

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

Injury No.: 05-087751

Employee: Allen Mills
Employer: MEMC Electronic Materials (Settled)
Insurer: Liberty Mutual Insurance (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 May 14, 2012. The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued May 14, 2012, 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 29th day of January 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Allen Mills

Injury No. 05-087751

Dependents: None

Employer: MEMC Electronic Materials (settled)

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance (settled)

Hearing Date: November 15, 2011

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

Checked by: GCG/ch

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 6, 2005
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 left shoulder while loosening a bolt 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: Left Shoulder
14. Nature and extent of any permanent disability: 45% of the left shoulder/combination PTD.
15. Compensation paid to-date for temporary disability: \$11,749.00
16. Value necessary medical aid paid to date by employer/insurer? \$62,038.61

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17. Value necessary medical aid not furnished by employer/insurer? Undetermined
18. Employee's average weekly wages: Undetermined, parties agree wage rate is sufficient to reach max rates
19. Weekly compensation rate: \$365.08 PPD/\$696.97 Total Disability
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 (\$331.89) payable by SIF for 104 3/7 weeks beginning
May 10, 2006 and, thereafter, beginning May 10, 2008 the weekly
benefit of \$696.97 for Claimant's lifetime.

TOTAL: SEE AWARD

23. Future requirements awarded: See Award

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 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Ann Dalton

Employee: Allen Mills

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Allen Mills

Injury No: 05-087751

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: MEMC Electronic Materials (settled)

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

Additional Party Second Injury Fund

Insurer: Liberty Mutual Insurance (settled)

Checked by: GCG/ch

PRELIMINARY STATEMENT

Hearing on the above referenced case was held before the undersigned Administrative Law Judge on November 15, 2011 at the Division of Workers' Compensation in St. Charles, Missouri. Allen Mills (Claimant) was present, and represented by Ann Dalton. The liability of MEMC (Employer) and Liberty Mutual Insurance Company (Insurer) was previously settled. Assistant Attorney General Caroline Bean represented the Second Injury Fund. Ms. Dalton requested a fee in the amount of 20%. The evidentiary hearings for Injury Numbers 05-087751 and 05-141594 were held simultaneously, in conjunction with each other. The parties submitted post-trial briefs.

STIPULATIONS

The parties entered into the following stipulations:

1. On or about September 6, 2005, Claimant sustained an accident arising out of and in the course of his employment resulting in injury to Claimant's left shoulder. 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 proper notice of the claim.
5. Claimant filed a claim within the time allowed by law.
6. The rates for temporary total and permanent total disability are \$696.97 and \$365.08 for permanent partial disability.
7. Temporary total disability benefits were paid in the amount of \$11,749.00 and medical paid amounted to \$62,038.61.
8. The Claimant reached maximum medical improvement with regard to his left shoulder injury on May 10, 2006.

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ISSUES

The sole issue presented for determination by this hearing is:

1. Liability of the Second Injury Fund for permanent partial or permanent total disability benefits.

SUMMARY OF THE 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.

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

- A. Deposition of Dr. David Volarich w/ attached exhibits (August 23, 2010)
- B. Deposition of Sherry Browning w/ attached exhibits (October 26, 2010)
- D. Assimilated records of 9-6-05 claim (right shoulder)
 - Stipulation for Compromise Settlement
 - Paul Spezia, M.D.: 8-10-05, 8-24-05, 9-2-05, 11-16-05 (9 pages)
 - Open MRI: 8-18-05 (1 page)
 - Barnes Care: 10-31-05 (2 pages)
 - Mark Miller, M.D.: 5-9-07, 5-17-07, 6-25-07, 7-24-07, 8-21-07, 10-3-07, 11-7-07 (12 pages)
 - Imaging Partners: 5-17-07 (2 pages)
 - Timberlake Surgery Center: 6-8-07 (3 pages)
 - Physical Therapy: 10-31-05 through 11-7-05 (2 pages)
- E. Assimilated records of 10-19-82 (left lower extremity)
 - St. Peters Hospital: 10-19-82 (1 page)
- F. Assimilated records of 9-1-97 claim (right carpal tunnel)
 - Stipulation for Compromise Settlement (primary claim) 5-12-04
 - Stipulation for Compromise Settlement (second injury fund claim) 6-14-05
 - Evan Crandall, M.D.: 10-20-98, 11-23-98, 12-7-98, 12-14-98, 1-5-99, 9-28-99 (9 pages)

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- David Peeples, M.D.: 11-4-98 (3 pages)
- G. Assimilated records of 2-19-94 claim (low back)
 - Stipulation for Compromise Settlement (primary claim) 9-22-98
 - Stipulation for Compromise Settlement (second injury fund claim) 10-15-98
 - Report of Injury 3-1-94
 - Barnes-St. Peters Hospital: 3-31-94 (2 pages)
- H. Assimilated records of 1999 (right hand and fingers Dupuytren's disease)
 - Subbarao Polineni, M.D.: 1-18-99, 2-5-99, 2-15-99, 3-10-99, 4-5-99, 4-26-99, 5-24-99, 7-12-99, 6-7-01 (9 pages)
 - Barnes St. Peters dated 4-99, 6-7-01 (4 pages)
- I. Assimilated records of 1999 (right trigger thumb)
 - Evan Crandall, M.D.: 9-28-99, 11-24-99, 12-21-99, 6-12-00 (6 pages—right trigger thumb)
- J. Assimilated records of 2000 (right foot)
 - Theodore Rummel, M.D.: 9-15-00, 9-29-00, 10-12-00, 11-17-00 (3 pages)
 - Dr. Bauman: 2-7-01, 3-8-01, 6-19-01 (2 pages)
 - Open MRI: 10-3-00 (1 page)
- K. Assimilated records of 2000 (left carpal tunnel)
 - Evan Crandall, M.D.: 6-12-00, 7-22-02, 9-30-02, 10-28-02, 11-4-02, 11-25-02, 8-6-03 (9 pages)
 - Daniel Phillips, M.D.: 8-7-02 (3 pages)
- L. Assimilated records of 2003 (right trigger thumb)
 - Evan Crandall, M.D.: 2-7-03, 3-11-03, 4-16-03, 8-6-03 (6 pages)
- M. Assimilated records of 2007 (low back)
 - Brett Taylor, M.D.: 8-21-07, 9-5-07 (6 pages)
 - Imaging Partners: 8-24-07 (1 page)
- N. Assimilated records 2007 (right knee)
 - Mark Miller, M.D.: 8-21-07, 9-5-07, 11-7-07, 12-19-07, 12-31-07, 1-28-08, 3-3-08 (11 pages)
 - Timberlake Surgery Center: 12-10-07 (4 pages)
- O. Assimilated records Dr. Mark Hingst dated 6-21-04 through 9-18-06

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

- I. Deposition of vocational expert James M. England
- II. Pages 79 and 80 from the Claimant deposition taken on the part of the Second Injury Fund
- III. Dr. Piper's Medical Records

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The records of Dr. Piper, SIF Exhibit III, were not available on the date of trial. The parties, by consent, agreed to leave the hearing record open until the records were obtained from Dr. Piper's office. There was an unexpected delay in receiving the records which, in turn, left the record of the evidentiary hearing open until February 10, 2012.

