

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

Injury No.: 04-047565

Employee: Mike Nelson
Employer: Vee Jay Cement Contracting Co., Inc.
Insurer: Builders Association Self Insurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)
Date of Accident: May 17, 2004
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 6, 2007. The award and decision of Administrative Law Judge Linda J. Wenman, issued February 6, 2007, 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 16th day of August 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Mike Nelson

Injury No.: 04-047565

31.05 weeks of permanent partial disability from Employer

\$10,775.90

TOTAL:

\$11,146.90

22. Future requirements awarded: None

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Mike Nelson	Injury No.:	04-047565
Dependents:	N/A		Before the
Employer:	Vee Jay Cement Contracting Co., Inc.		Division of Workers'
			Compensation
Additional Party:	Second Injury Fund (dismissed by Employee)		Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	Builders Association Self Insurance	Checked by:	LJW:tr

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on December 8, 2006.^[1] Attorney Robert Kister represented Mike Nelson (Claimant). Vee Jay Cement Contracting Co., Inc., (Employer) was insured by Builders Association Self Insurance, and represented by Attorney Jeff Stigall. Assistant Attorney General Tracey Cordia represented the Second Injury Fund (SIF).

Prior to the start of the hearing the parties identified the following issues for disposition in this case as: occupational disease; medical causation; past medical expenses; future medical care; and liability of Employer and SIF for permanent partial disability (PPD) benefits.^[2] With submission of his post hearing brief, Claimant dismissed his SIF claim.

Claimant offered Exhibits A-Y, and Employer offered Exhibit 1. Employer objected to Exhibit W, Claimant's deposition, on the grounds of improper use during direct examination. Employer's objection is sustained. The remaining

exhibits were admitted into the record. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

Post hearing briefs were received and the case was formally submitted on January 8, 2007.^[3] Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

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SUMMARY OF EVIDENCE
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All evidence presented has been reviewed. Only testimony necessary to support this award will be summarized.

Testimony

Claimant: Claimant has worked as a concrete laborer for Employer over the past twenty years without suffering a significant injury. On Monday, May 17, 2004, Claimant was assisting in filling a pool with concrete when he caught and twisted his right leg on a piece of untied rebar. Initially, Claimant did not experience symptoms, he completed his shift, and worked the next day. Claimant did not work on Wednesday due to rain, but his right leg had become very swollen, and he went to the emergency room at Jefferson Memorial Hospital. Prior to May 17, 2004, Claimant had not experienced pain or swelling in his right leg.

At the hospital emergency room testing was completed, Claimant was informed he had a blood clot in his right leg, and he was admitted to the hospital for further medical management. Claimant came under the care of internist, Dr. Patel, and a hematologist, and was hospitalized for twelve days. Claimant was placed on blood thinning medication, and later discharged with instructions to continue his medication, and to elevate his right leg when sitting.

Claimant was kept off work until June 20, 2004. When he returned to work, Claimant was restricted from working in concrete, instructed to elevate his leg when it was possible, and to only work forty hours per week. Claimant was assigned to grating and flagging, and he tried to arrange a break every three to four hours.

Claimant continued to experience pain and swelling that extended from his mid-thigh to his ankle. He applied ice to his right leg, and the swelling would go down over night. Claimant continued to treat with Dr. Patel, he was kept on Coumadin, underwent frequent INR testing, and occasional venous doppler studies.^[4] Eventually, Employer had Claimant examined and his medical records reviewed by Dr. Rao and Dr. Bolger, and Claimant was found to be at maximum medical improvement (MMI). Dr. Rao and Dr. Bolger did not believe Claimant required further Coumadin therapy.

After being found at MMI, Claimant resumed treatment with Dr. Patel, and treatment of Coumadin, INR tests, and venous doppler studies continued. Claimant paid \$83.30 per month for his Coumadin medication, \$90.00 every other month for office visits with Dr. Patel, and \$55.00 bi-monthly for INR blood testing. During the course of treatment, Claimant developed a large area of abdominal bruising. Dr. Patel sent Claimant to Jefferson Memorial Hospital for testing, and Claimant later received a bill related to this treatment.

As of hearing, Claimant complained of a burning sensation in his right leg. He also experiences right leg swelling with prolonged standing, and he elevates his leg four to eight times per day.

Upon cross-examination, Claimant verified although his claim for compensation was filed as seeking permanent total disability, he was working full-time for Employer at the time his claim was filed. Claimant also verified he stopped working in January 2006, after sustaining a new injury in August 2004. Claimant testified he now feels better since he no longer participates in physical work.

Pertinent Medical Records

Jefferson Memorial Hospital: Pertinent records summarized in chronological order as follows:

5/19/04 – Claimant's right knee x-rays demonstrated early mild degenerative changes. A venous doppler study was interpreted as demonstrating a thrombus, poor compression, and poor flow in the right common femoral, superficial femoral, and popliteal veins. Some recannulization was present in the region of the superficial femoral and popliteal vein, which suggested the findings might be subacute.

12/28/04 – A repeat venous doppler study is obtained of Claimant's bilateral lower extremities. The study was interpreted as demonstrating a chronic thrombus in the right superficial femoral and popliteal vein, with partial compression and augmentation. Claimant's left lower extremity was found to be without thrombus.

4/20/05 – A venous doppler study was repeated of Claimant's right lower extremity, which was interpreted as unchanged

from 12/28/04.

11/30/05 – A repeat right venous doppler study was interpreted as demonstrating chronic thickening of the walls of the superficial femoral vein without an identified thrombus.

Dr. Rao: Dr. Rao is a vascular surgeon who examined Claimant on January 10, 2006. Upon examination, Dr. Rao noted Claimant had mild swelling of his right leg. Dr. Rao provided a current diagnosis of post phlebotic syndrome, and indicated Claimant needed to wear, at a minimum, knee-high compression hose. Dr. Rao wanted Claimant to be referred to a hematologist to rule out a hypercoagulation disorder. If Claimant did not have a hypercoagulation disorder, Dr. Rao opined Claimant should stop his Coumadin, and would be considered to be a maximum medical improvement (MMI). Dr. Rao found Claimant to have permanent disability of 5 -10%.

