

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

Injury No. 11-041865

Employee: William Palmer
Employer: City of Columbia
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 18, 2015. The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued May 18, 2015, 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 3rd day of November 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: **William Palmer**

Injury No. **11-041865**

Dependents:

Employer: **City of Columbia**

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: **Second Injury Fund**

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

Insurer: **Self-Insured**

Hearing Date: **April 8, 2015**

Checked by: **RJD/njp**

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: **June 2, 2011.**
5. State location where accident occurred or occupational disease was contracted: **Boone County, Missouri.**
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? **Yes.**
7. Did employer receive proper notice? **Yes.**
8. Did accident or occupational disease arise out of and in the course of the employment? **Yes.**
9. Was claim for compensation filed within time required by Law? **Yes.**
10. Was employer insured by above insurer? **Employer is self-insured..**
11. Describe work employee was doing and how accident occurred or occupational disease contracted: **Employee was on the back of the trash truck when the driver reversed and pinned Employee between the truck and a pole; a lever on the truck pierced and crushed Employee's left shoulder.**
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.**
14. Nature and extent of any permanent disability: **Employee is permanently and totally disabled as a direct result of the work-related left shoulder injury alone.**
15. Compensation paid to-date for temporary disability: **\$1,049.58**
16. Value necessary medical aid paid to date by employer/insurer? **\$29,563.19**

Employee: **William Palmer**

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17. Value necessary medical aid not furnished by employer/insurer? **None.**
18. Employee's average weekly wages: **\$648.27.**
19. Weekly compensation rate: **\$432.18 for permanent total disability benefits; \$418.58 for permanent partial disability benefits.**
20. Method wages computation: **Stipulation.**

COMPENSATION PAYABLE

Employer is ordered to pay Claimant weekly permanent total disability benefits of \$432.18 beginning August 31, 2011 for the remainder of Claimant's life, subject to review and modification by law. Claimant's attorney, Allen & Nelson, PC, is allowed 25% of all permanent total disability benefits awarded herein, including future benefits, as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits.

Employer is also ordered to provide Claimant with future medical benefits per Section 287.140, RSMo.

Any past due compensation shall bear interest as provided by law.

Claimant's Claim for Compensation against the Second Injury Fund is denied in full.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

Employee: **William Palmer**

Injury No. **11-041865**

FINDINGS OF FACT AND RULINGS OF LAW

Employee: **William Palmer**

Injury No. **11-041865**

Dependents:

Employer: **City of Columbia**

Additional Party: **Second Injury Fund**

Insurer: **Self-Insured**

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

ISSUES DECIDED

The evidentiary hearing in this case was held on April 8, 2015 in Columbia. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on May 1, 2015. The hearing was held to determine the following issues:

1. Whether Employer shall be ordered to provide future medical benefits pursuant to §287.140, RSMo;
2. The liability, if any, of Employer for permanent partial disability benefits or permanent total disability benefits; and
3. The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue for the evidentiary hearing is proper in Boone County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Claimant's average weekly wage is \$648.27, with compensation rates of \$432.18 for temporary total disability benefits and permanent total disability benefits, and \$418.58 for permanent partial disability benefits;
6. That Claimant, William Palmer, sustained an accident arising out of and in the course of his employment with the City of Columbia on June 2, 2011;

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7. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation;
8. That Employer paid medical benefits of \$29,563.19 and temporary total disability benefits of \$1,049.58; and
9. That the City of Columbia was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, William Palmer, Jr., as well as Claimant's deposition testimony; the deposition testimony and narrative report of Dr. David Volarich; the deposition testimony and narrative report of Dr. Russell Cantrell; the deposition testimony and narrative report of Dr. Michael Nogalski; the deposition testimony and report of Gary Weimholt, a vocational rehabilitation consultant; the deposition testimony and report of James England, a vocational rehabilitation consultant; medical records; and school records.