Claimant testified that he was born on May 15, 1952, that he is married and is the legal guardian of two young grandsons ages 6 and 7. Claimant is right handed, graduated from high school in 1970 and is able to read, write and do basic math. Claimant has certifications in vacuum systems, hydraulic systems and emergency response. Claimant uses the computer for internet only. Claimant is not currently working and was last employed by MEMC where he worked for the past 17 years. Claimant has not worked his full duty job since September 6, 2005. He last received temporary total disability benefits on May 10, 2006 when he was released from Dr. Miller's care with permanent restrictions. He was subsequently terminated because the employer could not accommodate his permanent restrictions. Claimant is currently receiving Social Security Disability benefits and also supports his family with his 401K retirement. At the time of his left shoulder injury, Claimant was working as a maintenance team technician repairing industrial equipment and trouble shooting. He used hand tools and test equipment and was required to work in a variety of awkward positions, including lying on the floor, climbing up on equipment, pushing, pulling, kneeling, and squatting. The job also required constant and repetitive use of his hands and his arms away from his body and overhead. He worked 12 hour days, 4 days a week and overtime. Leading up to his last day of work, he was on light duty which consisted of office work and allowed him to get up and leave at any time.

On September 6, 2005, Claimant was performing his regular job duties as a maintenance team technician when he was loosening a bolt and heard a snap in his left shoulder. Claimant testified that there was an immediate onset of pain in the left shoulder.

Claimant filed a Workers' Compensation claim against MEMC (Employer) for his left shoulder injury. Employer accepted the claim and paid for all medical treatment. Initial treatment was provided at BarnesCare, but provided no relief. Claimant was then referred to Dr. Mark Miller who performed a left shoulder arthroscopy, biceps tenolysis and tenodesis, labral debridement of glenohumeral chondroplasty, subacromial decompression, and arthroscopic rotator cuff repair on October 11, 2005. The operative note indicates that Claimant also had a SLAP tear as well as a rotator cuff tear. Post-operatively, Claimant did not improve. Therefore, Dr. Miller performed a second surgery on January 30, 2006. This surgery involved manipulation under anesthesia, diagnostic arthroscopy, arthroscopic capsular release, chondroplasty hemoral head, arthroscopic lysis of adhesions and attempted rotator cuff repair with transcutaneous pain pump placement. This was an irreparable rotator cuff tear and Dr. Miller released Claimant with permanent restrictions of no overheard work and sedentary duty with no lifting over 10-20

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pounds. Claimant continues to have pain, fatigue, limited strength and limited range of motion in his left upper extremity. He resolved this claim with MEMC based upon 45% permanent partial disability of the left shoulder.

Claimant suffered from a number of physical conditions prior to September 6, 2005. Complaints were first noted by Dr. Crandall in January 1999 of pain in the right shoulder. Claimant also saw his family physician, Dr. Hingst, in July 2005 at which time x-rays revealed degenerative changes around the right shoulder with narrowing of the acromioclavicular space suggestive of a rotator cuff tear (according to the medical records). Claimant was referred to Dr. Spezia on August 10, 2005 and diagnosed with bilateral shoulder impingement and glenohumeral arthrosis. An MRI revealed a tear of the supraspinatus tendon at its insertion with a gap of nearly 7 millimeters and an associated rim of sub deltoid fluid anteriorly and superiorly. Dr. Hingst recommended surgery. Surgery was not performed on the right shoulder until June 8, 2007 because the left shoulder accident occurred September 6, 2005 and that became the focus of the Claimant's treatment. Surgery on the right shoulder involved diagnostic arthroscopy, intra-articular capsular debridement (biceps tendon rupture site), arthroscopic subacromial decompression, arthroscopic rotator cuff repair and transcutaneous pain pump placement. Following surgery, Claimant had physical therapy and was placed at maximum medical improvement on November 7, 2007 at which time he was advised to avoid doing overhead work and no lifting over 30-50 pounds floor to waist or 30 pounds waist to chest. Claimant continues to complain of pain, lack of strength, and limited range of motion in the right upper extremity. Claimant received 28.5% permanent partial disability of the right shoulder in a settlement with Employer for his right shoulder condition.

In the early 80's, Claimant fractured his left ankle which resulted in surgery for a closed reduction percutaneous pin fixation. Following that fracture, Claimant continued to have significant limited range of motion in the left ankle which caused problems going up and down steps. He also continued to have pain and swelling in the left foot.

Claimant's right foot has also been a problem dating back to 2000 when he received injections for neuritis. Subsequently he was diagnosed with a Morton's neuroma in the right foot and had surgery to remove it. Leading up to September 6, 2005, Claimant continued to have pain and swelling with numbness in his right foot, especially after being on his feet all day. He was able to get through work by stopping and resting or what he termed "smoke breaks". In addition, he took anti-inflammatory medication to help resolve the symptoms.

In 1994, Claimant sustained an injury at work to his low back. This injury resulted in a lumbar laminectomy and discectomy at L4-5 with continued complaints leading up to September 6, 2005 including stiffness, aching, and a knot which develops after twisting and turning. At work, Claimant would lay down on the floor instead of bending, he would constantly reposition

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himself when his back was aggravated and he asked for help when lifting. He also was able to sit down and rest as needed. Claimant received compensation from his employer for this injury based on 26% permanent partial disability of the body as a whole.

Prior to September 6, 2005, Claimant fractured his right small finger in 1998, was diagnosed with right carpal tunnel syndrome in 1998 and subsequently had surgeries for Dupuytren's contracture and right trigger thumb all on the right. As a result of these injuries and conditions, Claimant continued to have pain, stiffness and diminished grip strength. At work, he continued to drop tools and had difficulty holding tools. With regard to the carpal tunnel syndrome, Claimant received 17.5% permanent partial disability from his Employer as a result of a workers' compensation claim.

