

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

Injury No.: 07-115559

Employee: Edgar Moseley
Employer: Elite Stucco
Insurer: Guarantee Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to resolve the following issues: (1) nature and extent of permanent disability; (2) medical causation with respect to employee's right shoulder and low back injuries; (3) temporary total disability; (4) safety penalty under § 287.120.4 RSMo; (5) future medical benefits; (6) past medical expenses; and (7) Second Injury Fund liability.

The administrative law judge rendered the following findings and conclusions: (1) employee's right shoulder injury was not caused by work; (2) employee sustained a lumbar strain resulting in a 10% permanent partial disability of the body as a whole; (3) employee is not permanently and totally disabled as a result of the work injury; (4) employee is not entitled to any benefits from the Second Injury Fund; (5) employee's claim for future medical benefits is denied; (6) employer is liable for \$4,994.29 in temporary total disability benefits; and (7) employee is entitled to a 15% penalty against employer for its failure to provide safe scaffolding pursuant to § 292.090 RSMo. The administrative law judge did not consider the issue of past medical expenses, as employee waived his claim for past medical bills during the course of the hearing.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in finding employee is not permanently and totally disabled; (2) in excluding the certified medical records of Drs. Baker and Ellis; and (3) in relying on the opinions of Drs. Strege and Woodward with respect to medical causation of employee's right shoulder injury.

Employer filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in applying § 287.120.4 to increase employee's

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compensation by 15%; and (2) in finding employee suffered a lumbar strain resulting in a 10% permanent partial disability of the body as a whole.

For the reasons stated below, we modify the award of the administrative law judge referable to the issues of: (1) medical causation with respect to employee's right shoulder injury; (2) nature and extent of permanent disability; (3) whether employee's compensation is subject to an increase pursuant to § 287.120.4; and (4) Second Injury Fund liability.

Discussion

Medical causation of the right shoulder injury

The administrative law judge determined that employee failed to meet his burden of proving he suffered a right shoulder injury as a result of his accident at work on November 16, 2007. We disagree for the following reasons.

This employee was able to work up to 70 hours a week as a plasterer before his work injury, a job that required repetitive overhead use of his right upper extremity. Employee credibly testified (and we so find) that he fell on his right shoulder and experienced immediate pain in his right shoulder when he fell from scaffolding at work on November 16, 2007. After the accident, employee suffers from right shoulder pain, weakness, and difficulty with lifting and overhead tasks. An MRI study on October 5, 2010, revealed a partial thickness rotator cuff tear in employee's right shoulder.

At the hearing before the administrative law judge, employee testified that he did not receive any medical treatment for his right shoulder prior to the November 2007 accident, and employer has not, in its brief, directed us to any evidence on the record that would suggest to the contrary. At oral arguments in this matter, counsel for employer further conceded that the record contains no evidence suggesting employee had any problems with his right shoulder at work before the November 2007 accident, and that the record does not contain any evidence of a right shoulder injury subsequent to the accident at work.

We find that employee did not receive any medical treatment for his right shoulder, and did not have any problems performing his work referable to his right shoulder, prior to the November 2007 accident. We find that employee did not suffer any injury to his right shoulder subsequent to the November 2007 accident.

In rendering his opinion that employee's right shoulder problems are not the result of the November 2007 accident, employer's expert Dr. Strege relied, in part, on the purported absence of right shoulder complaints as reflected in the medical records generated in connection with employee's treatment for the accident. We note that the Missouri courts have declared that "[t]here is no requirement that the medical records report employment as the source of injury." *Daly v. Powell Distrib., Inc.*, 328 S.W.3d 254, 259 (Mo. App. 2010). We note also that Dr. Strege incorrectly identified an April 29, 2008, treatment note from Cox Hospital Emergency Department as the first medical record following the accident to include a right shoulder complaint, as he was apparently unaware of a December 4, 2007, note from Family Medical Walk-In Clinic recording employee's history of right shoulder pain.

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Given all of these considerations, we find more persuasive the causation opinion from Dr. Paul that the November 2007 accident is the prevailing factor causing employee to suffer a right shoulder rotator cuff tear.