FINDINGS OF FACT AND RULINGS OF LAW

William Palmer ("Claimant") is now 61 years of age and was 57 on the date of injury. Claimant has a 12th grade education, but was in Special Education classes throughout the majority of his schooling. Claimant received a high school diploma but spent his senior year in the COE program (Cooperative Occupation Education) where he received high school credit for working as a dishwasher at International House of Pancakes and at Chef Cafeteria in Columbia. Claimant's IQ testing runs from 64 to 82 with four of the six tests in the 60s.

Shortly after Claimant's graduation from high school, Claimant's father, a policeman for the City of Columbia, helped Claimant get hired by the City of Columbia ("Employer") as a Refuse Collector I. As a Refuse Collector I, Claimant would walk between residences or sometimes hop back on the trash truck to ride to the next stop and would pick up trash from residential curbsides and throw it into the trash truck. Claimant worked 38 years for Employer in this job except for a short period of time.

During a short period during this 38 year employment, Claimant worked as a Refuse Collector II. A Refuse Collector II drove the trash truck rather than picked up trash from the curbside and threw it into the truck. During this time, Claimant alternated between Refuse Collector I and Refuse Collector II. As a Refuse Collector II, he had to drive the truck, complete some hand written forms regarding the completed routes and status of special request pickups and check the truck for safety and maintenance. As a Refuse Collector II or driver, Claimant was responsible for the maintenance of the truck, but he would always ask for assistance from the mechanics regarding simple duties including checking the oil or hydraulic fluid. He would show the oil and hydraulic dipstick to the mechanics because he was not confident in his ability to read the dipsticks.

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Claimant has never married and has lived in the same house for 61 years which he shared with his parents while they were living. He has a driver's license which he obtained when he was 22 and can drive within Columbia without problems. Claimant relies primarily on his right arm to drive. He has difficulty with directions and often has to stop to ask for help when driving to a new location. Claimant had to ask for directions several times on a trip to Branson, and had a friend meet him to show him how to get to his friend's house when he arrived in Branson. He does not type or use a computer. Claimant does not own a computer or cell phone; his phone at home is a landline.

On June 2, 2011, Claimant was riding on the back of the truck when the driver reversed and pinned Claimant between the truck and a pole. A lever on the truck pierced and crushed Claimant's left shoulder. An ambulance took him to the emergency room. Dr. Volgas performed surgery on Claimant's left arm that same day and debrided portions of the deltoid, biceps, and brachialis muscles. Dr. Volgas noted that Claimant lacerated his biceps and brachialis muscles and he did not expect them to return to function.

Following surgery, Dr. Volgas placed Claimant in an immobilizer until June 10, 2011, and then placed Claimant in a sling. Dr. Volgas prescribed physical therapy to preserve as much range of motion as possible. Physical therapy consisted of passive range of motion exercises and modalities such as ultrasound massage. During the 21 visits Dr. Volgas prescribed, Claimant experienced other medical problems including anemia, endoscopy and colonoscopy procedures to diagnose stomach problems, and a bitter taste in his mouth which eventually proved to be an infected tooth. Claimant experienced fatigue because of the anemia and missed 7 out of the 21 visits because of other medical tests or was too tired. Shortly after physical therapy ended, Claimant was diagnosed with a blood clot which required treatment. Dr. Volgas never criticized or counseled Claimant regarding his missing the physical therapy appointments, and Dr. Volgas discontinued physical therapy because he did not believe it would provide any additional benefit to Claimant. He was not concerned about building strength in the shoulder but only concerned about scar tissue build up which he noted to have begun to be apparent. Dr. Volgas had Claimant off work and released Claimant on August 10, 2011. He noted significant limitation in range of motion and opined that Claimant could do a sedentary job, but only if he uses his left arm directly in front of him. Dr. Volgas did not think Claimant could do repetitive work with his left arm even in front of his body.

Claimant testified that he did not return to work after his injury. Claimant testified that he uses his left arm as little as possible. He cannot raise his left arm all the way up, he has to lean in with his body to grab things rather than reaching with his left arm, he has difficulty dressing, and repetitive motion strains his left arm.