Claimant also had carpal tunnel syndrome in his left hand prior to September 6, 2005. This was surgically treated by Dr. Crandall. However, Claimant continued to have pain, numbness and tingling as a result of this condition leading up to September 6, 2005. At work, he had difficulty with tools due to lack of grip strength. Claimant received 17.5% permanent partial disability of the left hand from his Employer as a result of the carpal tunnel syndrome on the left.

Prior to September 6, 2005, Claimant developed stiffness, aching, popping and grinding in his neck. He was treated by Dr. Piper and received epidural steroid injections, but no surgery. Leading up to September 6, 2005, Claimant continued to have popping, stiffness and difficulty bending and reaching overhead because of his neck condition.

Prior to September 6, 2005, Claimant injured his left knee in a motor vehicle accident in 1980. As a result, he had an arthrotomy. Leading up to September 6, 2005, Claimant continued to have limited range of motion in the left lower extremity and difficulty squatting and kneeling.

Claimant has long standing problems with his right knee pre-dating September 6, 2005. He had fluid drained off and treated with Dr. Piper conservatively. Over the years, the right knee would pop out of joint and it was difficult for Claimant to work squatting or getting on the floor.

Currently, Claimant has difficulty falling asleep and staying asleep. He is unable to get comfortable because "everything hurts". Throughout the night, Claimant gets up, tries to watch television, and sometimes eventually falls into a deep sleep. More commonly, even when Claimant falls asleep, he is woken two to three times during the night because of pain. When he does eventually start his day, it takes time to stretch out. He piddles around the house, keeps an eye on his grandchildren, might throw in a load of wash or do a little vacuuming. Claimant is able to mow his very small yard with a "zero turn mower" but he performs no other yard work or household chores. Claimant owns a classic pick-up truck, but does not show it or work on it. He no longer bow hunts but is able to deer hunt in a specially made deer stand.

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Claimant saw Dr. David Volarich on October 16, 2008. He also met with Sherry Browning, a vocational expert on April 10, 2009 and later spoke to her again by phone on July 6, 2009. He never met with or spoke to Mr. James England.

Opinion Evidence

Dr. David Volarich examined Claimant on October 16, 2008 for purposes of a rating evaluation. Dr. Volarich testified that he examined Claimant's left shoulder, right shoulder, right foot, left foot, back, neck, left hand, right hand, left knee, and right knee. At the time of the examination, Claimant complained of left greater than right shoulder pain. He could not accomplish overhead activities. He was able to complete a traction maneuver at the waist level but unable to throw overhand. Claimant complained that his arms, fatigue his motion is fair but there was popping. He compensates for these problems by doing things differently.

Also at the time of the examination, Claimant complained of right greater than left foot pain and swelling. He indicated that standing for prolonged periods of time caused his feet to swell and that he had to change shoe size because of it. If he walks for prolonged periods of time, he needs to stop and rest. He changed the way he placed his foot on the pedal when driving. Claimant also complained of back stiffness and difficulty bending. Because of his back complaints, it was hard for him to maintain a fixed position and he limited his lifting. Claimant complained of right greater than left wrist pain with numbness and tingling, diminished grip strength and range of motion as well as poor dexterity in his hands.

Also at the time of Dr. Volarich's evaluation of the Claimant, Claimant complained of ongoing problems with his neck including range of motion with popping and constant headaches. He complained that he was limited in his kneeling and crawling as well as impact activities due to his knee conditions.

Based upon his physical examination and review of the medical records, Dr. Volarich diagnosed internal derangement of the left shoulder (torn biceps tendon, torn labrum and torn rotator cuff with impingement) status post arthroscopic biceps tenolysis/tenodesis, labral debridement, glenohumeral joint debridement, subacromial decompression, and rotator cuff repair; failed rotator cuff repair status post redo repair including manipulation of the left shoulder under anesthesia, capsular release with lysis of adhesions, chondroplasty of the humeral head and attempted repair of the rotator cuff (irreparable). Dr. Volarich provided a rating of 65% permanent partial disability of the left shoulder as a result of the work injury on September 6, 2005.

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Based upon his physical examination and review of the medical records, Dr. Volarich diagnosed the following pre-existing conditions:

1. Mild left shoulder impingement — minimally symptomatic prior to 9/6/05.
2. Right shoulder impingement and rotator cuff tear — S/P arthroscopic subacromial decompression and rotator cuff repair with joint debridement.
3. Left great toe tip fracture.
4. Right great toe fracture metatarsophalangeal joint with residual hallux rigidus.
5. Left foot tarsal navicular fracture with subluxation of the naviculocuneiform joint — S/P closed reduction and pinning.
6. Right foot 1st, 2nd web space Morton's neuroma.
7. Herniated pulposus L4-5 causing bilateral lower extremity radicular symptoms — S/P bilateral laminectomy and discectomy at L4-5.
8. Right small finger fracture.
9. Right wrist carpal tunnel syndrome — S/P endoscopic carpal tunnel release.
10. Left wrist carpal tunnel syndrome — S/P endoscopic carpal tunnel release.
11. Right hand Dupuytren's contracture — S/P extension open palmar fasciectomy and capsulotomy.
12. Right thumb triggering — resolved.
13. Right hand cellulitis — resolved.
14. Chronic cervical syndrome secondary to degenerative disc disease and degenerative joint disease C5-6 and C6-7 without radiculopathy.
15. Left knee internal derangement — S/P medial compartment arthroscopy.
16. Post traumatic arthritis left knee.

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Dr. Volarich provided the following ratings with regard to the pre-existing diagnosis:

1. There is a 10% permanent partial disability of the left upper extremity rated at the shoulder due to the impingement that required a cortisone injection. The rating accounts for any minor aching and any lost motion that might have been present prior to 9/6/05.
2. There is a 35% permanent partial disability of the right upper extremity rated at the shoulder due to the rotator cuff tear and impingement that required arthroscopic repair. The rating accounts for pain, lost motion, weakness, crepitus, and atrophy in this shoulder leading up to 9/6/05.
3. There is a 20% permanent partial disability of the left lower extremity rated at the foot due to the tarsal navicular fracture that required closed reduction, pinning, and subsequent pin removal. The rating accounts for pain, lost motion, and difficulties with prolonged weight bearing and impact activities in the left lower extremity.
4. There is a 20% permanent partial disability of the right lower extremity rated at the foot due to the Morton's neuroma and hallux rigidus of the great toe. The rating accounts for lost motion, pain, and difficulties with weight bearing and impact activities involving the right foot.
5. There is a 30% permanent partial disability of the body as a whole rated at the lumbosacral spine due to the disc herniation at L4-5 that required laminectomy and discectomy. The rating accounts for his chronic back pain syndrome, lost motion, and rare lower extremity paresthesias prior to 9/6/05.
6. There is a 40% permanent partial disability of the right upper extremity rated at the wrist due to the carpal tunnel syndrome that required endoscopic carpal tunnel release and the Dupuytren's contracture that required extensive fasciectomy. The rating also accounts for his ongoing pain, lost motion, weakness, and difficulties with forceful grip and pinch in the dominant hand.
7. There is a 20% permanent partial disability of the left upper extremity rated at the wrist due to the carpal tunnel syndrome that required endoscopic carpal tunnel release. The rating accounts for pain, paresthesias, and weakness in the non dominant hand.
8. There is a 15% permanent partial disability of the body as a whole rated at the cervical spine due to the chronic cervical syndrome secondary to degenerative disc disease at C5-6 and C6-7. The rating accounts for neck pain and lost motion.

