

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

Injury No.: 02-157057

Employee: Albert Olive  
Employer: Vitran Express  
Insurer: Zurich American Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: September 10, 2002

Place and County of Accident: City of 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 August 23, 2005, with correction.

The administrative law judge recites the date of employee's accident incorrectly on page one of the Award (incorrectly recited as September 7, 2002). The date of employee's accident was September 10, 2002. In all other respects, we affirm the award and decision of Administrative Law Judge Edwin J. Kohner, issued August 23, 2005. The award and decision 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 21<sup>st</sup> day of December 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Dependents: N/A  
Employer: Vitran Express  
Additional Party: Second Injury Fund  
Insurer: Zurich American Insurance Company  
Hearing Date: June 24, 2005

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: EJK

### **FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 7, 2002
5. State location where accident occurred or occupational disease was contracted: City of St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
The claimant, a truck driver, suffered a left shoulder injury when he slipped on oil and grease.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left shoulder, neck
14. Nature and extent of any permanent disability: 40% permanent partial disability at the left shoulder and 2 ½% permanent partial disability to the neck.
15. Compensation paid to-date for temporary disability: \$34,109.78
16. Value necessary medical aid paid to date by employer/insurer? \$67,935.08

Employee: Albert Olive

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17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages: \$656.00
19. Weekly compensation rate: \$437.36/\$329.42
20. Method wages computation: By agreement

### **COMPENSATION PAYABLE**

21. Amount of compensation payable:

102.8 weeks of permanent partial disability from Employer

\$33,864.38

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: 102.8 weekly differential (\$107.94) payable by SIF for weeks beginning March 12, 2004, and, thereafter, for Claimant's lifetime	Unknown
TOTAL:	Unknown

23. Future requirements awarded: See Additional Findings of Fact and Rulings of Law

Said payments to begin 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: Jeffrey P. Gault, Esq.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Albert Olive	Injury No.:	02-157057
Dependents:	N/A		
Employer:	Vitran Express		
Additional Party:	Second Injury Fund		
Insurer:	Zurich American Insurance Company		
Hearing Date:	June 24, 2005	Checked by:	EJK

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, a truck driver, suffered a left shoulder injury when he slipped on oil and grease. The issues for determination are (1) Future medical care, (2) Permanent disability, and (3) Liability of the Second Injury Fund. The evidence compels an award for the claimant for future medical care, temporary total disability benefits, and.

At the hearing, the claimant testified in person and offered depositions of Raymond F. Cohen, D.O., and James M. England, Jr., records from the Missouri Division of Workers Compensation, and medical records from Parkland Health Center, Mineral Area Regional Medical Center, Missouri Baptist Medical Center, Orthopedic Associates, L.L.C., Farmington Sports and Rehabilitation Center, Christian Hospital, Neurological Associates of Cape Girardeau, BarnesCare, Madison Medical Center, and William R. Harris, D.O. The defense offered no additional evidence beyond cross-examination of witnesses.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

### SUMMARY OF FACTS

In the early morning of September 10, 2002, this forty-nine year old claimant, a truck driver, slipped on an oily step while entering his truck before leaving the company grounds for his normal route. When he slipped, the claimant's left arm became entangled on the metal support handle causing him to be suspended in mid air, being held aloft by his left arm and shoulder. The claimant was suspended in mid air for several minutes until he freed

himself. The claimant described immediate pain in his left shoulder, neck, and left arm.

The claimant left work after the injury and drove himself from his work in St. Louis to Parkland Health Center, near his home. The claimant arrived at Parkland at 7:23 A.M. See Exhibit A. At the emergency room, the physician diagnosed a left shoulder strain; applied a shoulder immobilizer; performed x-rays; and prescribed muscle relaxers and anti-inflammatories. The emergency room referred the claimant to Dr. Harris, an orthopedist, who examined the claimant on September 12, 2002, and diagnosed a ligamentous sprain and strain of the brachial plexus as well as the musculature of the shoulder, prescribed physical therapy, and advised the claimant to return to his office in several weeks. On September 26 and October 10, 2002, Dr. Harris examined the claimant and found little improvement, prompting Dr. Harris to recommend an MRI of the thoracic spine on October 30, 2002, which was negative. See Exhibit C. On November 18, 2002, a shoulder MRI prompted the claimant to go to Dr. Hulsey, a shoulder surgeon. See Exhibit D.