Claimant has no pain in his left shoulder if he does not use it. He uses his dominant right hand for almost all activity. He has limited range of motion and limited strength in his left hand. Making his bed and dressing is difficult for him. He is restricted to lifting 5-7 pounds with the left hand, and is advised to not reach out to pick up objects. If he uses his left hand to pick something up away from him, he has to move his body to reach the object because of his inability to stretch out his arm. If he holds something with his left hand, he has to keep it close to his body. If he performs a repetitive movement, he feels a strain in the left shoulder, so he uses it as little as possible.

At Employer's request. Dr. Kevin Komes evaluated Claimant on August 17, 2011. Dr. Komes ordered an EMG to determine whether Claimant suffered nerve damage in his left arm. On August 30, 2011, Dr. Komes concluded that there was no evidence of plexopathy and that Claimant was at MMI. He rated Claimant's disability at 70% of the left shoulder. Dr. Komes imposed the following work restrictions: no left arm use except in front of and within 40 cm. of the body; no prolonged, forceful grasping with the left hand; no lifting or carrying with the left arm; and no tasks above waist level.

Dr. David Volarich evaluated Claimant at his attorney's request on November 29, 2012. Dr. Volarich noted that Claimant had significant loss of range of motion, atrophy, weakness, and contractures in his left arm. Dr. Volarich rated Claimant's left shoulder at 80% permanent partial disability ("PPD"). Dr. Volarich recommended that Claimant only use his left arm for activities of daily living and that he avoid lifting, reaching, or carrying with his left arm. Dr. Volarich rated Claimant's preexisting conditions as follows: 20% PPD of the right shoulder, 15% PPD of each knee, 25% PPD of the left ankle, and 15% PPD of the right ankle. Dr. Volarich did not believe that Claimant required any restrictions for these injuries before June 2011. Dr. Volarich opined that Claimant was permanently and totally disabled based on his June 2, 2011 left shoulder injury alone. He noted that Claimant stated he would still be working if not for his left shoulder injury.

Dr. Russell Cantrell examined Claimant on April 29, 2013, at Employer's request. Dr. Cantrell found that Claimant was not at maximum medical improvement and suggested further diagnostic testing. After further testing, Dr. Cantrell again reviewed Claimant's records on October 7, 2013, and suggested an orthopedic evaluation. He also recommended the following permanent restrictions: no lifting greater than 10 pounds with the left arm, no lifting greater than 25 pounds with both arms, no work at the level of or above the left shoulder. Dr. Cantrell did not find a reason to assign any restrictions on Claimant's previous conditions. Dr. Cantrell believed Claimant could work at the sedentary to light demand level. Dr. Cantrell later issued a third report after reviewing additional orthopedic records. He felt that Claimant was at maximum medical improvement and had sustained a 30% PPD of the left shoulder.

Dr. Michael Nogalski examined Claimant on December 2, 2013, at Employer's request. Dr. Nogalski stated that Claimant had complete transection of his coracobrachialis and the short head of his biceps and damage to his pectoralis major and deltoid. He felt that Claimant was at maximum medical improvement and assigned 30% PPD to Claimant's left shoulder. Dr. Nogalski imposed the following permanent restrictions: no reaching beyond 40 cm. in front of the body, no lifting more than 5 pounds with the left arm, no use of the left arm over chest level within the 40 cm. range. Dr. Nogalski did not identify any permanent restrictions related to prior medical conditions or injuries. He felt that Claimant was not totally disabled and could compete for jobs such as delivery man or courier.

Claimant also testified about several preexisting injuries. In 2009, Claimant had right shoulder impingement with arthroscopic decompression. Following surgery and physical therapy, he was released back to his regular duties. He testified that he initially favored his right arm when he returned to work but that his strength and range of motion eventually returned.

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Claimant testified about injuries to both of his ankles. In 1980, he fractured his right ankle. He had repeated left ankle strains, and in 1985, he had surgery for unstable ligaments in his left ankle. He returned to full duty after his surgery. Claimant testified that, in the past, he occasionally wore ankle braces at work, but he was not using them in 2011 and had not used them for a number of years.