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9. There is a 25% permanent partial disability of the left lower extremity rated at the knee due to the internal derangement that required medial compartment arthrotomy. The rating accounts for some stiffness and crepitus in this knee prior to 9/6/05.

Dr. Volarich testified that the combination of Claimant's disabilities created a substantially greater disability than the simple sum or the total of each separate injury and illness. A loading factor should be added. It was his opinion that Claimant was unable to engage in any substantial gainful activity nor could he be expected to perform in an ongoing working capacity in the future. Dr. Volarich testified that the Claimant cannot reasonably be expected to perform on an ongoing basis 8 hours per day, 5 days per week throughout the work year. It was his opinion that the Claimant was unable to continue in his line of employment, nor can he be expected to work on a full time basis in a similar job. Dr. Volarich testified that based on his medical assessment alone, Claimant is permanently and totally disabled as a result of the work related injury of September 6, 2005 to his left shoulder in combination with all of his pre-existing medical conditions and that he was permanently and totally disabled before his recurrent back symptoms and right knee symptoms worsened in 2007 and required additional surgical repairs.

Sherry Browning, a vocational rehabilitation counselor, testified on behalf of the Claimant. Ms. Browning testified that she met with Claimant on April 10, 2009 and later spoke with him by telephone on July 6, 2009. Based upon her interview and review of the medical records, Ms. Browning concluded that Claimant is unemployable in the open labor market as a result of his functional limitations in his feet, right hand and fingers, back and shoulders in combination and including pain, swelling, decreased sensation and strength and limited range of motion.

James England, another vocational rehabilitation counselor, testified on behalf of the Second Injury Fund. Mr. England has never met nor has he spoken with Claimant. Mr. England opined that Claimant would be limited to light-sedentary jobs based upon his review of the medical records. However, he further acknowledged that his opinion might differ if he had an opportunity to meet with Claimant.

FINDINGS OF FACT AND 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: Claimant suffered a work-related injury on September 6, 2005. The injury resulted in a bicep tendon tear, rotator cuff tear, labral tear, and impingement that required two extensive surgical repairs. The second surgical repair showed an irreparable rotator cuff. I find Claimant suffered a permanent partial disability of 45% of the

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left shoulder as a result of the September 6, 2005 injury. 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 All...then determines “the degree of 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 pre-existing 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 Farm*, 952 S.W. 2d 369, 373 (Mo. App. 1997); and §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 pre-existing 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 v. Kloster Co.*, 8 S.W. 3d 585, 589 (Mo. App. 1999).

Claimant had several pre-existing medical conditions which were a hindrance or obstacle to employment. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had 28.5% permanent partial disability of the right shoulder as a result of the diagnostic arthroscopy, intra-articular capsular debridement, arthroscopic subacromial decompression, arthroscopic rotator cuff repair and transcutaneous pain pump placement. This injury resulted in permanent restrictions of no overhead work, no lifting over 30-50 pounds floor to waist or 30 pounds waist to chest. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Claimant had a pre-existing injury to the left ankle which is a hindrance or obstacle to employment. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had a 15% permanent partial disability to the left lower extremity at the foot. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Claimant received injections for neuritis in the right foot and surgery for a Morton’s neuroma in the right foot, as well. Based on the competent and substantial evidence presented, I find that the pre-existing problems with the right ankle were a hindrance or obstacle to employment. I find that at the time of the September 6, 2005 work injury, Claimant had a 15% permanent partial disability of the right lower extremity at the foot. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

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Claimant sustained a disc herniation at L4-5 causing chronic back pain, loss of motion and some lower extremity paresthesias prior to his work-related injury on September 6, 2005. This injury caused a hindrance or obstacle to employment. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had 26% permanent partial disability of the body as a whole relative to the low back. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Prior to September 6, 2005, Claimant had pre-existing injuries to his right hand which were a hindrance or obstacle to employment. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had 25% permanent partial disability to the right upper extremity at the wrist. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Claimant also had a pre-existing injury to his left upper extremity at the hand prior to September 6, 2005. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had 17.5% permanent partial disability to the left hand. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Prior to September 6, 2005, Claimant had a pre-existing injury to his neck which is a hindrance or obstacle to employment. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had a 12.5% permanent partial disability to the body as a whole referable to the cervical spine. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Claimant also had a pre-existing injury to his left knee which resulted in an arthrotomy. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had a 22.5% permanent partial disability to the left lower extremity at the knee. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Claimant sustained an irreparable rotator cuff repair in his left shoulder as a result of the injury of September 6, 2005. In addition, he suffers from multiple pre-existing disabilities to all four extremities, the low back and the cervical spine. Although Claimant was not under any permanent restrictions for any of these pre-existing conditions leading up to September 6, 2005, he testified he was restricted in his activities and had difficulties performing his job due to symptoms associated with these conditions.

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Dr. Volarich and Ms. Sherry Browning testified that Claimant was permanently and totally disabled. Specifically, Dr. Volarich opined that based upon his medical assessment alone, it is his opinion that Claimant is permanently and totally disabled as a result of the work related injuries of September 6, 2005 in combination with all of his pre-existing medical conditions. Dr. Volarich was the only medical expert to testify with regard to permanent total disability. Ms. Sherry Browning testified that Claimant was unemployable in the open labor market as a result of his functional limitations in his feet, right hand, back and shoulders in combination. The testimony of Claimant and the opinions of Dr. Volarich are credible. The testimony and opinions of Ms. Browning are more credible than those of Mr. England.