Dr. Bolger: Dr. Bolger is a hematologist/oncologist, and Claimant was referred to Dr. Bolger by Dr. Rao. Dr. Bolger examined Claimant on January 25, 2006. Upon examination Dr. Bolger noted Claimant had been prescribed knee high compression hose, and Claimant had never obtained the hose. Dr. Bolger noted Claimant exhibited mild pretibial swelling in his right leg, greater than his left, up to his knees. Dr. Bolger also noted Claimant had subtle dermatitis of his right lower leg, which was compatible with venous stasis dermatitis.

Dr. Bolger diagnosed Claimant as having sustained a single venous thrombus of his right lower limb, and associated post phlebotic syndrome. Dr. Bolger indicated medical guidelines for a first time thrombus recommend anticoagulation for three months, but no longer than six months. Dr. Bolger acknowledged anticoagulation is sometimes useful in managing post phlebotic syndrome, but surgically fitted thigh-high compression hose is normally used as a first intervention, and this had not been tried in Claimant's case. Dr. Bolger recommended Claimant's Coumadin be stopped, and Claimant be surgically fitted with thigh-high compression hose.

Dr. Bolger also ordered a venous doppler study. The study was obtained on January 25, 2006, and was interpreted as demonstrating chronic evidence of a deep vein thrombosis in the femoral and popliteal veins, without evidence an acute thrombus. Dr. Bolger opined residual venographic abnormalities do represent a risk factor for repeat thrombosis, but only a weak risk. Dr. Bolger further opined it is uncertain whether Claimant's May 17, 2004 injury precipitated the right lower leg thrombus as the original venous doppler study showed subacute features.

Deposition Testimony

Dr. Patel: Dr. Patel first examined Claimant while hospitalized at Jefferson Memorial Hospital after he had been diagnosed with an extensive right lower extremity deep vein thrombus (DVT). While hospitalized, Dr. Patel arranged for Claimant to be seen by Dr. Rosser, a hematologist. Dr. Rosser found Claimant to be at an increased risk of DVT due to his history of smoking, which causes blood vessels to narrow. Dr. Rosser had opined Claimant's only risk factors for development of DVT were his smoking, and work activities that left him standing in small confined spaces for extended periods, or in cramped or squatting positions. Dr. Patel confirmed Dr. Rosser had not found Claimant to have a hypercoagulation disorder.

After Claimant's hospital discharge, Dr. Patel had assumed Claimant's medical care, monitoring his INR levels, and adjusting his Coumadin as needed. Dr. Patel had last examined Claimant on April 11, 2006, Claimant still had swelling in his right leg, and Dr. Patel diagnosed post phlebotic syndrome. Dr. Patel testified Claimant may need to remain on Coumadin for his lifetime, as once a person has developed a DVT, they are at a greater risk of developing another clot. Dr. Patel indicated as Claimant would need to remain on Coumadin, he would also require scheduled blood testing to monitor his INR. Dr. Patel opined Claimant's DVT developed due to his work injury.

Upon cross-examination, Dr. Patel acknowledged she doesn't specialize in vascular medicine, and she has treated Claimant's DVT for two years without Claimant developing a new thrombus. Dr. Patel asserted the length of Coumadin treatment is dependent upon the DVT's underlying cause, treatment can continue from six months to two years, and Claimant's DVT was extensive. Dr. Patel verified she did not know the amount of time in a day Claimant spent in an immobilized or cramped position. Dr. Patel also verified Claimant had a thirty year history of smoking, he smoked 1 ½ packs per day, which is a significant history. Dr. Patel testified it is not possible to determine which of the risk factors provided Claimant with the highest risk of developing a DVT, but conceded Claimant's smoking is inhibiting his recovery. Finally, Dr. Patel testified she believes Claimant's work injury of May 17, 2004 was a triggering or precipitating factor in Claimant's development of his DVT, but she is not familiar with the language of the Workers' Compensation law.

Dr. Levy: Dr. Levy is a general surgeon. Early in his career, and when vascular surgery was in its infancy, Dr. Levy once performed vascular surgery. Dr. Levy examined Claimant on August 23, 2005. Upon examination, Dr. Levy noted Claimant had marked swelling in his right lower extremity. Dr. Levy diagnosed Claimant with a DVT of his right leg, and rated Claimant's disability at 45% PPD. Dr. Levy opined Claimant's right leg twisting injury of May 17, 2004 was a substantial factor in his development of his DVT, and any subsequent condition related to the DVT would be related to the injury.

Dr. Levy disagreed with the radiologist who described recannulization on the May 19, 2004 venous doppler study, and only agreed there was a partial occlusion, which can be very similar to re-cannulization. Dr. Levy testified Claimant's estimated future medical costs are reasonable, and does not believe Claimant will require vascular surgery.

Upon cross-examination, Dr. Levy agreed people who smoke constrict their blood vessels, and are more likely to develop a blood clot. Dr. Levy was unaware of how long, or how much Claimant smoked. Nor did Dr. Levy know if Claimant had been prescribed compression hose to wear. Dr. Levy verified he believed Claimant's May 2004 injury was traumatic, but Claimant was kneeling and squatting in an awkward position, although he doesn't know how long Claimant was in these positions.

Dr. Ludwig: Dr. Ludwig is a board certified surgeon, who has completed a fellowship in vascular surgery, and is a registered vascular technologist. Dr. Ludwig initially did not examine Claimant, but completed a record review. Dr. Ludwig later examined Claimant on April 10, 2006.

Dr. Ludwig completed his record review on March 10, 2006, and concluded Claimant's right lower extremity DVT preexisted his work injury because recanalization was present on Claimant's initial venous doppler study, and recanalization takes months to occur. Dr. Ludwig testified recanalization is an attempt by the body to re-open the blocked vein, this process happens over time, and the presence of recanalization indicates a clot is not new or "acute." Dr. Ludwig defined the word "subacute" as being a chronic condition.^[5] Dr. Ludwig concluded Claimant's work was not a substantial factor in causing his DVT, and in his initial record review Dr. Ludwig did not comment on whether Claimant's work may have aggravated the thrombus. Dr. Ludwig did rate Claimant's right leg disability as 10% referable to the entire leg, with 1% attributable to Claimant's May 2004 injury. Further, Dr. Ludwig opined Claimant no longer required Coumadin therapy, based on standard therapy protocol that advises a six month treatment regimen.