In the 1990s, Claimant saw his primary care physician for arthritis in his knees. He last saw his primary care physician regarding his knees in January 1998, and the physician's note states that Claimant's knees are not hurting. At the hearing, Claimant denied any ongoing treatment for his knees. He stated that his knees felt better if he waited for the truck to stop before jumping off of it.

Claimant denied any permanent restrictions before June 2011. Claimant testified that he was able to return to full duty after all of his prior injuries and that none of the prior injuries changed how he performed his job duties.

Gary Weimholt performed a vocational assessment at the request of Claimant's counsel. The interview and testing were done on December 6, 2013, and Mr. Weimholt issued a report dated March 12, 2014. He determined that Employee has a total loss of access to the open, competitive labor market. Weimholt noted that Claimant was an older worker with a high school education and no transferable job skills. Weimholt opined that Claimant's left shoulder restrictions, work history, limited reading and math skills, and lack of transferable job skills result in total disability. He did not believe Claimant was a candidate for any type of retraining. Weimholt testified at his deposition that Claimant's left shoulder injury alone was sufficient to take Claimant out of the labor market and that Claimant did not have any restrictions or accommodations for his previous injuries.

James England performed a vocational assessment at Employer's request. Mr. England concluded that, while Claimant could not return to his former job, his restrictions would not prevent him from alternative work. He did not believe that Claimant was totally disabled. At his deposition, Mr. England stated that Claimant denied any problems regarding prior injuries and said his left arm was really his problem area.

The evidence from Claimant's testimony and expert witnesses shows that Claimant is permanently and totally disabled and that the permanent total disability is as a result of his left shoulder injury alone. Claimant testified at his deposition that he cannot work because of ongoing problems with his left arm. Claimant stated that he uses his left arm as little as possible. He has difficulty lifting his left arm and reaching with his left arm. He has difficulty getting dressed. He cannot do repetitive work with his left arm without straining it. He did not believe that he had any problems with his ankles, knees, or right shoulder that contributed to his inability to work.

Additionally, Claimant's treating and examining physicians imposed significant restrictions on the use of his left arm. Dr. Volgas stated that Claimant could only use his left arm directly in front of his body and that he probably could not do repetitive work with his left arm even in front of his body. Dr. Komes limited Claimant to working with his left arm in front of his body and within 40 cm., and he discouraged lifting, carrying, working above waist level, and

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prolonged and forceful grasping with the left arm. Dr. Nogalski imposed the following permanent restrictions: no reaching beyond 40 cm. in front of the body, no lifting more than 5 pounds with the left arm, and no use of the left arm over chest level.

Dr. Volarich stated that Claimant should only use his left arm for activities of daily living. He noted Claimant had significant loss of range of motion, atrophy, weakness, and contractures in his left arm. He also noted that Claimant stated he would still be working if not for his left shoulder injury. Dr. Volarich determined that Claimant was permanently and totally disabled based on his left shoulder injury alone.

Vocational consultant Weimholt also concluded that Claimant was permanently and totally disabled as a result of his left shoulder injury alone. Weimholt based his opinion on Claimant's left shoulder restrictions, work history, limited reading and math abilities, and lack of transferable job skills. He did not believe that Employee was a candidate for retraining. Wiemholt opined that, considering Claimant's testimony regarding his left shoulder limitations and the expert opinions regarding Claimant's left shoulder restrictions and ability to return to work, Claimant's total disability is based on his left shoulder injury alone.

Claimant alleges that he is permanently and totally disabled solely as a result of the left shoulder injury from the June 2, 2011 accident; alternatively, Claimant is seeking permanent total disability benefits from the Second Injury Fund.