Claimant reached maximum medical improvement on May 10, 2006, which is the date he was released from treatment and placed on permanent restrictions by Dr. Miller. Claimant has met his burden, and is permanently and totally disabled as a result of the combination of pre-existing injuries and conditions, and the primary injury of September 6, 2005. The Second Injury Fund is therefore liable for permanent total disability benefits.

Permanent total disability benefits from Second Injury Fund are as follows: Weekly differential of \$331.89 payable by SIF for 104 3/7 weeks beginning May 10, 2006 and, thereafter, beginning May 10, 2008 the weekly benefit of \$696.97 for Claimant's lifetime.

Attorney Ann Dalton is granted a lien in the amount of 20% of the proceeds of this Award for necessary legal services provided.

Made by: /s/ GRANT C. GORMAN
Grant C. Gorman
Chief Administrative Law Judge
Division of Workers' Compensation

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

Injury No.: 05-141594

Employee: Allen Mills
Employer: MEMC Electronic Materials (Settled)
Insurer: Liberty Mutual Insurance (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 May 14, 2012. The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued May 14, 2012, 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 29th day of January 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Allen Mills	Injury No. 05-141594
Dependents:	None	
Employer:	MEMC Electronic Materials (settled)	Before the DIVISION OF WORKERS' COMPENSATION
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Liberty Mutual Insurance (settled)	Jefferson City, Missouri
Hearing Date:	November 15, 2011	Checked by: GCG/ch

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 6, 2005
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:
Repetitive trauma resulting in injury to the right shoulder.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right Shoulder
14. Nature and extent of any permanent disability: 28.5% of the right shoulder.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Allen Mills

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- 17. Value necessary medical aid not furnished by employer/insurer? Undetermined
- 18. Employee's average weekly wages: Undetermined, parties agree wage rate is sufficient to reach max rates
- 19. Weekly compensation rate: \$365.08 PPD/\$696.97 Total Disability
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: (Settled)

22. Second Injury Fund liability: Yes

56.325 weeks of permanent partial disability from Second Injury Fund \$20,563.13

TOTAL: \$20,563.13

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 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Ann Dalton

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Allen Mills	Injury No: 05-141594
Dependents:	None	Before the
Employer:	MEMC Electronic Materials (settled)	DIVISION OF WORKERS'
Additional Party	Second Injury Fund	COMPENSATION
Insurer:	Liberty Mutual Insurance (settled)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: GCG/ch

PRELIMINARY STATEMENT

Hearing on the above referenced case was held before the undersigned Administrative Law Judge on November 15, 2011 at the Division of Workers' Compensation in St. Charles, Missouri. Allen Mills (Claimant) was present, and represented by Ann Dalton. The liability of MEMC (Employer) and Liberty Mutual Insurance Company (Insurer) was previously settled. Assistant Attorney General Caroline Bean represented the Second Injury Fund. Ms. Dalton requested a fee in the amount of 20%. The evidentiary hearings for Injury Numbers 05-087751 and 05-141594 were held simultaneously, in conjunction with each other. The parties submitted post-trial briefs.

STIPULATIONS

The parties entered into the following stipulations:

1. Leading up to September 6, 2005, Claimant alleges that he sustained an occupational disease arising out of and in the course of his employment resulting in injury to Claimant's right shoulder that 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 proper notice of the claim.
5. Claimant filed a claim within the time allowed by law.
6. The rates for temporary total and permanent total disability are \$696.97 and \$365.08 for permanent partial disability.
7. Temporary total disability benefits were paid in the amount of \$0 and no medical benefits were paid.

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ISSUES

The issues presented for resolution by this hearing are:

1. Occupational disease.
2. Medical causation.
3. Liability of the Second Injury Fund.

SUMMARY OF THE 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.

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

- A. Deposition of Dr. David Volarich w/ attached exhibits (August 23, 2010)
- B. Deposition of Sherry Browning w/ attached exhibits (October 26, 2010)
- D. Assimilated records of 9-6-05 claim (right shoulder)
 - Stipulation for Compromise Settlement
 - Paul Spezia, M.D.: 8-10-05, 8-24-05, 9-2-05, 11-16-05 (9 pages)
 - Open MRI: 8-18-05 (1 page)
 - Barnes Care: 10-31-05 (2 pages)
 - Mark Miller, M.D.: 5-9-07, 5-17-07, 6-25-07, 7-24-07, 8-21-07, 10-3-07, 11-7-07 (12 pages)
 - Imaging Partners: 5-17-07 (2 pages)
 - Timberlake Surgery Center: 6-8-07 (3 pages)
 - Physical Therapy: 10-31-05 through 11-7-05 (2 pages)
- E. Assimilated records of 10-19-82 (left lower extremity)
 - St. Peters Hospital: 10-19-82 (1 page)
- F. Assimilated records of 9-1-97 claim (right carpal tunnel)
 - Stipulation for Compromise Settlement (primary claim) 5-12-04
 - Stipulation for Compromise Settlement (second injury fund claim) 6-14-05
 - Evan Crandall, M.D.: 10-20-98, 11-23-98, 12-7-98, 12-14-98, 1-5-99, 9-28-99 (9 pages)
 - David Peebles, M.D.: 11-4-98 (3 pages)
- G. Assimilated records of 2-19-94 claim (low back)

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- Stipulation for Compromise Settlement (primary claim) 9-22-98
 - Stipulation for Compromise Settlement (second injury fund claim) 10-15-98
 - Report of Injury 3-1-94
 - Barnes-St. Peters Hospital: 3-31-94 (2 pages)
- H. Assimilated records of 1999 (right hand and fingers Dupuytren's disease)
- Subbarao Polineni, M.D.: 1-18-99, 2-5-99, 2-15-99, 3-10-99, 4-5-99, 4-26-99, 5-24-99, 7-12-99, 6-7-01 (9 pages)
 - Barnes St. Peters dated 4-99, 6-7-01 (4 pages)
- I. Assimilated records of 1999 (right trigger thumb)
- Evan Crandall, M.D.: 9-28-99, 11-24-99, 12-21-99, 6-12-00 (6 pages—right trigger thumb)
- J. Assimilated records of 2000 (right foot)
- Theodore Rummel, M.D.: 9-15-00, 9-29-00, 10-12-00, 11-17-00 (3 pages)
 - Dr. Bauman: 2-7-01, 3-8-01, 6-19-01 (2 pages)
 - Open MRI: 10-3-00 (1 page)
- K. Assimilated records of 2000 (left carpal tunnel)
- Evan Crandall, M.D.: 6-12-00, 7-22-02, 9-30-02, 10-28-02, 11-4-02, 11-25-02, 8-6-03 (9 pages)
 - Daniel Phillips, M.D.: 8-7-02 (3 pages)
- L. Assimilated records of 2003 (right trigger thumb)
- Evan Crandall, M.D.: 2-7-03, 3-11-03, 4-16-03, 8-6-03 (6 pages)
- M. Assimilated records of 2007 (low back)
- Brett Taylor, M.D.: 8-21-07, 9-5-07 (6 pages)
 - Imaging Partners: 8-24-07 (1 page)
- N. Assimilated records 2007 (right knee)
- Mark Miller, M.D.: 8-21-07, 9-5-07, 11-7-07, 12-19-07, 12-31-07, 1-28-08, 3-3-08 (11 pages)
 - Timberlake Surgery Center: 12-10-07 (4 pages)
- O. Assimilated records Dr. Mark Hingst dated 6-21-04 through 9-18-06