Dr. Hulsey undertook treatment in December 2002 and treated the claimant through March 11, 2004, performing two surgeries to the left shoulder. The first on January 14, 2003, was an arthroscopy with debridement of superior labral tear, subacromial decompression, and open excision of ganglion, spinoglenoid notch. See Exhibit H. See Exhibits F and G. On September 2, 2003, Dr. Hulsey performed a second surgery, an arthroscopy with flap lesion repair and excision of distal clavicle. See Exhibit I. The claimant received additional physical therapy and Dr. Hulsey wrote a work/activity release permanently limiting him to 10 pounds of lifting and 10 pounds of carrying with no climbing, no above shoulder work, and no overhead work. See Exhibit J. Dr. Hulsey's office record shows different restrictions than the claimant's original work/activity release, which he produced at trial.

The claimant has never been able to return to his prior employment, is unable to lift his arm above his shoulder, and has constant pain, numbness, and tingling in his left arm and hand. The claimant testified that his neck pain is better but his primary problem now is pain in the left shoulder. The shoulder pain prevents him from sleeping more than on and one half to two hours, because he has to sleep in a chair or recliner. The claimant is plagued by constant headaches that emanate from his neck and shoulder region and his activities are extremely limited. The claimant keeps his left arm tucked against his abdomen to avoid moving the shoulder. The claimant is unable to perform his previous job as a truck driver due to his limitations.

The claimant did not finish high school, completing only through the tenth grade, joined the Air Force as a teenager, and received a medical discharge after suffering a hernia after only six months in the military. The claimant never received a GED equivalency. The claimant had no other technical or trade school training and for the past thirty years of his working career drove trucks or operated heavy machinery. The claimant has never used business or office machines or worked in sedentary employment. The claimant worked for this employer from November 1998 through the date of his injury, September 10, 2002. As a truck driver, the claimant loaded and unloaded his truck at frequent delivery stops all day, lifting products he was required to deliver, often in excess of one hundred pounds.

#### PRE-EXISTING CONDITIONS

The claimant had several pre-existing conditions that affected his work before his September 2002 injury. In 1991, the claimant testified that he injured his left ankle, was placed in a cast for several weeks, and has significant recurring pain and weakness in his left ankle. Division of Workers' Compensation records indicate that the claimant settled his workers' compensation claim based on a seven and one half percent permanent partial disability to his left ankle. See Exhibit S.

In 1993, the claimant suffered a head injury when the butt of a shotgun struck his head during a holdup attempt during one of his deliveries. See Exhibits M, N. The claimant testified that he has continuing neck pain and the claimant settled his workers' compensation case based on a five percent permanent partial disability settlement to the head and neck. See Exhibit S.

In 1999, the claimant suffered a right ankle injury which he described as not as severe as the 1991 left ankle injury but one which still causes him problems with prolonged standing, pain and weakness.

In 2000, the claimant suffered a right knee injury. BarnesCare initially treated this injury and Dr. Anderson, an orthopedist, performed a resection of synovial plica and debridement of medial femoral condyle and patella femoral joint. See Exhibit Q. The claimant testified that he has significant right knee problems which locks and gives way and causes significant pain and stiffness. The claimant settled his workers' compensation case based on a twenty percent permanent partial disability to his right knee. See Exhibit S.

The claimant testified that he had hypertension before May 2002 and had a stress test. See Exhibit R. He testified that before the September 2002 injury, he was off work and unable to work for three or four months due to hypertension. After the September 2002, the claimant had a heart attack in September of 2004, and had stents placed in his chest, both in September 2004 and February 2005. The claimant testified that he had significant pre-existing injuries or disabilities, which hindered or affected his work prior to the September 2002 injury.

The claimant testified that he is unable to do any of his former hobbies such as hunting or fishing due to the condition of his injured shoulder. The claimant testified that he is unable to stand for more than thirty minutes or sit for more than thirty minutes due to his ankle and knee problems combined with his shoulder complaints. The claimant testified that he is unable to kneel or to get down on the floor, because he would be always tired due to his inability to sleep properly. The claimant testified that he is neither unable to arise due to his many orthopedic problems. The claimant testified that he is able to perform his previous job as a truck driver, nor is he able to work any job due to his inability to sit and stand.