Dr. Ludwig examined Claimant on April 10, 2006, and diagnosed post phlebotic syndrome of Claimant's right leg. Dr. Ludwig specifically questioned Claimant regarding the length of time Claimant worked in squatting, kneeling, or confined spaces. Claimant informed Dr. Ludwig he did not spend any prolonged time in those positions while working. Dr. Ludwig considered "prolonged" to indicate a position of 15-20 minutes or longer. Based on Claimant's answer, Dr. Ludwig concluded Claimant's work had not predisposed Claimant to the development of a DVT. Dr. Ludwig advised Claimant to wear compression hose, and again indicated Claimant had received sufficient Coumadin therapy.

Upon cross-examination, Dr. Ludwig confirmed he examined Claimant on one occasion, and he did not speak with Claimant's treating physician before he rendered his opinion. Dr. Ludwig also confirmed he did not view the actual May 19, 2004 venous doppler images, rather, he relied on the radiologist's report interpreting the study. Dr. Ludwig agreed had he viewed the doppler study images, he would be in a better position to determine whether Claimant's DVT had been acute or subacute. However, Dr. Ludwig again asserted the reviewing radiologist did not "waffle" concerning his finding of recanalization demonstrated on the study. Dr. Ludwig also acknowledged later venous doppler studies do not include the word recanalization, but the later studies describe blood flow within the right superficial femoral and popliteal veins, which means it had to have recanalized. Dr. Ludwig dismissed a suggestion that sub-therapeutic INR levels would lengthen the amount of time a patient is required to remain on Coumadin, but Dr. Ludwig did agree with Dr. Rao's assessment regarding Claimant's inability to stand for long periods. Finally, Dr. Ludwig agreed it is possible for trauma to cause a DVT.

FINDINGS OF FACT & RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues relating to occupational disease

Claimant alleges the occupational hazard of work as a concrete laborer was the source of his right lower extremity DVT. Employer accepted Claimant's right leg twisting injury as an accident. Section 287.067 RSMo., defines occupational disease as:

. . . an identifiable disease arising with or without human fault out of and in the course of the employment.^[6] Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease needs not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

In cases of alleged occupational disease, the disease must be occupationally induced, rather than an ordinary disease of life. *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296 (Mo.App.1991) (overruled on other grounds). An occupational disease is not compensable if work is merely "a triggering or precipitating factor". §287.067.2 RSMo. The exposure to the disease must be greater or different from disease exposure to the general public, and there must be a disease/work link common to the specific job or profession. *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63 (Mo.App. 1995). The work must be a substantial factor in the cause of the resulting medical condition or disability. §287.020.2 RSMo. A causative factor may be substantial even if it is not the primary or most significant factor. *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App. 1998) (overruled on other grounds). Further, there is no minimum percentage set out in the Workers' Compensation Law defining 'substantial factor'. *Id.* Whether employment is a substantial factor in causing the injury is a question of fact. *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. 1999) (overruled on other grounds).

Claimant's theory of an occupational disease as the source of his DVT fails for multiple reasons. First, two of Claimant's medical experts, Dr. Patel and Dr. Levy testified Claimant's DVT developed as a result of an injury. Second, when asked by Dr. Ludwig, Claimant specifically denied working in positions of squatting, kneeling, or in confined spaces for prolonged periods. I find Claimant failed to establish his injury was the result of an occupational disease. Employer has accepted that an injury by accident occurred on May 17, 2004. I find Claimant sustained an injury by accident involving his right leg on May 17, 2004.

At the start of hearing, Claimant raised as an issue occupational hearing loss.^[7] Claimant offered no evidence to support occupational exposure or any hearing loss. I find Claimant's allegation of alleged hearing loss to be without merit.

Issues relating to medical causation

The true question in dispute involves the relationship of Claimant's DVT to the twisting of his right leg on the date of injury. Claimant alleges the twisting of his right leg caused his right lower extremity DVT. Employer alleges Claimant's DVT was present before the twisting injury occurred, based on the results of the initial venous doppler study performed on May 19, 2004.

Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds). Medical causation must be established within a reasonable degree of medical probability. *Fisher v. Archdiocese of St. Louis*, 793 S.W.2d 195 (Mo.App. 1990) (overruled on other grounds). Reasonable probability is based on reason and experience that inclines the mind to believe, but leaves room for doubt. *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 320 (Mo.App. 1986).

The medical experts provide differing opinions regarding the relationship of Claimant's DVT to his right leg twisting injury of May 17, 2004. Claimant's experts, Dr. Patel and Dr. Levy opined Claimant's right leg twisting injury allowed the DVT to evolve. Employer's experts, Dr. Rao, Dr. Bolger, and Dr. Ludwig have expressed opinions (either in medical reports or deposition testimony) Claimant's right lower extremity DVT was already present on the date of injury due to the presence of recanalization as noted by the radiologist on Claimant's May 19, 2004 venous doppler study. Drs. Rao, Bolger, and Ludwig indicated recanalization does not occur overnight, but takes months to develop. Drs. Patel and Levy believe the radiologist interpreted the doppler study incorrectly. None of the medical experts reviewed the actual doppler images, and the radiologist was not deposed. Other than mere speculation that the radiologist was somehow incorrect in his interpretation, Claimant has not produced any evidence the radiologist was wrong. I find the opinions of Drs. Rao, Bolger, and Ludwig to be persuasive, and find Claimant's DVT preexisted his May 17, 2004 injury.

However, Employer's expert, Dr. Ludwig does opine in a March 10, 2006 letter, Claimant's right leg twisting injury of May 17, 2004 may have exacerbated his preexisting DVT. The aggravation of a preexisting condition is a compensable injury if the claimant establishes a direct casual link between job duties and the aggravated condition. *See Smith v. Climate Engineering*, 939 S.W.2d 429, 433-34 (Mo. App. E.D. 1996) (overruled on other grounds). If a claimant can show that the performance of the usual and customary duties led to a breakdown or change in pathology, the injury is compensable. *Bennett v. Columbia Health Care*, 80 S.W.3d 524 (Mo.App.W.D. 2002) (overruled on other grounds). The worsening of a preexisting condition is a change in pathology. *Id.* at 529. Claimant clearly suffered a breakdown in his condition following the right leg twisting incident on May 17, 2004, which took a then asymptomatic condition and caused it to be symptomatic. In regard to the aggravation of Claimant's preexisting DVT, I find the opinion of Dr. Ludwig to be persuasive, and Claimant has met his burden to establish medical causation regarding the aggravation of a preexisting condition.

