

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

Injury No.: 03-126452

Employee: Ronald O'Neal
Employer: Beltservice Corporation
Insurer: Liberty Mutual Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: December 16, 2003
Place and County of Accident: St. Louis, 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 October 4, 2006. The award and decision of Administrative Law Judge Kathleen M. Hart, issued October 4, 2006, 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 25th day of September 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Dependents: n/a

Before the

Employer: Beltservice Corporation

Division of Workers'

Compensation

Department of Labor and Industrial

Relations of Missouri

Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance Company

Hearing Date: July 13, 2006

Checked by: KMH

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: December 16, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant injured his right shoulder while making conveyor belts.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right shoulder, body as a whole
14. Nature and extent of any permanent disability: 30% of the right shoulder, 5% body as a whole re psychiatric as a result of the primary injury, PTD against the SIF due to a combination of the primary injury and preexisting injuries.
15. Compensation paid to-date for temporary disability: \$3,028.41
16. Value necessary medical aid paid to date by employer/insurer? \$15,923.83

Employee: Ronald O'Neal

Injury No.: 03-126452

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$685.89
19. Weekly compensation rate: \$457.26/\$347.05
20. Method wages computation: Application of §287.250(4).

COMPENSATION PAYABLE

21. Amount of compensation payable:

10 weeks of underpaid temporary total disability	\$ 1,544.19
89.6 weeks of permanent partial disability from Employer	\$31,095.68

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
\$110.21 weekly differential payable by SIF for 89.6 weeks beginning
July 13, 2005 and, thereafter, \$457.26 for Claimant's lifetime

TOTAL: TO BE DETERMINED

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 hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dean Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ronald O'Neal

Injury No.: 03-126452

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Beltservice Corporation

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

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance Company

Checked by: KMH

A hearing was held on the above captioned matter July 13, 2006. Attorney Dean Christianson represented Ronald O'Neal (Claimant). Attorney Debby Hellmann represented Beltservice Corporation (Employer) and Liberty Mutual Insurance Company (Insurer). Assistant Attorney General Carol Barnard represented the Second Injury Fund (SIF).

The Division's records erroneously show the Attorney General's office has withdrawn. AAG Barnard formally re-entered her appearance at trial.

STIPULATIONS

The parties stipulated to the following:

1. Claimant sustained an injury to his right shoulder in the course and scope of his employment with Employer on or about December 16, 2003.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law and Employer's liability was fully insured by Insurer.
3. Employer had notice of the injury and a claim for compensation was timely filed.
4. While Claimant's TTD rate is in dispute, the parties agree Claimant has been paid compensation in the amount of \$3,028.41 for the time period of December 22, 2003 through March 1, 2004.
5. Claimant's rate for PPD is \$347.05.
6. Claimant has received \$15,923.83 in medical benefits.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. The medical causation of Claimant's psychiatric condition
2. Whether Claimant is entitled to future medical care
3. Claimant's average weekly wage and compensation rate
4. Whether TTD benefits were underpaid
5. The nature and extent of Claimant's permanent partial or permanent total disability
6. The liability of the Second Injury Fund

FINDINGS OF FACT

Based on the competent and substantial evidence, I find:

1. Claimant is a 56 year-old male who worked for Employer from 1984 through July 2005.
2. Claimant's father was an alcoholic and was physically abusive towards him as a child. Claimant developed alcohol and drug problems, but he has "been clean" for 13 years.
3. Claimant is a high school graduate although he testified he "barely passed". He had Army training from 1969 or 1970 in air-frame repair of helicopters. He has not used this training since that time. He was discharged from the Army after he refused to go to Vietnam. Claimant has no other vocational training. He is unable to type, and his computer knowledge consists of using his email and copying photographs.
4. After leaving the Army in the early 1970's, Claimant worked as a dry cleaner for close to three years. He then worked in shipping and receiving for another employer for close to six years.
5. Claimant began working for Employer as a Laborer in 1984. He made conveyor belts which were anywhere from 1"x12" long to 60" wide x a few hundred feet long. Many of the conveyor belts weighed 200-300 pounds. Claimant was a very valuable employee and got along well with his co-workers. He was eventually promoted to a Lead Man working in a management capacity and training new employees. All of his evaluations before 2003 showed he met and exceeded expectations.
6. In 2001, Claimant had a left shoulder arthroscopy with subacromial decompression and debridement. He feels he had a good result from this surgery although he continues to have some pain and difficulty reaching overhead. He

believes he lost about one-third of his strength in his left arm. Following this injury, Claimant returned to work as a Laborer. He did favor his left arm somewhat by using his right arm more.