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

- I. Deposition of vocational expert James M. England
- II. Pages 79 and 80 from the Claimant deposition taken on the part of the Second Injury Fund
- III. Dr. Piper's Medical Records

The records of Dr. Piper, SIF Exhibit III, were not available on the date of trial. The parties, by consent, agreed to leave the hearing record open until the records were obtained from

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Dr. Piper's office. There was an unexpected delay in receiving the records which, in turn, left the record of the evidentiary hearing open until February 10, 2012.

Claimant testified that he was born on May 15, 1952, that he is married and is the legal guardian of two young grandsons ages 6 and 7. Claimant is right handed, graduated from high school in 1970 and is able to read, write and do basic math. Claimant has certifications in vacuum systems, hydraulic systems and emergency response. Claimant uses the computer for internet only. Claimant is not currently working and was last employed by MEMC where he worked for the past 17 years. Claimant has not worked his full duty job since September 6, 2005. He last received temporary total disability benefits on May 10, 2006 when he was released from Dr. Miller's care with permanent restrictions. He was subsequently terminated because the employer could not accommodate his permanent restrictions. Claimant is currently receiving Social Security Disability benefits and also supports his family with his 401K retirement. At the time of his left shoulder injury, Claimant was working as a maintenance team technician repairing industrial equipment and trouble shooting. He used hand tools and test equipment and was required to work in a variety of awkward positions, including lying on the floor, climbing up on equipment, pushing, pulling, kneeling, and squatting. The job also required constant and repetitive use of his hands and his arms away from his body and overhead. He worked 12 hour days, 4 days a week and overtime. Leading up to his last day of work, he was on light duty which consisted of office work and allowed him to get up and leave at any time.

Claimant filed a Workers' Compensation claim against Employer for his right shoulder injury as a result of the constant and repetitive nature of his job duties. Right shoulder complaints were first noted by Dr. Crandall in January 1999 of pain in the right shoulder. Claimant also saw his family physician, Dr. Hingst, in July 2005 at which time x-rays revealed degenerative changes around the right shoulder with narrowing of the acromioclavicular space suggestive of a rotator cuff tear (according to the medical records). Claimant was referred to Dr. Spezia on August 10, 2005 and diagnosed with bilateral shoulder impingement and glenohumeral arthrosis. An MRI revealed a tear of the supraspinatus tendon at its insertion with a gap of nearly 7 millimeters and an associated rim of sub deltoid fluid anteriorly and superiorly. Dr. Hingst recommended surgery. Surgery was not performed on the right shoulder until June 8, 2007 because the Claimant was focusing on treatment for a left shoulder accident which occurred September 6, 2005. Surgery on the right shoulder involved diagnostic arthroscopy, intra-articular capsular debridement (biceps tendon rupture site), arthroscopic subacromial decompression, arthroscopic rotator cuff repair and transcutaneous pain pump placement. Following surgery, Claimant had physical therapy and was placed at maximum medical improvement on November 7, 2007 at which time he was advised to avoid doing overhead work and no lifting over 30-50 pounds floor to waist or 30 pounds waist to chest. Claimant continues to complain of pain, lack of strength, and limited range of motion in the right upper extremity. Claimant received 28.5% permanent partial disability of the right shoulder in a settlement with Employer for his right shoulder condition.

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Claimant suffered from a number of physical conditions prior to September 6, 2005. In the early 80's, Claimant fractured his left ankle which resulted in surgery for a closed reduction percutaneous pin fixation. Following that fracture, Claimant continued to have significant limited range of motion in the left ankle which caused problems going up and down steps. He also continued to have pain and swelling in the left foot.

Claimant's right foot has also been a problem dating back to 2000 when he received injections for neuritis. Subsequently he was diagnosed with a Morton's neuroma in the right foot and had surgery to remove it. (Exhibit J). Leading up to September 6, 2005, Claimant continued to have pain and swelling with numbness in his right foot, especially after being on his feet all day. He was able to get through work by stopping and resting or what he termed "smoke breaks". In addition, he took anti-inflammatory medication to help resolve the symptoms.

In 1994, Claimant sustained an injury at work to his low back. This injury resulted in a lumbar laminectomy and discectomy at L4-5 with continued complaints leading up to September 6, 2005 including stiffness, aching, and a knot which develops after twisting and turning. At work, Claimant would lay down on the floor instead of bending, he would constantly reposition himself when his back was aggravated and he asked for help when lifting. He also was able to sit down and rest as needed. Claimant received compensation from his employer for this injury based on 26% permanent partial disability of the body as a whole.

Prior to September 6, 2005, Claimant fractured his right small finger in 1998, was diagnosed with right carpal tunnel syndrome in 1998 and subsequently had surgeries for Dupuytren's contracture and right trigger thumb all on the right. As a result of these injuries and conditions, Claimant continued to have pain, stiffness and diminished grip strength. At work, he continued to drop tools and had difficulty holding tools. With regard to the carpal tunnel syndrome, Claimant received 17.5% permanent partial disability from his Employer as a result of a workers' compensation claim.

Claimant also had carpal tunnel syndrome in his left hand prior to September 6, 2005. This was surgically treated by Dr. Crandall. However, Claimant continued to have pain, numbness and tingling as a result of this condition leading up to September 6, 2005. At work, he had difficulty with tools due to lack of grip strength. Claimant received 17.5% permanent partial disability of the left hand from his Employer as a result of the carpal tunnel syndrome on the left.

Prior to September 6, 2005, Claimant developed stiffness, aching, popping and grinding in his neck. He was treated by Dr. Piper and received epidural steroid injections, but no surgery. Leading up to September 6, 2005, Claimant continued to have popping, stiffness and difficulty bending and reaching overhead because of his neck condition.