Issues relating to liability for unpaid medical expenses

Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury, and if employer does not contest the reasonableness of the bills. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989). Further, when an employer has notice of the need for medical treatment, and fails to provide such treatment, an employee is free to select a medical care provider, and the employer will be liable for the costs incurred. *Feltrop v. Eskens Drywall and Insulation*, 957 S.W.2d 408 (Mo.App. 1997) (overruled on other grounds).

Employer has paid \$34,327.77 in medical expenses. In order to determine whether Employer has additional liability for medical expenses will turn on when Claimant reached MMI from the May 17, 2004 injury. Claimant was found by Dr. Rao to be at MMI on January 10, 2006, and Employer notified Dr. Patel on February 16, 2006, that she was no longer authorized to treat Claimant. Dr. Patel has opined Claimant may need to remain on Coumadin for life. Drs. Rao, Bolger, and Ludwig have all opined Claimant has received Coumadin in excess of the normal six month treatment protocol for a first

time DVT. I find the opinion of Drs. Rao, Bolger, and Ludwig to be persuasive, and find Claimant reach MMI from the May 17, 2004 injury on January 10, 2006.

Claimant seeks \$2,354.60 in past medical expenses not paid by Employer. Billing in the amount of \$1,642.09 was found scattered throughout Claimant's extensive evidentiary record. Of the billed amount, \$1,271.09 consisted of itemized billing. Of the itemized billing, only one bill was incurred before Claimant was found to be at MMI. Claimant presented a bill for \$371.00 indicating a date of service of January 2, 2006. The bill is from a collection agency, and indicated the provider to be Crystal City Emergency Services, LLC. Claimant identified the bill as representing services he received at Jefferson Memorial Hospital after he developed extensive abdominal bruising, and was sent to the hospital by Dr. Patel. Corresponding hospital records support Claimant's testimony. Of the amount requested by Claimant, I find Employer liable for \$371.00 in unpaid medical expenses.

Issues relating to future medical care

Claimant sought a ruling regarding future medical benefits as it relates to this injury.^[8] Claimant is not required to present evidence concerning the specific future medical treatment that will be necessary in order to receive an award of future medical care. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo.App. 1997) (overruled in part). Future medical benefits may be awarded if a claimant shows by reasonable probability that there will be a need for additional medical care due to the work-related injury. *Id.* When future medical benefits are awarded, the medical care must flow from the accident in order to hold an employer liable. *Id.* Claimant's DVT was found to preexist his May 17, 2004 work injury. I find Employer has provided all necessary medical care related to an aggravation of Claimant's preexisting condition, and Employer is not liable for future medical care.

Issues relating to permanent partial disability owed by Employer

A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App. 1991) (overruled on other grounds). Dr. Levy rated Claimant's right leg at 45% PPD. Dr. Rao rated Claimant's right leg disability at 5-10% PPD, and Dr. Ludwig rated Claimant's right leg disability at 10% PPD with 9% preexisting and 1% referable to the May 17, 2004 injury. All rating physicians agree Claimant has mild swelling of his right leg, post phlebotic syndrome, and he is restricted to standing approximately one hour.

With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). Taking into consideration the opinions expressed by the various physicians, I find Claimant has 20% disability of his right leg, of which 5% preexisted his injury, and 15% is due to the May 17, 2004 work related injury for which Employer is liable.

CONCLUSION

In summary, Claimant sustained an injury on May 17, 2004, that arose out of and in the course of his employment with Employer. All necessary medical care has been provided. Claimant is awarded \$10,775.90 PPD referable to Claimant's right leg, and \$371.00 in past medical expenses. Claimant's attorney is entitled to a 20% lien of any payments made to Claimant. Claimant voluntarily dismissed his SIF claim.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 04-102224

Employee: Mike Nelson
Employer: Vee-Jay Cement Contracting Co., Inc.
Insurer: St. Paul Fire & Marine Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 27, 2004
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 6, 2007. The award and decision of Administrative Law Judge Linda J. Wenman, issued February 6, 2007, 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 16th day of August 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Mike Nelson Injury No.: 04-102224
Dependents: N/A Before the
Employer: Vee Jay Cement Contracting Co., Inc. **Division of Workers'**
Compensation
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: St. Paul Fire & Marine Insurance Co.
Hearing Date: December 8, 2006 Checked by: LJW:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
3. 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
6. Date of accident or onset of occupational disease: August 27, 2004
7. State location where accident occurred or occupational disease was contracted: St. Louis 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
10. 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: While working light duty as a flagger, Claimant was hit by a car sustaining injuries to his left shoulder and left knee.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left shoulder and left knee
15. Nature and extent of any permanent disability: 30% left shoulder, 20% left knee, and 15% load for multiplicity.
15. Compensation paid to-date for temporary disability: \$21,499.77, representing 37 weeks.
16. Value necessary medical aid paid to date by employer/insurer? \$51,515.85

Employee: Mike Nelson Injury No.: 04-102224

17. Value necessary medical aid not furnished by employer/insurer? None
19. Employee's average weekly wages: Sufficient to produce the rates below.
19. Weekly compensation rate: \$637.87 / \$354.05
20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

116.84 weeks of permanent partial disability from Employer \$41,367.20

22. Second Injury Fund liability: Yes

19.9 weeks of permanent partial disability from Second Injury Fund \$7,045.60

TOTAL: \$48,412.80

23. Future requirements awarded: None

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Mike Nelson	Injury No.:	04-102224
Dependents:	N/A	Before the	
Employer:	Vee Jay Cement Contracting Co., Inc.	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	St. Paul Fire & Marine Insurance Co.	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	LJW:tr

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on December 8, 2006. ^[9] Attorney Robert Kister represented Mike Nelson (Claimant). Vee Jay Cement Contracting Co., Inc., (Employer) was insured by St. Paul Fire & Marine Insurance Co., and represented by Attorney Mary Calzaretta. Assistant Attorney General Tracey Cordia represented the Second Injury Fund (SIF).