7. Claimant has had breathing difficulty for several years. He easily gets out of breath and has been treated for this by his family physician, Dr. Brightfield.
8. Claimant has a history of psychological problems dating back to 2001. During his testimony, Claimant didn't remember when his treatment started, but records indicate he sought help through his Employee Assistance Program in March 2002. He was referred to a psychiatrist and started seeing Dr. Bassett in September 2002. He has continued to treat with Dr. Bassett and has treated with no other psychiatrists.
9. Claimant has a history of migraine headaches, which he thinks began sometime in 2000. He began having almost daily migraines and started treating with his neurologist, Dr. Lee, in January 2003. He had difficulties working when he had a migraine because he could not concentrate and the noise of his co-worker's radios bothered him. He was hospitalized in March 2004 and June 2005 for his migraines. He continues to have migraines and he regularly sees his neurologist to monitor his medications and continued headaches. Claimant missed a significant amount of work in the summer of 2005 due to his migraines and his depression.
10. Claimant did not remember many of the details regarding his psychiatric treatment prior to his December 2003 shoulder injury. He did recall that he was treating with Dr. Bassett for depression. He remembered he was crying a lot, he was not paying attention to his wife, he did not care much about work, he had sold all his hunting equipment, and he wasn't doing much of anything. He recalls he had an attitude at work, he didn't like his job, and he missed time from work. He remembers having hallucinations, but he did not recall if that was before or after his 2003 work injury.
11. The records indicate Dr. Bassett took Claimant off work from September 19, 2002, through December 2, 2002, to treat his severe major depressive disorder. Claimant applied for short-term disability from September 18, 2002, through November 13, 2002. He then returned to work as a Laborer, but continued to have excessive absenteeism. He again applied for short-term disability and was off work from May 8, 2003, through June 10, 2003, and then requested an extension until June 30, 2003. He then returned to work half days and then full time on July 14, 2003. On October 22, 2003, at Claimant's request, Dr. Bassett recommended he not return to work in a management capacity as lead man and that he not be involved in training of employees. On December 17, 2003, Employer gave Claimant an oral warning that he had excessive absenteeism.
12. Claimant injured his right shoulder in the fall of 2003 due to the repetitive nature of his work. He initially felt he had simply strained his shoulder and went to the doctor on his own. When his pain increased, he reported his condition to his employer on December 16, 2003. Shortly thereafter, Employer referred him to Dr. Kreigshauser who performed surgery to repair a partially torn rotator cuff and adhesive capsulitis in January 2004. He was taken off work for 7 weeks following surgery. After a period of light duty, Claimant returned to work full time and was released from treatment in July 2004 with a permanent restriction of no lifting greater than 25 pounds above his shoulder and a rating of 10% PPD. Employer was able to accommodate this lifting restriction.
13. Claimant continued to regularly miss work due to his migraines and his depression. His psychiatric symptoms increased to the point that in July 2004, he began having suicidal thoughts. By July 2005 he began having hallucinations and saw little men on the television. Throughout June and July 2005 he missed time from work due to his psychiatric condition and his migraines. Dr. Bassett gave Claimant a letter to be off work July 11, 2005(Exhibit N). His notes for the following day indicate Claimant was at work July 12, 2005 and had a disagreement with his boss. Employer's personnel records verify Claimant last worked July 12, 2005(Exhibit 2). On July 20, 2005, Dr. Bassett and Claimant were discussing disability. On July 25, 2005, Dr. Bassett hospitalized Claimant for psychiatric treatment.
14. On August 1, 2005, Dr. Bassett wrote to Employer advising Claimant could not work due to a worsening of his condition which Dr. Bassett believed was not due to the work injury. Claimant was then terminated from employment. He believes the reason for his termination was that his psychiatrist could not release him to return to work. Employer's Human Resource Manager, John Mikusch, testified Claimant was terminated because he had been on medical leave for 12 weeks throughout the year, and he had no projected return to work date. He had used all his FMLA time and Employer felt they needed to terminate him.
15. Although his shoulder feels better than it did before surgery, Claimant continues to have pain and limitations in his shoulder. He has pain over the top of his shoulder and it sometimes gets worse with no cause. He can't do yard work and has difficulty washing his hair with his right arm. He is able to do laundry if his wife carries the laundry basket downstairs. He can not lift his right arm over his head. He sleeps on the couch, but he wakes up several times throughout the night due to right shoulder pain.
16. Claimant's typical day at home now involves going to church in the morning and watching television the rest of the day. He is able to drive to church because it is only a half-mile from his home. He feels uncomfortable driving any more than that and does not go to the store. He does not wash dishes or vacuum anymore, but he didn't know if that

was due to his depression or to his shoulder. He does not want to read.