Section 287.020.3(1) RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

We conclude that the accident is the prevailing factor causing the resulting medical conditions of (1) a right shoulder rotator cuff tear and associated 15% permanent partial disability of the right upper extremity at the 232-week level; and (2) a lumbar strain and associated 10% permanent partial disability of the body as a whole. Employer is liable for 74.8 weeks of permanent partial disability benefits at the stipulated rate of \$389.04 for a total of \$29,100.19.

Safety penalty

The administrative law judge determined that employee's compensation is subject to a 15% increase under § 287.120.4 RSMo, which provides, as follows:

Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent.

Employee argues that his injuries were caused by employer's failure to comply with § 292.090 RSMo, which provides, in relevant part:

All scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling therein, or the falling of such materials or articles as may be used, placed or deposited thereon. All persons engaged in the erection, repairing or taking down of any kind of building shall exercise due caution and care so as to prevent injury or accident to those at work or nearby.

It is uncontested that when employee fell, he was working on scaffolding that was, at most, four feet above the ground. It is also uncontested that employee himself set up the scaffolding, and that he personally selected the boards that he placed across the scaffold frames. We note that employee conceded, in his deposition, that he noticed that one of the boards he selected had a knot in it. Employee further testified that this was a dangerous condition.

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Although employee blamed his employer, Michael Boyer, for the failure of the scaffold when Mr. Boyer stepped onto the board, employee failed to identify any affirmative act or omission to demonstrate how Mr. Boyer failed to provide him with scaffolding that was “well and safely supported, and of sufficient width, and so secured” as to insure his safety, where employee himself set up the scaffolding and selected the boards. Rather, employee conceded that Mr. Boyer would not have any reason to know about the condition of the board at the time the accident occurred.

Where there is no showing that employer failed to make a good faith and reasonable effort to comply with § 292.090, we are reluctant to make a finding that employer violated the law. It appears to us that, at worst, Mr. Boyer may have been negligent when he stepped onto the scaffold with employee, but because there is no evidence on this record to suggest that Mr. Boyer knew (or should have known) that this would result in failure of the scaffold, we are not convinced that this act by Mr. Boyer amounted to a failure to provide employee with scaffolding sufficiently secure as to insure employee’s safety. After careful consideration, we are not persuaded that employer engaged in any acts or omissions that would rise to the level of a failure to comply with § 292.090 for purposes of § 287.120.5. Accordingly, we must modify the administrative law judge’s award on this point. We conclude that employee’s compensation is not subject to a 15% increase under § 287.120.5.

Permanent total disability

The administrative law judge determined that employee is not permanently and totally disabled, based in part on his determination that employee’s right shoulder injury was not the result of the November 2007 accident. We have modified the administrative law judge’s determinations as to the issue of medical causation of employee’s right shoulder injury, and for the following reasons, we are persuaded that employee is permanently and totally disabled.

The administrative law judge noted employee’s 1995 low back injury which necessitated multilevel lumbar surgery and took employee out of work for 2 years. As a result of employee’s preexisting lumbar spine injury, employee tried not to lift anything that weighed more than about 25 pounds, took Vicodin three or four times a day to address ongoing pain, and took breaks throughout the day to address “jolting” pain in his low back. Employee also would occasionally lie down on stacks of Styrofoam during his lunch break to rest his back.

The vocational expert, Philip Eldred, opined that employee is permanently and totally disabled given his physical restrictions referable to the primary injury combined with employee’s preexisting low back injury. Employee’s evaluating expert, Dr. Paul, opined that employee is permanently and totally disabled when the effects of the primary right shoulder and low back injury are combined with employee’s prior low back injury. We find these expert opinions to be persuasive and adopt them as our own with respect to the nature and extent of employee’s permanent disability.