Prior to the start of the hearing the parties identified the following issues for disposition in this case as the liability of Employer and SIF for permanent partial disability (PPD), or permanent total (PTD) benefits. ^[10]

Claimant offered Exhibits A-Y, and Employer offered Exhibits 1-2. Employer objected to Exhibit W, Claimant's deposition, on the grounds of improper use during direct examination. Employer's objection is sustained. The remaining exhibits were admitted into the record. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

Post hearing briefs were received and the case was formally submitted on January 8, 2007. ^[11] Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

On December 15, 2006, Claimant filed an amended claim to include hearing loss. The amended claim was filed after the close of evidence, out of time, without consent of the adverse parties, and without notification or leave of the Court. Not only is the amended claim untimely, but Claimant did not retain his right to amend his claim to conform to the evidence, as no testimonial or documentary evidence regarding hearing loss was produced at trial. This Court can find no legal authority that would allow this amendment. Accordingly, there is no hearing loss issue to be considered in this case.

SUMMARY OF EVIDENCE

All admissible evidence presented has been reviewed. Only testimony necessary to support this award will be summarized.

Testimony

Claimant: Claimant has worked as a concrete laborer for Employer over the past twenty years without suffering a significant injury. On Monday, May 17, 2004, Claimant was assisting in filling a pool with concrete when he caught and twisted his right leg on a piece of untied rebar. Initially, Claimant did not experience symptoms, he completed his shift, and worked the next day. Claimant did not work on Wednesday due to rain, but his right leg had become very swollen, and he went to the emergency room at Jefferson Memorial Hospital. Prior to May 17, 2004, Claimant had not experienced pain or swelling in his right leg.

At the hospital emergency room testing was completed, Claimant was informed he had a blood clot in his right leg, and he was admitted to the hospital for further medical management. Claimant came under the care of internist, Dr. Patel, and a hematologist, and was hospitalized for twelve days. Claimant was placed on blood thinning medication, and later discharged with instructions to continue his medication, and to elevate his right leg when sitting.

Claimant was kept off work until June 20, 2004. When he returned to work, Claimant was restricted from working in concrete, instructed to elevate his leg when it was possible, and to only work forty hours per week. Claimant was assigned to grating and flagging, and he tried to arrange a break every three to four hours.

On August 27, 2004, Claimant was working light duty flagging traffic when he was struck by a car. The impact threw Claimant over the car's hood, and he landed on his left side. He initially thought he had not been injured, but approximately one hour after the impact he noticed his left knee was stiffening. Employer directed him to SSM Healthcare for medical evaluation. While being treated at SSM Healthcare, Claimant reported he was also experiencing discomfort in his left shoulder. Several days after the injury, SSM Healthcare obtained a MRI of Claimant's left knee, and referred him to an orthopedist, Dr. Kriegshauser.

Dr. Kriegshauser eventually performed a left knee reconstruction surgery, and a left shoulder surgery. Claimant underwent physical therapy after each surgery, and during May 2005, he underwent a functional capacity evaluation (FCE). Following the FCE, Dr. Kriegshauser informed Claimant he could not return to work as a concrete laborer, and he was released from care.

After his release, Claimant's temporary total disability (TTD) was stopped, and he was without income. He applied for, and received unemployment benefits for several months, and he applied for Social Security Disability. He later began to receive a union disability pension. In early September 2005, Claimant found employment with a company that buried telephone cable. Claimant would open a hole, place the cable using a machine that fed the cable, and then cover the hole. The job did not involve lifting, but did involve occasional bending. Claimant would walk behind a person operating a trenching machine, and he stood for 1-11/2 hours at a time. He was scheduled to work five days per week, depending on weather conditions. He stopped working for this company in either December 2005 or January 2006. Claimant would like to return to work, but does not feel he physically can work.

As of hearing, Claimant is unable to flex his left leg fully, as it causes pulling and tightness. Claimant has limited use of his left shoulder, and he can not use it above his head. He experiences grinding, and a burning sensation from his

shoulder down to his knuckles.

Regarding Claimant's right leg, he continued to experience pain and swelling that extended from his mid-thigh to his ankle. He applied ice to his right leg, and the swelling would go down over night. Claimant continued to treat with Dr. Patel, he was kept on Coumadin, underwent frequent INR testing, and occasional venous doppler studies.^[12] Eventually, Employer had Claimant examined and his medical records reviewed by Dr. Rao and Dr. Bolger, and Claimant was found to be at maximum medical improvement (MMI). Dr. Rao and Dr. Bolger did not believe Claimant required further Coumadin therapy.

After being found at MMI for his right leg, Claimant resumed treatment with Dr. Patel, and treatment of Coumadin, INR tests, and venous doppler studies continued. As of hearing, Claimant complained of a burning sensation in his right leg. He also experiences right leg swelling with prolonged standing, and he elevates his leg four to eight times per day.

Upon cross-examination by Employer, Claimant verified while he worked for the cable company he was not physically accommodated, and he did not miss work due to his August 2004 injuries. Claimant also verified he stopped working in January 2006, because he could no longer stand or kneel for sustained periods, but he confirmed no physician has told him he cannot work. Claimant also verified he can no longer perform union work, or he will be ineligible to collect his union disability pension, and consequently he earns less when he is working. Claimant acknowledged he has not needed to seek medical treatment for his left knee since his release from care, and he will occasionally take a pain pill for his left shoulder.

Upon cross-examination by SIF, Claimant confirmed he was able to perform the cable job because he worked at a waist high level. Claimant confirmed the last time he saw Dr. Kriegshauser was on May 12, 2005. Claimant verified the only difficulty he now experiences with his left knee is stiffness while going up/down stairs, and he is otherwise doing well. Claimant also verified he completed the 10th grade, and had no problems during school with reading or math.

Pertinent Medical Records

Jefferson Memorial Hospital: Pertinent records summarized in chronological order as follows:

5/19/04 – Claimant's right knee x-rays demonstrated early mild degenerative changes. A venous doppler study was interpreted as demonstrating a thrombus, poor compression, and poor flow in the right common femoral, superficial femoral, and popliteal veins. Some recannulization was present in the region of the superficial femoral and popliteal vein, which suggested the findings might be subacute.