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Prior to September 6, 2005, Claimant injured his left knee in a motor vehicle accident in 1980. As a result, he had an arthrotomy. Leading up to September 6, 2005, Claimant continued to have limited range of motion in the left lower extremity and difficulty squatting and kneeling.

Claimant has long standing problems with his right knee pre-dating September 6, 2005. He had fluid drained off and treated with Dr. Piper conservatively. Over the years, the right knee would pop out of joint and it was difficult for Claimant to work squatting or getting on the floor.

Currently, Claimant has difficulty falling asleep and staying asleep. He is unable to get comfortable because "everything hurts". Throughout the night, Claimant gets up, tries to watch television, and sometimes eventually falls into a deep sleep. More commonly, even when Claimant falls asleep, he is woken two to three times during the night because of pain. When he does eventually start his day, it takes time to stretch out. He piddles around the house, keeps an eye on his grandchildren, might throw in a load of wash or do a little vacuuming. Claimant is able to mow his very small yard with a "zero turn mower" but he performs no other yard work or household chores. Claimant owns a classic pick-up truck, but does not show it or work on it. He no longer bow hunts but is able to deer hunt in a specially made deer stand.

Claimant saw Dr. David Volarich on October 16, 2008. Based upon his physical examination and review of the medical records, Dr. Volarich opined that there is a 35% permanent partial disability of the right upper extremity rated at the shoulder due to the rotator cuff tear and impingement that required arthroscopic repair. The rating accounts for pain, lost motion, weakness, crepitus, and atrophy in this shoulder leading up to 9/6/05.

Opinion Evidence

Dr. David Volarich examined Claimant on October 16, 2008 for purposes of a rating evaluation. Dr. Volarich testified that he examined Claimant's right shoulder, right foot, left foot, back, neck, left hand, right hand, left knee, and right knee. At the time of the examination, Claimant complained of left greater than right shoulder pain. He could not accomplish overhead activities. He was able to complete a traction maneuver at the waist level but unable to throw overhand. Claimant complained that his arms fatigue, his motion is fair but there was popping. He compensates for these problems by doing things differently.

Also at the time of the examination, Claimant complained of right greater than left foot pain and swelling. He indicated that standing for prolonged periods of time caused his feet to swell and that he had to change shoe size because of it. If he walks for prolonged periods of time, he needs to stop and rest. He changed the way he placed his foot on the pedal when driving. Claimant also complained of back stiffness and difficulty bending. Because of his back complaints, it was hard for him to maintain a fixed position and he limited his lifting. Claimant

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complained of right greater than left wrist pain with numbness and tingling, diminished grip strength and range of motion as well as poor dexterity in his hands.

Also at the time of Dr. Volarich's evaluation of the Claimant, Claimant complained of ongoing problems with his neck including range of motion with popping and constant headaches. He complained that he was limited in his kneeling and crawling as well as impact activities due to his knee conditions.

Based upon his physical examination and review of the medical records, Dr. Volarich diagnosed the following pre-existing conditions:

1. Mild left shoulder impingement — minimally symptomatic prior to 9/6/05.
2. Right shoulder impingement and rotator cuff tear — S/P arthroscopic subacromial decompression and rotator cuff repair with joint debridement.
3. Left great toe tip fracture.
4. Right great toe fracture metatarsophalangeal joint with residual hallux rigidus.
5. Left foot tarsal navicular fracture with subluxation of the naviculocuneiform joint — S/P closed reduction and pinning.
6. Right foot 1st, 2nd web space Morton's neuroma.
7. Herniated pulposus L4-5 causing bilateral lower extremity radicular symptoms — S/P bilateral laminectomy and discectomy at L4-5.
8. Right small finger fracture.
9. Right wrist carpal tunnel syndrome — S/P endoscopic carpal tunnel release.
10. Left wrist carpal tunnel syndrome — S/P endoscopic carpal tunnel release.
11. Right hand Dupuytren's contracture — S/P extension open palmar fasciectomy and capsulotomy.
12. Right thumb triggering — resolved.
13. Right hand cellulitis — resolved.

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14. Chronic cervical syndrome secondary to degenerative disc disease and degenerative joint disease C5-6 and C6-7 without radiculopathy.
15. Left knee internal derangement — S/P medial compartment arthroscopy.
16. Post traumatic arthritis left knee.

Dr. Volarich provided the following ratings with regard to the pre-existing diagnosis:

1. There is a 10% permanent partial disability of the left upper extremity rated at the shoulder due to the impingement that required a cortisone injection. The rating accounts for any minor aching and any lost motion that might have been present prior to 9/6/05.
2. There is a 20% permanent partial disability of the left lower extremity rated at the foot due to the tarsal navicular fracture that required closed reduction, pinning, and subsequent pin removal. The rating accounts for pain, lost motion, and difficulties with prolonged weight bearing and impact activities in the left lower extremity.
3. There is a 20% permanent partial disability of the right lower extremity rated at the foot due to the Morton's neuroma and hallux rigidus of the great toe. The rating accounts for lost motion, pain, and difficulties with weight bearing and impact activities involving the right foot.
4. There is a 30% permanent partial disability of the body as a whole rated at the lumbosacral spine due to the disc herniation at L4-5 that required laminectomy and discectomy. The rating accounts for his chronic back pain syndrome, lost motion, and rare lower extremity paresthesias prior to 9/6/05.
5. There is a 40% permanent partial disability of the right upper extremity rated at the wrist due to the carpal tunnel syndrome that required endoscopic carpal tunnel release and the Dupuytren's contracture that required extensive fasciectomy. The rating also accounts for his ongoing pain, lost motion, weakness, and difficulties with forceful grip and pinch in the dominant hand.
6. There is a 20% permanent partial disability of the left upper extremity rated at the wrist due to the carpal tunnel syndrome that required endoscopic carpal tunnel release. The rating accounts for pain, paresthesias, and weakness in the non dominant hand.
7. There is a 15% permanent partial disability of the body as a whole rated at the cervical spine due to the chronic cervical syndrome secondary to degenerative disc disease at C5-6 and C6-7. The rating accounts for neck pain and lost motion.

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8. There is a 25% permanent partial disability of the left lower extremity rated at the knee due to the internal derangement that required medial compartment arthroscopy. The rating accounts for some stiffness and crepitus in this knee prior to 9/6/05.