17. Claimant has not tried to work since he lost his job and has not filed for unemployment benefits. He is trying to volunteer at church.
18. He continues to take anti-depressants and migraine medication. He uses over-the-counter pain relievers as needed for his right shoulder. Due to his confusion, his wife monitors his medications.
19. Claimant has undergone 16 electro-convulsive treatments since August 2005.
20. Claimant's wife testified she believes his mood is worse following his right shoulder injury. He sleeps on the couch due to right shoulder pain, he doesn't lift or work around the house and he doesn't have the energy or desire to go anywhere. He doesn't talk much or communicate. She acknowledged that in 2002 he began shutting down emotionally and began crying a lot. His sleep problems developed in 2002 and he missed several months of work during that year.
21. Claimant believes his depression is worse now than before his right shoulder surgery because he is still getting ECT treatments and he is doing nothing now whereas he was doing things before his shoulder injury.
22. Claimant has a very flat affect and spoke in a slow, deliberate manner. At times during his testimony he had difficulty with his memory, but he testified honestly and credibly.

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, I find the following:

1. Claimant's right shoulder condition arose out of and in the course of his employment. Claimant's psychiatric condition was aggravated by his employment.

The parties stipulated Claimant's right shoulder injury arose out of and in the course of his employment. Claimant and Employer's experts found his shoulder condition to be work related. Employer provided TTD benefits and medical treatment.

Regarding Claimant's psychiatric condition, the evidence is clear Claimant had a major depressive disorder before his work injury. Dr. Stillings opined Claimant developed an anxiety disorder and a pain disorder and an aggravation of his preexisting depressive disorder due to his right shoulder injury. Dr. Stillings also found Claimant is permanently and totally disabled from a psychiatric standpoint and believes he will need ongoing treatment. Based on the medical evidence and the Claimant's testimony, I find his psychiatric condition was aggravated by his employment. The work injury was a substantial factor in causing the psychiatric condition to worsen or intensify.

2. Claimant is not entitled to additional medical care.

Section 287.140.1 "entitles the worker to medical treatment as may reasonably be required *to cure and relieve from the effects of the injury.*" *Ford v. Wal-Mart Associates, Inc.*, 155 S.W.3d 824, 828 (Mo.App. E.D. 2005) (citations omitted). Claimant's surgeon, Dr. Kreigshauser, found Claimant had reached maximum medical improvement in July 2004 and recommended no additional treatment. He released Claimant to return "as needed". Claimant's expert, Dr. Lichtenfeld, recommended anti-inflammatories, exercises and an MRI to assess Claimant's overhead limitations.

I find Dr. Kreigshauser's opinion more persuasive, and I find Employer is not liable for additional treatment to Claimant's right shoulder. Dr. Kreigshauser saw Claimant on numerous occasions. After he was released from treatment for his shoulder, Claimant was able to return to work for several months and was lifting up to 50 pound conveyor belts. Claimant did work somewhat sporadically throughout 2004 and 2005, but his absences were due to his migraines and his psychiatric treatment. There is no evidence Claimant asked Employer for additional treatment on his shoulder, and Claimant needs only over the counter medications for his shoulder on an as needed basis.

I find Employer is not liable for Claimant's psychiatric treatment. In *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, (Mo.App.2004) (*Bowers I*), the Court found the Claimant need not prove that the treatment would *only* benefit the work injury. It is irrelevant that the treatment may benefit a preexisting condition, but Claimant must prove the treatment *flows from* the work injury. The court went on to explain that if a Claimant is on medication for a preexisting condition and

sustains a work injury which causes him to need *more* of the same medication, that additional treatment would be compensable.

That case was remanded for additional evidence. The case was again appealed and the court issued its decision in *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, (Mo.App.2006). In that decision, the court followed its earlier reasoning and held it is not sufficient for Claimant to show the need for treatment arises from one or the other of two causes. He must prove the treatment arose from the cause for which Employer is liable.

Both of the psychiatric experts in this case believe Claimant is in need of continued psychiatric treatment. Dr. Stillings assessed half of this need for treatment to the preexisting conditions and half to the work injury.