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Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have found that employee suffered from a preexisting permanent partially disabling condition referable to his lumbar spine at the time he sustained the work injury. We are convinced this condition was serious enough to constitute a hindrance or obstacle to employment. This is because we are convinced employee's preexisting condition had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of the condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Having found that employee suffered from a preexisting permanent partially disabling condition that amounted to a hindrance or obstacle to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove his entitlement to such an award, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have determined that, as a result of the accident on November 16, 2007, employee sustained a right shoulder injury amounting to a 15% permanent partial disability at the 232-week level, and a lumbar strain amounting to a 10% permanent partial disability of the body as a whole. We conclude that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

We have credited the expert opinions from Dr. Paul and Mr. Eldred that employee's permanent total disability is owing to the effects of the primary injury combined with

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employee's preexisting disability referable to the lumbar spine. We conclude employee is permanently and totally disabled owing to a combination of his preexisting disabling condition in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issues of: (1) medical causation of employee's right shoulder injury; (2) nature and extent of permanent disability; (3) the safety penalty; and (4) Second Injury Fund liability.

Employee is entitled to, and employer is hereby ordered to pay, \$29,100.19 in permanent partial disability benefits.

Employee's compensation is not subject to any increase under § 287.120.4 RSMo.

The Second Injury Fund is liable for weekly permanent total disability benefits beginning August 4, 2008, (the date upon which the parties stipulated permanent total disability benefits should begin) at the differential rate of \$70.96 for 74.8 weeks, and thereafter at the stipulated weekly permanent total disability rate of \$460.00. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Robert H. House, issued September 27, 2013, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an 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 10th day of April 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Edgar Moseley

Injury No. 07-115559

Dependents: N/A

Employer: Elite Stucco

Additional Party: Second Injury Fund

Insurer: Guarantee Insurance Company

Hearing Date: August 28, 2013

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

Checked by:

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: NOVEMBER 16, 2007
5. State location where accident occurred or occupational disease was contracted: BRANSON TANEY COUNTY,MO
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: FELL FROM SCAFFOLDING
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease : LOW BACK
14. Nature and extent of any permanent disability: 10% BODY AS A WHOLE
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? \$14,641.43

- 17. Value necessary medical aid not furnished by employer/insurer? -0-
- 18. Employee's average weekly wages: \$690.00
- 19. Weekly compensation rate: \$460.00 / \$389.04
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: -0-

10 6/7 weeks of temporary total disability (or temporary partial disability)
(MAY 20, 2008, TO AUGUST 4, 2008)

40 weeks of permanent partial disability from Employer

N/A weeks of disfigurement from Employer

- 22. Second Injury Fund liability: -0-

TOTAL:

- 23. Future requirements awarded:

Said payments to begin IMMEDIATELY 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:

JONATHAN PITTS

Employee: Edgar Moseley

Injury No. 07-115559

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Edgar Moseley

Injury No. 07-115559

Dependents: N/A

Employer: Elite Stucco

Additional Party: Second Injury Fund

Insurer: Guarantee Insurance Company

Hearing Date: August 28, 2013

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

Checked by:

AWARD

A hearing was held in this matter on August 28, 2013. Claimant appeared in person and with his attorney, Jonathan Pitts. Employer/insurer appeared through their attorney, Patricia Musick. The Second Injury Fund appeared through its attorney, Skyler Burks. The parties presented the following issues for determination:

1. The nature and extent of disability with claimant alleging permanent total disability against the Second Injury Fund.

2. Whether claimant's current physical condition was caused by his accidental injury at work. Specifically, both employer/insurer and the Second Injury Fund dispute that the right shoulder injury was caused by claimant's accidental injury at work and the Second Injury Fund disputes that claimant's low back condition was caused by his accidental injury at work.

3. The liability of employer/insurer for past temporary total disability benefits with claimant alleging an entitlement for said benefits from May 20, 2008, through at a minimum August 4, 2008, which was the date Dr. Woodward released claimant to full duty, November 4, 2008, which was the date Dr. Woodward opined that claimant had reached maximum medical improvement or as late as October 5, 2010, the date of an MRI performed at the request of Dr. Strege.

4. A safety penalty of 15 percent alleged by claimant to be assessed against employer/insurer pursuant to §287.120.4 for violation of §292.090 for faulty scaffolding.

5. The liability of employer for future medical care with the claimant alleging that he was entitled to two years of anti-inflammatory medications and pain medication pursuant to a January 13, 2011, report by Dr. Paul.

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6. The liability of the Second Injury Fund with claimant alleging permanent total disability against the Fund.