Dr. Volarich testified that the combination of Claimant's disabilities created a substantially greater disability than the simple sum or the total of each separate injury and illness. A loading factor should be added. It was his opinion that Claimant was unable to engage in any substantial gainful activity nor could he be expected to perform in an ongoing working capacity in the future. Dr. Volarich testified that the Claimant cannot reasonably be expected to perform on an ongoing basis 8 hours per day, 5 days per week throughout the work year. It was his opinion that the Claimant was unable to continue in his line of employment, nor can he be expected to work on a full time basis in a similar job.

Sherry Browning, a vocational rehabilitation counselor, testified on behalf of the Claimant. Ms. Browning testified that she met with Claimant on April 10, 2009 and later spoke with him by telephone on July 6, 2009. Based upon her interview and review of the medical records, Ms. Browning concluded that Claimant is unemployable in the open labor market as a result of his functional limitations in his feet, right hand and fingers, back and shoulders in combination and including pain, swelling, decreased sensation and strength and limited range of motion.

James England, another vocational rehabilitation counselor, testified on behalf of the Second Injury Fund. Mr. England has never met nor has he spoken with Claimant. Mr. England opined that Claimant would be limited to light-sedentary jobs based upon his review of the medical records. However, he further acknowledged that his opinion might differ if he had an opportunity to meet with Claimant.

FINDINGS OF FACT AND RULINGS OF LAW

Claimant has established a right to recover from the Second Injury Fund. A Claimant in a workers' compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 W.W. 3d 902, 911 (Mo. App. E.D. 2008). In order for a Claimant to recover against the SIF, she must prove that she sustained a compensable injury, referred to as "the last injury", which resulted in permanent partial disability. Section 287.220.1 RSMo. A Claimant must also prove that she had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to her employment or reemployment should she become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W. 3d 267, 272 (Mo. App. E.D. 2008) (Citations omitted).

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In order for a Claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W. 3d 714, 717-18 (Mo. banc 2004). Claimant has met this burden.

The Second Injury Fund asserts as a defense that after the 2005 amendments to Chapter 287 RSMo., Fund liability is not triggered when the primary injury is an occupational disease claim. The argument is essentially that the language of §287.220.1 requires “a subsequent compensable *injury*” to trigger fund liability, and the definition of injury in §287.020.3(5) states that except as specifically provided for in the Chapter it is not to include occupational disease. The Fund argues applying strict construction; an occupational disease does not create Fund liability.

However, the definition of “injury” or “personal injury” in Section 287.020.3(5) only excludes occupational diseases **“except as specifically provided in this chapter.”** (emphasis added). Thus the definition of injury can include occupational disease under some circumstances. Section 287.067.2 provides that an “**injury** by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” (emphasis added) Likewise, §287.067.3 provides “An **injury** due to repetitive motion is recognized as an occupational disease for purposes of this chapter.” (emphasis added). Sections 287.067.2 and 3 both specifically provide for injury by occupational disease. Further, §287.067.3 specifically provides that occupational disease by repetitive motion, which is the primary injury in this case, is an “injury”. The claim against the Second Injury Fund is compensable.

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: Claimant suffered a work-related injury on September 6, 2005. The constant and repetitive use of the Claimant’s right upper extremity resulted in shoulder impingement and rotator cuff tear which required arthroscopic subacromial decompression and rotator cuff repair with joint debridement. The opinions of Dr. Volarich are credible regarding occupational disease, medical causation, and PPD of the right shoulder. Claimant suffered a permanent partial disability of 28.5% of the right shoulder as a result of the September 6, 2005 injury.

Claimant had several pre-existing medical conditions which were a hindrance or obstacle to employment. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had a pre-existing injury to the left ankle which is a hindrance or obstacle to employment. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had a 15% permanent partial disability to the left lower extremity at the foot. This

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finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Claimant received injections for neuritis in the right foot and surgery for a Morton's neuroma in the right foot, as well. Based on the competent and substantial evidence presented, I find that the pre-existing problems with the right ankle were a hindrance or obstacle to employment. I find that at the time of the September 6, 2005 work injury, Claimant had a 15% permanent partial disability of the right lower extremity at the foot. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Claimant sustained a disc herniation at L4-5 causing chronic back pain, loss motion and some lower extremity paresthesias prior to his work-related injury on September 6, 2005. This injury caused a hindrance or obstacle to employment. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had 26% permanent partial disability of the body as a whole relative to the low back. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Prior to September 6, 2005, Claimant had pre-existing injuries to his right hand which were a hindrance or obstacle to employment. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had 25% permanent partial disability to the right upper extremity at the wrist. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Claimant also had a pre-existing injury to his left upper extremity at the hand prior to September 6, 2005. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had 17.5% permanent partial disability to the left hand. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Prior to September 6, 2005, Claimant had a pre-existing injury to his neck which is a hindrance or obstacle to employment. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had a 12.5% permanent partial disability to the body as a whole referable to the cervical spine. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Claimant also had a pre-existing injury to his left knee which resulted in an arthrotomy. Based on the competent and substantial evidence presented, I find that at the time of the September 6, 2005 work injury, Claimant had a 22.5% permanent partial disability to the left

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lower extremity at the knee. This finding takes into account the testimony of Claimant, the medical records and objective tests and evidence, and the opinions of the rating physicians.

Claimant has met his burden, and the Second Injury Fund is liable for permanent partial disability benefits as a result of the combination of pre-existing injuries and conditions, and the primary injury of September 6, 2005.

Therefore, as of the right shoulder injury of September 6, 2005, Claimant had the following pre-existing permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:

- a) 15% permanent partial disability of the left foot (22.5 weeks)
- b) 15% permanent partial disability of the right foot (22.5 weeks)
- c) 26% permanent partial disability of the low back (104 weeks)
- d) 25% permanent partial disability of the right wrist (43.75 weeks)
- e) 17.5% permanent partial disability of the left hand (30.625 weeks)
- f) 12.5% permanent partial disability of the neck (50 weeks)
- g) 22.5% permanent partial disability of the left knee (36 weeks)

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 15% greater overall disability than the independent sum of disabilities.

The Second Injury Fund liability is calculated as follows: 66.12 weeks for the last injury + 309.38 weeks for pre-existing injuries = 375.5 weeks x 15% = 56.325 weeks of overall greater disability. 56.325 x \$365.08 = \$20,563.13.

CONCLUSION

The Second Injury Fund is liable to Claimant for \$20,563.13 in permanent partial disability benefits. Attorney Ann Dalton shall be entitled to an attorney fee of 20% of this award for necessary legal services provided.

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Made by: /s/ GRANT C. GORMAN
Grant C. Gorman
Chief Administrative Law Judge
Division of Workers' Compensation