Dr. Cohen

Dr. Cohen, a neurologist, examined the claimant on and diagnosed (1) status post two left shoulder surgeries for a labral tear with impingement; (2) cervical myofascial pain disorder; and (3) left supra scapular nerve neuropathy and that the September 10, 2002, injury was a substantial factor causing those conditions. See Dr. Cohen deposition, pages 15, 16. Dr. Cohen opined that the claimant's had pre-existing chronic left ankle sprain/strain, post right knee surgery for chondromalacia, and hypertension. See Dr. Cohen deposition, page 17. Dr. Cohen opined that due to Claimant's ongoing neck and left arm pain that he should receive a cervical MRI scan to rule out a disc herniation on the left, and then additional treatment which would follow depending upon the results of that study. See Dr. Cohen deposition, page 18. Dr. Cohen also testified Claimant is in need of pain management or should be followed by a pain management specialist for his chronic pain from the shoulder injury. See Dr. Cohen deposition, page 18. Dr. Cohen further testified that the September 10, 2002, incident was a direct cause of and the necessity for those medical treatments he recommended. See Dr. Cohen deposition, page 19. Dr. Cohen testified that Claimant sustained a 15% permanent partial disability of the body as a whole relative to the neck plus 60% permanent partial disability at the left shoulder from the primary work related injury. See Dr. Cohen deposition, page 19. Dr. Cohen placed restrictions on the Claimant that would restrict him from any type of work in which he had to keep his head and neck in a sustained position. See Dr. Cohen deposition, page 19. Dr. Cohen testified that Claimant must avoid awkward positions involving his head and neck. See Dr. Cohen deposition, pages 19-20. Dr. Cohen further testified that the claimant should not do any overhead work with his left arm; should not lift more than five pounds with the left upper extremity; should not do any grasping work with the left arm and needs to avoid ladder work or any type of climbing. See Dr. Cohen deposition, page 20.

Dr. Cohen rated the claimant's pre-existing permanent partial disabilities as fifteen percent of the left ankle; thirty percent of the right knee; and fifteen percent of the body as a whole relative to the hypertension. See Dr. Cohen deposition, page 20. Dr. Cohen opined that those disabilities combine with the primary work related injury to create a greater overall disability than their simple sum, and that Claimant is permanently and totally disabled and not capable of gainful employment. See Dr. Cohen deposition, pages 20-21. Dr. Cohen further stated that the pre-existing conditions were a hindrance or an obstacle to Claimant's employment prior to the September 10, 2002 accident. See Dr. Cohen deposition, page 21. Finally, Dr. Cohen stated that from a medical perspective the Claimant is permanently and totally disabled. See Dr. Cohen deposition, page 21. Dr. Cohen explained that his rating for hypertension was performed prior to Claimant's heart attack in August 2004. See Dr. Cohen deposition, page 34. Dr. Cohen explained that people with hypertension are at a higher risk of having a heart attack due to the constant pressure produced by the elevation of blood pressure. See Dr. Cohen deposition, page 35. This pressure on the heart constantly increases the stress on the heart and puts the person at a higher risk for having a heart attack at a later time. See Dr. Cohen deposition, page 35.

Mr. England, a vocational expert, testified that the claimant would not be able to perform any of his past work activity. See England deposition, page 22. Mr. England further testified that Dr. Cohen's restrictions would restrict the claimant to less than even sedentary work because normally sedentary jobs involve bi-manual dexterity, which the claimant is unable to perform. See England deposition, page 23. Mr. England opined that with the claimant's description of his functioning; that he does not sleep well at night; and that he dozes off during the day; provides that the claimant would not be able to sustain work in the long run. See England deposition, page 23. Mr. England opined that the claimant's presentation holding his left arm in a fixed position close to his torso, and his inability to sit for more than short periods of time would have a very negative effect on employment. See England deposition, pages 23-24. Mr. England opined that it is very unlikely that the claimant would be able to go out and, one, compete for, or, two, sustain any kind of work activity on a consistent day-to-day basis. See England deposition, page 24. Mr. England opined that as the claimant would likely remain totally disabled from a vocational standpoint, because he appeared to be functioning without significant improvement in his overall physical functioning. See England deposition, page 25. Mr. England testified that the previous knee condition and ankle condition would severely limit the claimant's employability prior to his injuring his left shoulder. See England deposition, page 26. Mr. England opined that given the claimant's restrictions, pain, age, and education, a prospective employer would not consider the claimant for employment. See England deposition, page 26. Mr. England opined that the claimant would be unable to compete for employment in the open labor market. See England deposition, page 27.

Mr. England was asked to consider the shoulder injury, and the sequela from the shoulder injury alone, and would there be a job that Claimant could perform. Mr. England's response was "as he presented to me with holding the shoulder in like that combined with the fatigue and needing to lie down during the day, I don't see how somebody like that would be able to work whether he hurt his ankles or not or his knee and that type of thing". See England deposition, page 40.