Claimant's treating psychiatrist, Dr. Bassett, has been treating him since 2002. He has monitored the changes in Claimant's psychiatric condition and he is in the best position to determine what psychiatric treatment Claimant needs. His report of August 1, 2005, indicates Claimant's psychiatric condition has worsened, but that worsening is not due to his work injury.

While Claimant's condition and medications have vacillated as the experts expect with his condition, the records indicate Claimant continues to take the same anti-depressant and anxiety medications he has taken throughout his psychiatric treatment and well before his work accident. There is no evidence Dr. Bassett or Dr. Stillings recommend these medications be changed or Claimant's treatment be changed. I believe Claimant's testimony that he has been receiving electro convulsive treatments, but those records are not in evidence. There is no expert opinion to provide guidance as to the causation of that treatment.

Accordingly, I find Employer is not liable for Claimant's continued psychiatric treatment. I find the work injury has aggravated the psychiatric condition, but Claimant has failed to demonstrate his work accident created an additional need for treatment greater in quantity or different in nature than the treatment for his preexisting psychiatric condition.

3. Claimant's average weekly wage is \$685.89. Accordingly his compensation rates are \$457.26 for permanent total/temporary total disability and \$347.05 for permanent partial disability.

Section 287.250(4) RSMo sets out the procedure for calculating Claimant's average weekly wage. Since Claimant's wages are fixed by the hour, his average weekly wage is computed by "dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which employee was injured...For purpose of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week."

The parties agreed Claimant's injury date was December 16, 2003. Exhibit O contains his pay stubs for the thirteen weeks prior to December 16. These pay stubs total \$8,230.62. It is clear from a review of the pay stubs Claimant missed more than "five regular or scheduled work days" and this should be considered absence for a calendar week. To determine the average weekly wage, Claimant's gross wages should be divided by twelve instead of thirteen. His average weekly wage is \$685.89 giving him compensation rates of \$457.26 for permanent total/temporary total disability and the maximum rate of \$347.05 for permanent partial disability.

4. Claimant is entitled to \$1,544.19 in underpaid TTD benefits.

The parties stipulated Claimant was paid \$3,028.41 in temporary benefits covering time lost from December 22, 2003 through March 1, 2004. Using the appropriate rate of \$457.26, Claimant should have received \$4,572.60 in temporary benefits. Employer is therefore liable for an additional \$1,544.19 in temporary benefits.

5. Claimant is permanently and totally disabled as a result of the combination of his primary injury and his multiple pre-existing disabilities.

Claimant contends he is permanently totally disabled. *Chatmon v. St. Charles County Ambulance District*, 555 S.W.3d 451 (Mo. App. E.D., 2001)(overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, (Mo. 2003)) outlines the basis for permanent total disability.

"Total disability" means inability to return to any employment and not merely... inability to return to the employment in which the employee was engaged at the time of the accident." §287.020.7 (RSMo 2000). "The test for permanent total disability is a worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment." *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo.App. 2000). "The critical question then becomes whether any employer in the usual course of employment would reasonably be expected to hire this employee in his or her present physical condition." *Reese v. Gary and Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. 1999)."

Dr. Stillings and Dr. Lichtenfeld found Claimant is permanently and totally disabled. Dr. Stillings describes Claimant's appearance best in his report as a less than alert, cooperative, tremulous man with moderate psychomotor retardation. He describes Claimant's speech as slow in tempo and with a latency of response to questions. He found Claimant had no formal thought disorder, poor verbal comprehension, and a failure to understand some simple questions. He felt Claimant had impaired concentration and he easily wandered off the topic at hand. Dr. Stillings found Claimant was withdrawn and his affect was constricted and somewhat blunted. Claimant appeared automatic in his movements and his mood was depressed. This accurately describes my impression of Claimant during his testimony.

The only vocational evidence presented is the report and deposition of Timothy Lalk, submitted on behalf of Claimant. Mr. Lalk is a certified rehabilitation counselor. He found that given Claimant's poor reading and math abilities, it is doubtful he would be able to pursue any training programs. He opined Claimant is not able to compete for any position in the open labor market. His physical limitations restrict him from any labor positions, he has no marketable skills, and his depression prevents him from any type of customer service or unskilled work.

Claimant is fifty-five years old with limited education. He has worked as a laborer his entire career. He is unable to type and has very limited computer knowledge. He has no formal vocational training.