12/28/04 – A repeat venous doppler study is obtained of Claimant's bilateral lower extremities. The study was interpreted as demonstrating a chronic thrombus in the right superficial femoral and popliteal vein, with partial compression and augmentation. Claimant's left lower extremity was found to be without thrombus.

4/20/05 – A venous doppler study was repeated of Claimant's right lower extremity, which was interpreted as unchanged from 12/28/04.

11/30/05 – A repeat right venous doppler study was interpreted as demonstrating chronic thickening of the walls of the superficial femoral vein without an identified thrombus.

Dr. Rao: Dr. Rao is a vascular surgeon who examined Claimant on January 10, 2006. Upon examination, Dr. Rao noted Claimant had mild swelling of his right leg. Dr. Rao provided a current diagnosis of post phlebotic syndrome, and indicated Claimant needed to wear, at a minimum, knee-high compression hose. Dr. Rao wanted Claimant to be referred to a hematologist to rule out a hypercoagulation disorder. If Claimant did not have a hypercoagulation disorder, Dr. Rao opined Claimant should stop his Coumadin, and would be considered to be a maximum medical improvement (MMI). Dr. Rao found Claimant to have permanent disability of 5 -10%.

Dr. Bolger: Dr. Bolger is a hematologist/oncologist, and Claimant was referred to Dr. Bolger by Dr. Rao. Dr. Bolger examined Claimant on January 25, 2006. Upon examination Dr. Bolger noted Claimant had been prescribed knee high compression hose, and Claimant had never obtained the hose. Dr. Bolger noted Claimant exhibited mild pretibial swelling in his right leg, greater than his left, up to his knees. Dr. Bolger also noted Claimant had subtle dermatitis of his right lower leg, which was compatible with venous stasis dermatitis.

Dr. Bolger diagnosed Claimant as having sustained a single venous thrombus of his right lower limb, and associated post phlebotic syndrome. Dr. Bolger indicated medical guidelines for a first time thrombus recommend anticoagulation for three months, but no longer than six months. Dr. Bolger acknowledged anticoagulation is sometimes useful in managing post phlebotic syndrome, but surgically fitted thigh-high compression hose is normally used as a first intervention, and this had not been tried in Claimant's case. Dr. Bolger recommended Claimant's Coumadin be stopped, and Claimant be surgically fitted with thigh-high compression hose.

Dr. Bolger also ordered a venous doppler study. The study was obtained on January 25, 2006, and was interpreted as demonstrating chronic evidence of a deep vein thrombosis in the femoral and popliteal veins, without evidence an acute thrombus. Dr. Bolger opined residual venographic abnormalities do represent a risk factor for repeat thrombosis, but only a weak risk. Dr. Bolger further opined it is uncertain whether Claimant's May 17, 2004 injury precipitated the right lower leg thrombus as the original venous doppler study showed subacute features.

Dr. Kriegshauser: Pertinent records summarized in chronological order as follows:

9/13/04 – Claimant was examined for the first time. Claimant's MRI of his left knee demonstrated a complete rupture of his anterior cruciate ligament (ACL). Dr. Kriegshauser diagnosed a torn left ACL, and left shoulder strain, but an MRI was ordered to rule out a rotator cuff tear.

9/15/04 – The MRI of Claimant's left shoulder revealed a high grade partial tear of Claimant's distal superior rotator cuff at the insertion point of the greater tuberosity.

9/24/04 – Claimant is informed of his left shoulder MRI results, and a determination is reached to surgically repair his left knee before completing surgical repair of his shoulder.

10/19/04 – Dr. Kriegshauser performed left medial and lateral meniscectomies, patella chondroplasty, and ACL reconstruction with patella tendon and bone graft allograft of Claimant's left knee.

11/5/04 – Physical therapy of Claimant's left knee started.

12/7/04 – Dr. Kriegshauser performed a debridement of a torn labrum, repair of the rotator cuff, excision of the distal clavicle, and acromioplasty of Claimant's left shoulder.

1/31/05 – Physical therapy of Claimant's left shoulder started.

5/2/05 – An FCE is obtained.

5/12/05 – Dr. Kriegshauser reviewed Claimant's FCE and determined: the FCE placed Claimant in a light physical demand level over an eight hour day; restrictions confining Claimant to working at waist level or below would allow Claimant to work in a medium heavy physical demand level over an eight hour day; Claimant would be unable to return to work as a concrete laborer; any future work of Claimant should not involve repetitive or heavy stress on his left shoulder, particularly at or above shoulder level; Claimant was doing "very well" in regard to his left knee, he had full range of motion of his knee with good stability, and no significant effusion; and Claimant was at MMI from the August 27, 2004 injury.

5/23/05 – Dr. Kriegshauser rated Claimant's injuries as 15% PPD referable to the left knee, and 20% PPD referable to his left shoulder.

Deposition Testimony

Dr. Levy: Dr. Levy is a general surgeon. Early in his career, and when vascular surgery was in its infancy, Dr. Levy once performed vascular surgery. Dr. Levy examined Claimant on August 23, 2005. Upon examination, Dr. Levy noted Claimant was fifty four years old, had marked swelling in his right lower extremity; marked decreased range of motion of Claimant's left shoulder, with moderate pain with motion of the left shoulder; and slight loss of flexion of Claimant's left knee with marked grating of the left knee. Dr. Levy diagnosed Claimant with a DVT of his right leg, and operated left knee and shoulder as outlined in Dr. Kriegshauser's progress notes. Dr. Levy rated Claimant's right leg disability at 45% PPD; 20% disability for his left knee; and 45% disability for Claimant's left shoulder. Dr. Levy opined the combination of the May 17, 2004 and August 27, 2004 injuries created a greater disability than the simple sum, and a load factor should be applied. Dr. Levy also opined there was a synergistic effect between Claimant's various disabilities, and found after considering Claimant's age, only occupation as a concrete worker, and his disabilities, Claimant was PTD and unable to compete in the open labor market. Dr. Levy noted the rating opinions of Dr. Ludwig and Dr. Kriegshauser only considered the injuries they evaluated, and didn't consider the disability of the other injury for purposes of considering employability.