Employer/insurer has paid no temporary total disability benefits to claimant. Employer/insurer have paid \$14,641.43 for past medical benefits to claimant. The parties agree that the average weekly wage in this case is \$690.00, producing a workers' compensation rate of \$460.00 for temporary total disability and permanent total disability benefits and \$389.04 for permanent partial disability benefits. The parties agree that should I find that claimant is permanently and totally disabled that permanent total disability benefits would begin on May 20, 2008, if no temporary total disability benefits were found, and would begin on a later date following any assessment of temporary total disability.

Claimant's Exhibits A, B, C, E, and G were admitted into evidence. Employer/insurer's Exhibits 1 through 9 were admitted into evidence. Pursuant to objections dealing with Exhibit C, the records of Dr. Baker and Dr. Ron Ellis, were excluded. Those exhibits were C-8 and C-9 respectively. Those records were excluded because as admitted by claimant he failed to provide those medical records to employer/insurer or the Second Injury Fund until the day of the hearing.

Claimant testified by deposition and at the hearing. Claimant was born on January 26, 1947. He quit school at 16 in the 8th grade. He had been held back in school for two years. He obtained a GED and took a couple of courses at a community college. He also went to an apprentice school to become a plasterer. Claimant last worked for employer on November 30, 2007. He has performed some other small jobs as a plasterer following his work injury. His earlier occupations included performing plastering work for himself as well as other companies along with prior work as a warehouse manager.

Claimant suffered a preexisting injury in 1995 which resulted in low back surgery for a bilateral partial L3 laminectomy, a total L4 and L5 decompressive laminectomy along with decompression of the L3-4, L4-5 and L5, S1 interspaces. Claimant testified that he obtained workers' compensation settlement for that injury but that settlement was not offered into evidence. Claimant's diagnosis was lumbar stenosis with lumbar radiculopathy. Claimant missed two and half years of work following the 1995 injury and surgery.

On November 16, 2007, claimant was working for Elite Stucco when he was on a scaffold working with Michael Boyer, who was the owner of Elite Stucco. Mr. Boyer admitted in his deposition testimony that claimant was working on a scaffold at the time accident. Claimant was on a board on the scaffold which broke when Mr. Boyer attempted to walk on the same board. The board broke causing both Mr. Boyer and claimant to fall approximately four feet to the ground. Claimant fell on his right shoulder, his knee, and back. Claimant finished work that day and did not seek medical treatment until December 1, 2007, at St. John's emergency room. This was a day after he had been laid off by employer.

On December 1, 2007, claimant complained of his right knee and low back. He did not report any right shoulder problems. However, on December 4, 2007, he was treated at Family Walk-In Clinic where it was reported that his right shoulder was better and also noting knee and back pain. Claimant's next treatment was April 29, 2008, at the Cox emergency room where it

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was noted that he had back and ongoing shoulder pain. Ultimately employer/insurer provided treatment for claimant with Dr. Woodward, who noted claimant's right shoulder and back pain with S-1 radiculopathy. He ordered claimant undergo physical therapy releasing him for full duty on August 4, 2008, finding him at maximum medical improvement on November 4, 2008, and ultimately rating claimant's disability for his injury at work as 6 percent to the body as a whole with 4 percent for his preexisting spine degeneration. On September 26, 2008, Dr. Woodward opined that, "Initial medical records corroborate lumbar and knee pain with no mention at all of right shoulder pain 2 weeks after the initial injury which in my opinion would preclude the work injury from being the prevailing cause of the current shoulder pain." Nevertheless, Dr. Woodward opined that claimant had a lumbar strain which was the current cause of his lumbar pain finding the earlier preexisting problem as noted above to be a 4 percent disabling condition.

Claimant was also evaluated by Dr. David Strege, an orthopedic surgeon who opined as follows:

With respect to causation, Mr. Mosely's examination today demonstrates some significant stiffness and mild pain in his left shoulder, in addition to right shoulder difficulties. It would appear that he has likely underlying pathology involving both shoulders, which would not be unexpected in a 61-year-old gentleman who has been a laborer for the past 42 years. Additionally, degenerative changes noted on radiographs of the right shoulder are chronic in nature and well known to cause problems of rotator cuff tendinopathy. In view of this, I believe that Mr. Mosely's injury of November 16, 2007, was an aggravating factor, rather than the prevailing factor, for problems involving his right shoulder and the need for ongoing treatment.