Based on the evidence and my observations of Claimant at trial, I find he has satisfied his burden of proving he is permanently and totally disabled and incompetent to compete in the open labor market.

The next question is whether he is permanently and totally disabled as a result of his December 16, 2003, work injury or as a result of the combination of all his disabilities. In *Hughey v. Chrysler Corp.*, 34 S.W.3d 845 (Mo. App. E.D. 2000), the court held that:

"In deciding whether the Second Injury Fund has any liability, the first determination is the degree of disability from the last injury. Until that disability is determined, it is not known whether the second injury fund has any liability. Accordingly, a claimant's preexisting disabilities are irrelevant until employer's liability for the last injury is determined. If a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount."

Id at 847 (citations omitted)

Accordingly, I must first determine the disability from Claimant's last injury.

The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of employee and other lay witnesses and draw reasonable inferences from such testimony. *Fogelsong v. Banquet Foods Corporations*, 526 S.W.2d 886, 892 (Mo.App. 1975). Employer's expert, Dr. Kreighshauser, found a 10% disability to Claimant's right shoulder and imposed a 25-pound lifting restriction. Claimant's expert, Dr. Lichtenfeld, found he had a 42 ½% permanent disability to his shoulder and agreed with Dr. Kreighhauser's restrictions. Dr. Stillings also assess disability due to the last injury based on his opinion the work injury aggravated Claimant's preexisting psychiatric condition.

Claimant was able to return to work within his lifting restrictions for nearly a year before his termination. Employer testified Claimant was a very valuable employee. He was terminated due to excessive absenteeism related to his migraines and his depression. I find Claimant's right shoulder and aggravation of his psychiatric injury alone do not render him permanently and totally disabled. Based on Claimant's continued complaints and on the medical evidence, I find Claimant sustained a 30% permanent partial disability to his right shoulder as a result of his work injury. I find Claimant has sustained an additional 5% disability to the body as a whole as a result of the aggravation of his pre-existing psychological condition.

Section 287.220 (RSMo 2000) creates the Second Injury Fund and outlines the compensation to be paid in cases of permanent disability where there is previous disability.

To trigger the liability of the Second Injury Fund for his permanent total disability, Claimant must have a pre-existing permanent partial disability, whether from a compensable injury or otherwise. Section 287.220.1; *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo.App.2001)(overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.2003)). "The permanent disability pre-dating the injury in question must exist at the time the work-related injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed." *Id.* (quoting *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App.1999)). *See also* 287.220.1. To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, "the Commission should focus on the potential that the pre-existing injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition."

Carlson v. Plant Farm, 952 S.W.2d 369, 373 (Mo.App.1997)(overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.2003)). Claimant must then prove that the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time of the last injury resulted in permanent total disability, *Boring v. Treasurer*, 947 S.W.2d 483 (Mo.App. 1997)(overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.2003)).

If there is any percentage of Claimant's disability that is not attributable to the work injury, then the Fund becomes liable for the difference. *Messex v. Sachs Elec. Co.* 989 S.W.2d 206, 215 (Mo.App. E.D.,1999)(overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.2003))

I find Claimant has satisfied his burden to trigger Second Injury Fund liability for his permanent total disability.

Claimant had preexisting permanent partial disability due to his left shoulder surgery, migraines and depressive disorder. Each one of these disabilities caused him to miss a significant amount of work before his last injury. He had to compensate for his physical limitations with his left shoulder by over-using his right shoulder. His missed several weeks of work before his 2003 work injury due to his depression and his migraines. He took a demotion from his lead man position back to a laborer due to his psychiatric condition. Dr. Bassett and Dr. Stillings agree Claimant had a major depressive disorder prior to his work accident. All of these disabilities constitute a hindrance or obstacle to his employment or to obtaining re-employment.

CONCLUSION

Claimant is permanently and totally disabled as a result of the combined effects from his December 16, 2003, work injury and his preexisting disabilities.

Based on the evidence, I find Claimant was permanently and totally disabled as of July 13, 2005. He is entitled to 89.6 weeks of compensation from Employer at a rate of \$347.05. The Second Injury Fund is liable for the differential of \$110.21 during that 89.6 weeks and thereafter for \$457.26 per week in permanent total disability benefits. The Second Injury Fund shall remain liable for such benefits for as long as Claimant remains so disabled.

An attorney lien of 25 percent of all compensation awarded herein is allowed Dean Christianson, Claimant's attorney, for necessary legal services rendered.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation