or psychological injuries in the October 2002 accident. Obviously, he did not prove that he sustained any permanent disability as a result of any such injuries from the accident.

Dr. MacMillan, who testified on Claimant's employer's behalf, concluded that Claimant could do light work as defined by the Dictionary of Occupational Titles. He also concluded that Claimant had sustained a permanent partial impairment of 5 percent due to the right knee injury and 25 percent to the body as a whole due to the lumbar spine injury.

Drs. MacMillan and Sandow are board certified orthopedic surgeons. Dr. Koprivica is not an orthopedic surgeon. Dr. Sandow no longer practices orthopedic surgery. Dr. Sandow was not a treating physician in the case.

Thus, based on the most credible, competent evidence, including the expertise of the physicians who rendered opinions in the case, I find that the opinions of Dr. MacMillan, the treating orthopedic surgeon, were entitled to more

weight than the opinions of either Drs. Koprivica or Sandow. Dr. MacMillan is a specialist in spine surgeries. He has performed numerous surgeries similar to the one he performed on Claimant. His opinions were credible and supported by the evidence. His November 2003 letter to the adjustor for Claimant's employer's workers' compensation insurer, wherein he challenged some of the assertions made by the adjustor provided further evidence of the doctor's credibility.

Based on the most credible, competent evidence, I find that Claimant did not prove that he was rendered permanently and totally disabled solely by the injuries he sustained in the October 2002 accident at work. Dr. MacMillan testified that there were not a lot of objective findings either prior to or after Claimant's back surgery. Dr. Sandow's findings supported Dr. MacMillan's. Dr. Downs, an orthopedic surgeon, reached a similar conclusion. All the doctors found evidence that Claimant's subjective complaints were out of proportion to the objective findings. Claimant was positive in several areas on the tests for symptom magnification.

Dr. MacMillan testified that Claimant needed a work conditioning program if Claimant wanted to pursue a more active lifestyle or return to work and that Claimant chose not to do so. Dr. MacMillan testified that Claimant chose to live a disabled lifestyle. The evidence simply failed to show that Claimant's physical and alleged psychological injuries from the October 2002 accident rendered him permanently and totally disabled from doing any work.

In fact, the most credible, competent evidence clearly showed that Claimant failed to prove that he sustained any psychological or psychiatric injuries in the October 2002 accident. The only opinion that the injuries from the October 2002 accident resulted solely in Claimant being permanently and totally disabled was premised on Claimant having sustained psychological or psychiatric injuries in the accident. See Dr. Koprivica's report. Thus, because Claimant failed to prove that he sustained any psychiatric or psychological injuries in the accident, he offered no evidence that his injuries from that accident solely rendered him permanently and totally disabled.

Dr. Hughes was the only psychiatrist to testify in the case. Dr. Hughes, who examined Claimant on Claimant's employer's behalf, concluded that Claimant had not sustained any psychiatric or psychological injuries in the October 2002 accident.

Dr. Hughes was credible in his opinion. The evidence clearly supported his opinion. There was no credible evidence that Claimant had sustained a permanent psychiatric or psychological impairment as a result of the October 2002 accident at work. There was no credible evidence that the October 2002 accident had caused, aggravated, or exacerbated in anyway any preexisting psychiatric or psychological problems Claimant might have been experiencing. There was no credible or competent evidence that the October 2002 accident was a substantial factor in the cause or aggravation of any psychiatric or psychological problems Claimant might be experiencing.

Dr. Butts, a psychologist, however, testifying on Claimant's behalf offered conclusory, unsupported opinions that Claimant had developed depression and anxiety as a result of the October 2002 accident at work. Dr. Butts' diagnoses and opinions on that issue were entitled to little weight. He offered no credible or objective evidence in support of his opinion that Claimant had developed psychological problems as a result of the October 2002 accident at work. He admitted that Claimant had been plagued by a number of psychological problems prior to October 2002, but failed to explain the relationship if any between those problems and his diagnoses subsequent to October 2002.

Dr. Butts noted that Claimant, as a child, had been emotionally, mentally and physically abused. He failed to explain what effect or relationship if any the abuse had on Claimant's alleged psychological problems resulting from the October 2002 accident. Dr. Butts noted that Claimant had self-esteem problems prior to October 2002. He argued that the accident at work had affected Claimant's self-esteem, but failed to provide a credible explanation as to how it could be determined that Claimant's self esteem problems were related to the October 2002 accident.

Claimant was in special education classes in school. Claimant was divorced twice prior to October 2002. Claimant alleged that both divorces were because his wives left him due to his illiteracy. Claimant admitted that he had attempted to conceal his illiteracy. Claimant admitted that he was embarrassed by his inability to read and write. Dr. Butts apparently gave no weight or consideration to those factors as being causes for Claimant's self-esteem problems and what he diagnosed as depression and generalized anxiety. He failed to explain how it could be determined that

any self-esteem problems, depression and anxiety experienced by Claimant was caused, aggravated or exacerbated in anyway by the October 2002 accident.