Dr. Strege in his deposition opined that he did not believe that the rotator cuff tear was caused by direct or blunt trauma to the shoulder. He believed that it would be consistent with an aging process. He specifically found that it was significant that there was no mention of shoulder discomfort in the earliest evaluations following his accidental injury at work. Dr. Strege opined that occupational exposure would contribute to claimant's rotator cuff tendonitis; however, his ultimate conclusion was that his specific findings were consistent with the aging process and evidence of a more chronic rotator cuff condition as opposed to an injury at work.

Dr. Strege provided restrictions for claimant which he believed would make it difficult for him to return to significant overhead work and significant lifting. He did not believe that those work restrictions were a result of the work injury. He specifically opined that the work accident on November 16, 2007, was not the prevailing factor in causing Mr. Moseley's shoulder condition.

Claimant was also examined by Dr. Daniel Kitchens, a neurosurgeon. Dr. Kitchens opined that claimant had reached maximum medical improvement for the injuries he sustained on November 16, 2007, and that no treatment would be necessary in addition to what he had already received. He also opined that the accidental injury at work was not the prevailing factor and the cause of his diagnosis of scoliosis of the lumbar spine and degenerative disk disease of the lumbar spine. He reviewed an MRI which showed claimant having degenerative disk disease

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throughout the lumbar spine at L1-L2, L2-L3, L3-L4, L4-L5, and L5-S1. He noted the earlier laminectomy from L3 through L5 and degenerative end plate changes at L2-3 noting that claimant had significant degenerative changes and degenerative disk disease and significant rotoscoliosis of the lumbar spine. Nevertheless, Dr. Kitchens found that claimant had a permanent partial disability of 5 percent related to a lumbar strain from his fall from a scaffold on November 16, 2007.

Claimant obtained the services of Dr. Robert Paul, an occupational medicine practitioner. Dr. Paul, upon examination of claimant, issued a report finding that claimant sustained a work-related right shoulder injury and low back injury. Dr. Paul, in his deposition, noted that claimant's failure to report the injury to his treating physicians on December 1, 2007, was not significant because of greater pain to other parts of the body at that time. Dr. Paul also noted claimant's prior surgery for decompressive laminectomies and his current extensive pain with his back and shoulder. Dr. Paul assessed disability to the right shoulder of 30 percent at the 232 week level and disability to the body as a whole for the lumbar spine condition as 25 percent to the body as a whole. He additionally found that claimant was 100 percent temporarily and totally disabled by virtue of the on-the-job injury of November 16, 2007, in combination with his prior low back disability.

Claimant also obtained the services of Phil Eldred, a vocational rehabilitation counselor. Mr. Eldred found additionally that claimant was permanently and totally disabled as a result of the combination of claimant's preexisting back disability with the disability from his work injury on November 16, 2007. Mr. Eldred used the highest level of restrictions in his analysis.

Based upon all of the evidence in this case I find that claimant's right shoulder injury was not caused by his accident at work. I find more persuasive the report and testimony of Dr. Strege when considered along with the findings of Dr. Woodward. Both Drs. Strege and Woodward find it significant that claimant did not express any right shoulder problems to the initial treating physicians at the St. John's emergency room visit on December 1, 2007, approximately 15 days following his fall at work. Based upon the greater expertise of Dr. Strege, board certification as an orthopedic surgeon, along with the analysis of the injury in his report and deposition, I find that claimant's shoulder injury is not related to his accident at work.