#### **FUTURE MEDICAL CARE**

Awards may and often do include an allowance for the expense of reasonable future medical care and treatment. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo. App. W.D. 2001). Future medical care and treatment are provided for in Section 287.140.1, which states:

In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

This statute has been interpreted to mean that a claimant is entitled to compensation for care and treatment "which gives comfort [relieves] even though restoration to soundness [cure] is beyond avail." Id. Of course, the appellant bears the burden to prove an entitlement to benefits for such care and treatment. Id. To prove an entitlement to workers' compensation benefits for future medical care and treatment, an employee must show something more than a possibility that he will need such medical care and treatment. Id. However, the claimant is not required to present evidence demonstrating with absolute certainty a need for future medical care and treatment. Id. Rather, it is sufficient for the claimant to show his/her need for additional medical care and treatment by a "reasonable probability." Id. "'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." Id. "In determining whether this standard has been met, the court should resolve all doubt in favor of the employee." Id. "[A] claimant is not required to present evidence of specific medical treatment or procedures which will be necessary in the future in order to receive an award for future medical care." Id. Such a requirement could "put an impossible and unrealistic burden" upon the claimant. Id. The only requirement is that the finding of a need for future medical care and treatment be shown to be reasonably probable and be founded upon reason and experience. Id. Future medical may be awarded even though the claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271 (Mo.App. 1996).

The Claimant testified that he has significant pain in his shoulder interfering with reclining and sleeping. He testified he must recline in a chair in order to sleep. Dr. Cohen testified that the Claimant required continuing medical care for pain management as the result of the incident, and should receive medication and follow-up care from a pain management clinic. Dr. Cohen further testified that Claimant should receive an MRI to rule out any type of disc herniation in his neck. Dr. Cohen's testimony provides substantial evidence to support the award of future medical treatment. The Claimant is awarded continuing medical care at a pain clinic by a provider selected by the employer. If the employer fails to designate a medical provider within thirty days from the date this award becomes final, the employer will have waived its right to designate a

medical provider and the claimant may select a medical provider for those services at the claimant's expense.

### **PERMANENT DISABILITY**

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

The standard for determining whether Claimant was permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. Joultzhouer v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997).

"Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

Dr. Hulsey and Dr. Cohen opined that the claimant can no longer work in his previous position as a driver. The claimant's physical restrictions eliminate him from doing any type of work involving activity with his left hand, arm, or shoulder. Combining the medical testimony from the physicians with the vocational expert (with no evidence to the contrary) the claimant is permanently and totally disabled. Mr. England testified that no employer would hire the claimant in his present condition and that he would not be able to sustain employment if by some chance he would be able to obtain

employment. The claimant's disabilities are all permanent and all the experts opined that the claimant is permanently and totally disabled. Dr. Cohen testified that the claimant sustained a sixty percent permanent partial disability of the left shoulder and a fifteen percent permanent partial disability of the neck from the work related accident. Dr. Hulsey opined that the claimant sustained a twenty-two percent permanent partial disability of the left shoulder.

Based on the entire record the claimant is to be awarded forty percent permanent partial disability at the left shoulder and a two and one half percent permanent partial disability to the neck.

### **SECOND INJURY FUND**

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).

2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) The employer's liability is considered in isolation - "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability;" (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). The standard for determining whether Claimant was permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the

person in his present physical condition. Joulzhouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997). Generally, where two events, one compensable and the other non-compensable, contribute to the claimant's alleged disabilities, the claimant has the burden to prove the nature and extent of disability attributed to the job related injury. Strate v. Al Baker's Restaurant, 864 S.W.2d 417, 420 (Mo.App. E.D. 1993); Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. E.D. 1991).

The claimant sustained a significant injury in and of itself to his left shoulder and neck rendering him unable to work in his previous employment suggests that the last injury alone may be sufficient enough to render the Employer liable for permanent total disability. Clearly, the evidence supports an award of permanent total disability as against the Second Injury Fund as a combination of all of the claimant's previous disabilities do indeed combine with his primary injury to create an overall disability greater than their simple sum which renders the claimant permanently and totally disabled. The medical evidence of Dr. Cohen indicates that the combination of the injuries is the distinguishing factor resulting in permanent total disability, which renders liability against the Second Injury Fund.

The claimant testified, however, at the hearing that he felt the primary injury alone is what rendered him disabled, and coupled with Mr. England's testimony could be taken and interpreted as such. The claimant's testimony, however, should not be taken in isolation. The claimant testified that he was able to work essentially up until he hurt his shoulder but had difficulties from his knee and both ankles pre-existing the accident. The shoulder injury then catapulted claimant into total disability. This severe primary injury alone, however, occurring to an individual with a tenth grade education, no GED, and essentially no transferable employment skills renders him totally disabled in and of itself.

The claimant is awarded permanent total disability benefits against the Second Injury Fund for the reasons stated above.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
*Patricia "Pat" Secrest*  
*Director*  
*Division of Workers' Compensation*