The most credible, competent evidence clearly failed to show that the October 2002 accident was a substantial factor in causing Claimant to develop self-esteem problems, depression or an anxiety disorder. There was no credible, competent evidence showing that any such problems experienced by Claimant were permanent and not remediable. Dr. Hughes even testified that the terms dysthymia and generalized anxiety disorder used by Dr. Butts referred to chronic life long conditions. Dr. Butts failed to explain how the October 2002 accident had caused chronic life long conditions.

Moreover, Dr. Butts even admitted that Claimant's psychological problems which he attributed to the October 2002 accident were not major. Yet, he rated the disability from those problems at 55 percent to the body as a whole. He offered no credible evidence that the psychological problems he attributed to the October 2002 accident combined with the physical injuries Claimant sustained in the October 2002 accident to render Claimant permanently and totally disabled. Claimant clearly failed to prove his employer's liability for permanent total disability benefits.

Claimant proved that the right knee and low back injuries he sustained in the October 2002 accident at work resulted in a permanent partial disability of 40 percent to the body as a whole. Dr. Sandow stated in his report that Claimant's low back injury had resulted in a permanent partial disability of 50 percent to the body as a whole. He did not rate Claimant's right knee injury. Dr. MacMillan testified that Claimant's low back injury had resulted in a permanent partial impairment of 25 percent to the whole person and that Claimant's right knee injury had resulted in an impairment of 5 percent of the extremity.

As noted above, Claimant proved that the disability he sustained as a result of the October 2002 accident was 40 percent to the body as a whole. In so finding, it was noted that the medical records showed that Claimant complained in May 2000 of bilateral low back pain. It was noted that the doctors agreed that objective evidence following the October 2002 accident did not support Claimant's subjective complaints. It was noted that all the doctors found evidence of symptom magnification, albeit not specifically on a conscious basis by Claimant.

It was further noted that although Claimant denied any prior right knee problems, the evidence did not support his testimony. Claimant alleged that subsequent to his October 2004 surgery, he began to experience problems with his right knee giving way. He denied any prior problems with his right knee giving way. Claimant's testimony, however, was not credible. The medical records of Dr. Bruce Skully, M.D. dated October 15, 2002, the date of the accident at work, stated that Claimant "has a past history of right knee pain giving out periodically" Claimant's Ex G, p.8).

Thus, based on all the evidence, including the rating reports, Claimant proved that he sustained a permanent partial disability of 40 percent to the body as a whole. At a rate of \$340.12 per week, for 160 weeks, his employer is liable for \$54,419.20 in permanent partial disability benefits. His employer is ordered to pay that amount to Claimant less the credit based on the overpayment of temporary total disability benefits.

Claimant proved that pre-existing the October 2002 accident at work, he had sustained permanent partial disability as a result of his mental retardation. Dr. Butts, a psychologist, testified that based on Claimant's low IQ scores he had diagnosed Claimant as being mentally retarded. Mr. Dreiling, the vocational expert, also concluded that Claimant was mentally retarded.

The evidence supported Dr. Butts' and Mr. Dreiling's opinions regarding Claimant's mental retardation. No contradictory evidence was offered. The evidence clearly showed that Claimant was illiterate. The evidence showed that he had low IQ scores. The evidence showed that he was placed in special education classes in school. The evidence showed that as an adult he had still been unsuccessful in his attempts to learn how to read and write.

Dr. Butts testified that Claimant's preexisting mental retardation had resulted in a permanent partial disability of 20 percent to the body as a whole. Again, Dr. Butts' rating was credible. No evidence was offered which contradicted his rating.

Thus, Claimant proved that he had sustained permanent partial disability as a result of his preexisting mental retardation. He further proved that his preexisting mental retardation, which resulted in his inability to learn how to read and write, was a hindrance or obstacle to his employment or reemployment. Claimant testified that his illiteracy had limited his employment opportunities. Both vocational experts agreed that Claimant's mental retardation and illiteracy was a hindrance or obstacle to Claimant's employment or reemployment. Both were credible in that aspect of their testimony. No evidence was offered which contradicted their testimony.

Claimant proved his preexisting mental retardation combined with the physical injuries he sustained in the October 2002 accident at work to render him permanently and totally disabled. Thus, he proved that the Second Injury Fund was liable for permanent total disability benefits. See Fletcher v. Second Injury Fund, 922 S.W. 2d 402 (Mo.App. 1996); Reiner v. Treasurer, 837 S.W. 2d 363 (Mo.App. 1992); Brown v. Treasurer, 795 S.W. 2d 478 (Mo. App. 1990).

Claimant offered medical evidence that he was permanently and totally disabled with the opinion of Dr. Koprivica. Dr. Sandow noted that Claimant could no longer do the labor intensive work that Claimant had done in the past. Drs. MacMillan and Hughes agreed that Claimant had sustained severely limiting injuries. All the doctors agreed that Claimant could no longer do the physical labor he had done in the past.

Mr. Dreiling, the vocational expert, who testified on Claimant's behalf, concluded that there were no jobs that Claimant could do. Mr. Dreiling recognized that Dr. MacMillan had limited Claimant to light work based on the physical injuries Claimant sustained in the October 2002 accident. Mr. Dreiling testified that there were no light jobs that Claimant could do when Claimant's mental retardation was considered in combination with Claimant's physical injuries.

Mr. Langston, the vocational expert, who testified on Claimant's employer's behalf, admitted on cross-examination by Claimant that when the restrictions given by Dr. MacMillan were considered along with Claimant's learning disability or mental retardation, that Claimant would not be able to compete in the open labor market.

Thus, the evidence clearly showed that Claimant could no longer do the physical labor he had performed in the past due to his back and right knee injuries. The most credible evidence showed that Claimant could do light work based on the physical injuries he sustained in the October 2002 accident. The most credible, competent evidence, however, also clearly showed that when Claimant's mental retardation, which encompassed his inability to read and write was considered in combination with the physical injuries he sustained in the October 2002 accident that there were no light jobs that Claimant could perform and that Claimant could not compete in the open labor market.

Claimant's inability to learn how to read and write prevents him from being retrained to do sedentary work or any other jobs as the vocational experts testified. Claimant's permanent total disability was due to a combination of the physical injuries he sustained in the October 2002 accident and his preexisting mental retardation. Claimant proved the Second Injury Fund's liability for permanent total disability benefits.

Claimant proved that he reached maximum medical improvement from the injuries he sustained in the October 2002 accident effective with April 14, 2005. Dr. MacMillan, the treating orthopedic surgeon, noted in his report on that date that Claimant was at maximum medical improvement. Dr. MacMillan was credible in his opinion. No evidence was offered which contradicted his opinion.

Claimant proved that he became permanently and totally disabled effective with April 15, 2005. Thus, as noted earlier, his employer was liable for permanent partial disability benefits in the amount of \$340.12 per week for the first 160 weeks subsequent to April 15, 2005. The Second Injury Fund was liable for the difference in the permanent total disability rate of \$647.36 per week and the permanent partial disability rate of \$340.12 per week, or \$307.24 per week in benefits for the first 160 weeks subsequent to April 15, 2005. At the end of the first 160 weeks subsequent to April 15, 2005, the Second Injury Fund shall be liable for \$647.36 per week in permanent total disability benefits and it shall remain so liable for such benefits for so long as Claimant remains so disabled.

Claimant argued that there was an underpayment of temporary total disability benefits because his employer paid

the benefits at an improper rate. The parties stipulated prior to the hearing that the proper rate was \$647.36 per week and that benefits were paid at the rate of \$647.10 per week. Thus, there was an underpayment of 26 cents per week. Claimant's employer is ordered to pay the additional 26 cents per week for each week during which Claimant was temporarily and totally disabled.

The evidence, however, showed that Claimant reached maximum medical improvement effective with April 14, 2005. Benefits were paid to April 25, 2005. Thus, there was an overpayment of temporary total benefits for 11 days at the rate of \$647.10 per week. Claimant's employer is entitled to a credit for the overpayment of 11 days of temporary total disability benefits.

Claimant argued that his employer was liable for future medical benefits. He proved that he was still in need of future medical benefits to cure and relieve him of the effects of the injuries he sustained in the October 2002 accident. Dr. Sandow noted that Claimant was in need of ongoing conservative treatment. Dr. Koprivica testified that Claimant was in need of future medical treatment. Claimant testified that his family doctor was still prescribing the pain medications previously prescribed by the authorized treating physicians. Dr. MacMillan testified that Claimant was in need of conservative treatment for Claimant's right knee injury. He stated that the pain medication for Claimant's right knee complaints provided relief for Claimant's back complaints.

Thus, the most credible, competent evidence clearly showed that Claimant was in need of future medical treatment to cure and relieve him from the effects of his right knee and low back injuries. Claimant's employer is hereby ordered to provide the treatment and to continue to provide it for so long as Claimant remains in need of it. Claimant's employer, however, has the right to direct the medical treatment.

In conclusion, Claimant proved that he was rendered permanently and totally disabled due to a combination of the disability he sustained in the October 2002 accident and his preexisting mental retardation. He proved that the Second Injury Fund was liable for permanent total disability benefits. He proved that he was in need of future medical benefits as set out in the award. He proved that temporary total disability benefits were paid at improper rate resulting in an underpayment of 26 cents per week. The evidence also showed that he was overpaid temporary total disability benefits for 11 days.

Date: _____

Made by: _____

Kenneth J. Cain
*Chief Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Jeff Buker
*Deputy Director
Division of Workers' Compensation*