The Second Injury Fund has raised the issue of causation as it relates to claimant's current back condition. It is clear from the medical records of Dr. Woodward that he finds that claimant suffered a back lumbar strain as a result of his fall at work. It is also clear that Dr. Kitchens finds that claimant suffered a lumbar back strain as a result of the fall at work. It is also apparent from both Drs. Woodward and Kitchens that they do not find any relationship with the degenerative nature of claimant's back condition to be related to his fall at work. Dr. Paul finds to the contrary. Nevertheless, based upon what I believe to be the greater expertise of Dr. Kitchens as a neurosurgeon and the extensive nature of claimant's earlier back surgery and resulting two and half years of work loss, I find Dr. Kitchens more persuasive as, corroborated by Dr. Woodward, that claimant has suffered from a lumbar back strain only as a result of his fall at work on November 16, 2007. Dr. Woodward has rated that injury at 6 percent to the body as a whole. Dr. Kitchens has rated it as 5 percent to the body as a whole. Dr. Paul has rated claimant's low back condition which included the degenerative nature of claimant's back

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condition and complaints as being 25 percent to the body as a whole. Based upon all of the evidence in this case, including claimant's testimony, I find that claimant has sustained a lumbar back strain to the extent of 10 percent to the body as a whole over and above any preexisting lumbar back degeneration. As a result, I find that claimant is not permanently and totally disabled as a result of his last injury at work on November 16, 2007. As a result I order employer/insurer to pay to claimant 40 weeks of disability at the agreed upon rate of compensation of \$389.04 for a total of \$15,561.60.

Claimant has sought permanent total disability against the Second Injury Fund. Since I have found that claimant's right shoulder condition is not related to his injury at work and have found that the disability from claimant's lumbar back strain is 10 percent, I find that claimant has not met the thresholds required for the last injury to combine with the preexisting injury for permanent partial disability. §287.220 requires the last injury to result in a minimum of 50 weeks of compensation when related to the body as a whole. Dr. Paul assessed claimant's preexisting disability to the lumbar spine as 25 percent to the body as a whole. I find that that is an appropriate assessment of claimant's preexisting disability based upon the nature of his surgery, his loss of two and a half years of work, and his continuing back pain which Dr. Kitchens relates to his preexisting degenerative condition. Nevertheless, I find and conclude that claimant is not permanently and totally disabled as a result of his preexisting lumbar spine condition when combined with his lumbar strain of only 10 percent to the body as a whole. As a result, I find and conclude that claimant is not entitled to any permanent disability benefits from the Second Injury Fund.

Claimant has sought future medical benefits for the recommendation of Dr. Paul for two years of anti-inflammatories and narcotic pain medication. The period of time has already run for that particular treatment. There is no other evidence of the need for additional medical treatment for claimant's November 16, 2007, injury other than Dr. Paul's recommendation for that two years of anti-inflammatories and pain medication. Indeed, both Drs. Woodward and Kitchens find no additional medical treated is necessary. As a result, I deny claimant's claim for future medical benefits.

Claimant has also sought past temporary total disability benefits. Claimant underwent treatment with Dr. Woodward through the August 4, 2008, release to full duty. Claimant was off work and receiving unemployment compensation up to May 20, 2008. I find and conclude it appropriate that claimant was temporarily and totally disabled from May 20, 2008, to August 4, 2008, and I order employer/insurer to pay to claimant temporary total disability benefits for that period of time at the agreed upon rate of \$460.00 per week, which totals \$4,994.29. As a result, I order employer/insurer to pay to claimant \$4,994.29 in temporary total disability benefits.

Claimant has sought a safety penalty of a 15 percent increase in compensation against employer/insurer for violation of §287.120.4, RSMo. That section allows for a penalty to be assessed "where the injury is caused by the failure of the employer to comply with any statute in this state...." Employee specifically alleged that employer has violated §292.090 which requires that "[a]ll scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and is sufficient with, and so secured as to insure the safety of persons working thereon...." As is apparent from the testimony of both claimant

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and claimant's employer, claimant was working on scaffolding which broke when his employer attempted to walk on the same board occupied by claimant. It is clear that under claimant's back strain was caused by the failure of that scaffolding. As a result, I find and conclude that under §287.120.4 claimant is entitled to a 15 percent penalty against employer/insurer for its failure to provide safe scaffolding pursuant to §292.090.

I allow claimant's attorney, Jonathan Pitts, an attorney's fee of 25 percent of all amounts awarded herein, which shall constitute a lien upon this award.

Made by: _____

Robert H. House
Administrative Law Judge
Division of Workers' Compensation
Signed 9/24/13