Upon cross-examination by Employer, Dr. Levy acknowledged Claimant had given the impression he suffered from moderate pain in his left knee and shoulder. Dr. Levy did not know Claimant had returned to work after the August 27, 2004 injuries. Dr. Levy was also unaware Claimant was not taking any medication for his left knee or shoulder. Dr. Levy verified he would restrict Claimant's left shoulder to not working overhead, no frequent lifting greater than 20 pounds, and lifting of 25-30 pounds on an occasional basis, and not working in awkward positions. Dr. Levy testified the restrictions would limit Claimant to light work if only considering his left shoulder disability.

Upon cross-examination by SIF, Dr. Levy verified he had not performed any vocational or educational testing of Claimant. Dr. Levy acknowledged Claimant had no disability related to his right arm. Dr. Levy also acknowledged

Claimant's FCE had placed him in a light physical demand over an eight hour day, and if Claimant worked at or below waist level he could perform medium demand work. Finally, Dr. Levy conceded the only job Dr. Kriegshauser had restricted Claimant from working was as a concrete laborer.

Dr. Kriegshauser: Dr. Kriegshauser is a board certified orthopedic surgeon. Dr. Kriegshauser verified Claimant's had an 80% tear of his left rotator cuff prior to surgical repair. Dr. Kriegshauser released Claimant from care regarding his left knee on April 11, 2005, and released Claimant on May 12, 2005 regarding Claimant's left shoulder. Dr. Kriegshauser verified he had not placed any restrictions regarding Claimant's left knee when he was released from care. Dr. Kriegshauser had placed permanent work restrictions regarding Claimant's left shoulder that included: no work as a concrete laborer; no lifting with his left arm above his shoulder level; lifting of 25 pounds using his left arm, and only on an occasional basis. Dr. Kriegshauser also confirmed he had rated Claimant's left knee disability at 15% PPD, and his left shoulder disability at 20% PPD.

Upon cross-examination by Claimant, Dr. Kriegshauser verified all treatment, ratings, and FCE were restricted to Claimant's left knee and left shoulder. Dr. Levy confirmed that due to the type of injury Claimant received to his left knee, Claimant's risk of developing arthritis has increased. Dr. Kriegshauser testified Claimant's difficulty climbing and descending stairs is related with the chondromalacia of his patella rather than his ACL, as ACL problems normally present when a patient attempts to perform squats or heavy physical work.

Vocational Deposition Testimony

Susan Shea, M.A.: Ms. Shea is a certified rehabilitation counselor, who interviewed Claimant on August 15, 2006. In addition to interviewing Claimant, Ms. Shea reviewed Claimant's medical records, and looked up Claimant's previous work in the Dictionary of Occupational Titles.

Ms. Shea determined Claimant's "residual functional capacity" by considering: Dr. Levy's assertion Claimant had increased pain after being on his feet more than thirty minutes, and left shoulder pain that was exacerbated by working above horizontal levels; Dr. Rao's assertion Claimant can work without limits, but would incur disability related to his right leg and had an inability to stand for a long period of time; Dr. Patel's assertion Claimant should not sit for more than two hours or stand for more than one hour; Dr. Kriegshauser's assertion Claimant could work at a light lifting level, and a medium work level below his waist based on his FCE; and Claimant's assertion he could stand and sit for a couple of hours before his right leg would swell, and his left shoulder hurt continuously and the pain would increase with use. Ms. Shea noted Claimant's FCE did not consider Claimant's DVT, and only Dr. Levy's report considered both the May and August 2004 injuries.

Based on her interview and review, Ms. Shea opined Claimant was unemployable in the competitive open labor market, due to a combination of his May and August 2004 injuries. Ms. Shea clarified she did not consider any impairment Claimant had that arose after August 27, 2004.

Upon cross-examination by Employer, Ms. Shea confirmed Claimant had informed her he had recovered "pretty well" from his left knee surgery, and Dr. Kriegshauser had released Claimant without knee restrictions. Regarding Claimant's cable laying employment, Ms. Shea believed Claimant's employment lasted three months, and Claimant left the employment due to problems with his right leg and left shoulder. Ms. Shea conceded the cable job did not require lifting, Claimant did not experience difficulty performing the job because he worked at waist level or below, and Claimant never missed work due to his August 2004 injuries. Ms. Shea also acknowledged Claimant's FCE placed Claimant in a light physical demand over the course of an eight hour day, but if working below waist level, Claimant could work in a medium to heavy physical demand. Ms. Shea conceded a job as a concrete raker would be within Claimant's medical restrictions. Finally, Ms. Shea verified she did not conduct any educational testing to determine Claimant's vocational aptitude.

Upon cross-examination by SIF, Ms. Shea verified Claimant had indicated he had been a "fair" student while he attended school. Ms. Shea confirmed Claimant is right hand dominant. Taking into consideration the restrictions placed by Dr. Patel and Dr. Kriegshauser, Ms. Shea acknowledged it would be possible for Claimant to perform sedentary work.

FINDINGS OF FACT & RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Liability of the Employer and Second Injury Fund for Permanent Total Disability

Claimant seeks permanent total disability benefits from either Employer or Second Injury Fund. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled on other ground). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled on other grounds). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably

expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled on other grounds). The Second Injury Fund is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone. §287.220.1 RSMo. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995).

Claimant alleges PTD against either Employer or SIF. In reality, if PTD is proven, the evidence produced by Claimant would suggest PTD against SIF. Claimant's medical and vocational experts opined Claimant's PTD is due to a combination of Claimant's May 2004 right leg injury and his August 2004 injuries. Although Claimant's medical and vocational experts opined Claimant was PTD, their evaluations were lacking crucial information that might have impacted their opinions. Dr. Levy did not know Claimant had returned to work after the August 27, 2004 injuries. Dr. Levy was also unaware Claimant was not taking any medication for his left knee or shoulder. Ms. Shea asserted she analyzed Claimant's "global functional capacity evaluation" when rendering her opinion, but Ms. Shea conducted no educational testing to consider Claimant's potential for retraining, did not discuss or evaluate Claimant's potential transferable skills, and did not look to see if any potential jobs existed in the marketplace that would meet Claimant's restrictions.

Claimant is fifty-six years old, has a tenth grade education, and has always worked as a laborer. He has also incurred serious injury to his right leg, left knee, and left shoulder. All these factors favor a finding of PTD for Claimant. However, Claimant's age, while approaching the age of an "older worker," does not yet place Claimant within that category, and although Claimant has a limited education, he reportedly did "fair" while attending school. There is no doubt Claimant would have a difficult time returning to any form of physical labor, although he did return to work within his restrictions for three plus months, and worked forty hours a week. Claimant does not take any medication that interferes with his ability to physically or mentally function in the workforce. By Claimant's own testimony, his left knee is "doing well," but he continues to experience difficulty and limitations regarding his left shoulder and right leg.

When pressed by SIF during cross-examination, Ms. Shea agreed it was possible for Claimant to perform sedentary work applying the restrictions placed by Dr. Patel and Dr. Kriegshauser, provided Claimant was afforded a fifteen minute break every two hours to change positions (Exhibit H, pgs 66-67). Dr. Patel was the treating physician for Claimant's right leg DVT. Dr. Kriegshauser was the treating physician for Claimant's left shoulder and left knee. As treating physicians, these physicians are in the best position to determine the appropriate permanent physical restrictions for Claimant. Based on the evidence available, I find Claimant is not permanently and totally disabled, and neither Employer nor SIF is liable for PTD benefits.

Issues relating to permanent partial disability owed by Employer

A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App. 1991) (overruled on other grounds). Dr. Levy rated Claimant's left shoulder at 45% PPD, and his left knee at 20% PPD. Dr. Kriegshauser rated Claimant's left shoulder at 20% PPD, and his left knee at 15% PPD. All rating physicians agree Claimant has permanent restrictions regarding his left shoulder, and Dr. Kriegshauser indicated Claimant can not return to work as a concrete laborer.

With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). Taking into consideration the opinions expressed by the various physicians, and the record as a whole, I find Claimant has 30% disability of his left shoulder, 20% disability referable to his left knee, and 15% multiplicity or \$41,367.20 for which Employer is liable.

Issues relating to permanent partial disability owed by Second Injury Fund

Once a determination is made that a claimant is not permanently and totally disabled, the inquiry then turns to what degree, if any, is an individual permanently partially disabled for purposes of SIF liability. *Leutzinger v. Treasurer of the State of Missouri*, 895 S.W. 591 (Mo.App. 1995). Section 287.220.1 RSMo., provides that SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and pre-existing conditions must produce additional disability greater than the last injury standing alone.

Claimant's previous disability relates to his May 2004 right leg injury and preexisting DVT. There is no question Claimant's right leg injury created a hindrance or obstacle to his employment. Claimant was off work for a significant period of time, and was on light duty when his last injury occurred. Claimant has developed post phlebotic syndrome as a result of the injury, and now has permanent work restrictions. I find Claimant's preexisting right leg injury rose to a level to produce a hindrance or obstacle to employment, and meets the statutory threshold needed for SIF liability. I further find Claimant has 15% PPD referable to his preexisting injury, and resulting post phlebotic syndrome. I find when Claimant's last injuries to his left knee and shoulder are combined with his preexisting right leg disability, the combination creates a

substantially greater disability than the simple sum, and a synergistic affect occurs. Applying a 15% load factor, Claimant is entitled to receive 19.9 weeks of compensation from SIF or \$7,045.60.

CONCLUSION

In summary, Claimant sustained an injury on August 27, 2004 that arose out of and in the course of his employment with Employer. Employer is liable for 30% PPD referable to Claimant's left shoulder, 20% PPD referable to his left knee, and 15% multiplicity. Further, Claimant is awarded 19.9 weeks of additional PPD from SIF. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[1] This case was heard in conjunction with Claimant's companion case #04-102224.

[2] Also prior to the start of the hearing, Claimant dismissed duplicate injury number 04-147986.

[3] Attorney Kister's post hearing brief was reviewed from page 1 through the first paragraph contained on page 19. The remainder of Attorney Kister's brief was not reviewed, and will not be considered. On page 19, beginning with the first sentence of the second paragraph, Attorney Kister begins to reveal the pre-trial settlement recommendation given by the mediation ALJ. Code of State Regulations 8 CSR 50-2.050 (3) (4), prohibits an ALJ from acquiring knowledge of pre-trial settlement matters without the parties to the case acquiescing to such knowledge. Attorney Stigall never indicated his client wished to have the trial judge privy to such knowledge.

[4] International normalized ratio (INR) testing provides a standardized test upon which physicians can monitor and adjust a patient's Coumadin dose. Venous doppler studies were used to track the status of Claimant's deep venous thrombus.

[5] The word "subacute" was used by the reviewing radiologist when interpreting Claimant's initial venous doppler study.

[6] Section 287.020.3(1) defines injury as that which has arisen out of and in the course of employment. Section 287.020.3(2) instructs that to arise out of and in the course of employment an injury must meet four requirements; (a) the employment is a substantial factor causing the injury, (b) the injury is a natural incident of the work/employment, (c) the employment was a proximate cause of the injury, and (d) the injury is not from risk unrelated to the employment to which other workers would be equally exposed outside of employment in normal life.

[7] In his post hearing brief, Attorney Kister's contented the ALJ dismissed Claimant's hearing loss issue from his claim. Attorney Kister is mistaken, and Claimant's hearing loss issue was never dismissed.

[8] On page 16 of Claimant's post hearing brief it appears Claimant has abandoned his claim for future medical benefits, although the legal basis is misstated.

[9]

This case was heard in conjunction with Claimant's companion case #04-047565.

[10] In his post hearing brief, Claimant suggested an underpayment of TTD occurred as Employer paid TTD at an incorrect rate. A TTD underpayment was not raised as a disputed issue at hearing and it will not be considered.

[11] Attorney Kister's post hearing brief was reviewed from page 1 through the first paragraph contained on page 19. The remainder of Attorney Kister's brief was not reviewed, and will not be considered. On page 19, beginning with the first sentence of the second paragraph, Attorney Kister begins to reveal the pre-trial settlement recommendation given by the mediation ALJ. Code of State Regulations 8 CSR 50-2.050 (3) (4), prohibits an ALJ from acquiring knowledge of pre-trial settlement matters without the parties to the case acquiescing to such knowledge. Neither, Attorney Calzaretta or Attorney Cordia indicated their clients wished to have the trial judge privy to such knowledge.

[12] International normalized ratio (INR) testing provides a standardized test upon which physicians can monitor and adjust a patient's Coumadin dose. Venous doppler studies were used to track the status of Claimant's deep venous thrombus.