Under section 287.020.7, "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. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo.App. E.D. 2007). The primary inquiry is whether an employer can reasonably be expected to hire the claimant, given his present physical condition, and reasonably expect the claimant to successfully perform the work. *Id.*

Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that constitutes a hindrance or obstacle to employment or re-employment, that combines with a compensable injury to create a disability greater than the simple sums of disabilities. §287.220.1 RSMo 2000; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576, (Mo.App.E.D. 1985). When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990). In order to find permanent total disability against the Second Injury Fund, it is necessary that Employee suffer from a permanent partial disability as a result of the last compensable injury, and that disability has combined with prior permanent partial disability(ies) to result in total disability. 287.220.1 RSMo 1994, *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990), *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo.App. 1985). Where preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability **after** the employer has paid the compensation due the employee

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for the disability resulting from the work related injury. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 366 (Mo.App. 1992) (emphasis added). In determining the extent of disability attributable to the employer and the Second Injury Fund, an Administrative Law Judge must determine the extent of the compensable injury first. *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-43 (Mo.App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* **It is, therefore, necessary that the Employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.** *Id.* (Emphasis added.)

Claimant has made an extremely compelling case for permanent total disability. He is an "older worker" with a borderline IQ (at best), who has worked for 38 years in the most undesirable of entry-level jobs. He has no transferable skills and no possibility of retraining. He has sustained a devastating injury to his left upper extremity, which injury Employer's first IME physician, Dr. Kevin Komes, evaluated at 70% permanent partial disability.

Employer's evidence, considered in the best light, is that Claimant can now work at a sedentary or very light work. In this scenario, Claimant's employability is premised upon the fact that Claimant has a very pleasant personality. While Claimant's pleasant personality might get him past a first interview, the plain truth is that, pleasant personality or not, Claimant simply cannot perform a job to any employer's satisfaction.

Dr. Cantrell's and Dr. Nogalski's criticisms of Claimant for not working hard enough at physical therapy ring quite hollow. They criticize Claimant for missing physical therapy sessions, yet agree that Claimant had legitimate, serious medical conditions which prevented him from attending those sessions. They criticize Claimant for not increasing his strength during physical therapy, yet acknowledge that Dr. Volgas (the treating doctor chosen by Employer) was prescribing range of motion exercises only, and was not prescribing strengthening exercises. Essentially, Drs. Cantrell and Nogalski criticize Claimant for following the treatment plan set forth by the authorized treating doctor. (Neither Dr. Cantrell nor Dr. Nogalski provided Claimant with any additional treatment.) How such criticism has any bearing on Claimant's permanent disability status totally escapes me.

Dr. Nogalski also criticizes Dr. Volarich (and even to some extent Dr. Volgas) for misrepresenting or misconstruing the nature of Claimant's left upper extremity injuries. Yet, Dr. Nogalski imposes restrictions on Claimant's employment consistent with those imposed by Dr. Volgas and Dr. Volarich. Again, I fail to discern how such criticism changes Claimant's disability status.

I find that the work-related left shoulder injury of June 2, 2011 resulted in Claimant's permanent and total disability. Claimant's left shoulder condition reached maximum medical improvement on August 30, 2011, the date Dr. Komes pronounced Claimant at MMI and rated Claimant's disability; although Claimant saw Drs. Cantrell and Nogalski on later dates and underwent additional diagnostic testing, no additional treatment was ever offered, thus further evidencing that August 30, 2011 is the correct MMI date. Employer is therefore responsible for payment of weekly permanent total disability benefits of \$432.18 beginning August 31, 2011.

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Claimant's claim against the Second Injury Fund is denied in full.

Regarding the issue of future medical treatment, while Claimant has sustained a very significant injury, the medical experts all agree that Claimant will not require additional surgery. Dr. Volarich has opined that Claimant will most likely require the use of narcotics or non-narcotic pain medication and muscle relaxants in the future, and I find that opinion to be accurate and reasonable based upon the significance of the injury.

ORDER

Employer is ordered to pay Claimant weekly permanent total disability benefits of \$432.18 beginning August 31, 2011 for the remainder of Claimant's life, subject to review and modification by law. Claimant's attorney, Allen & Nelson, PC, is allowed 25% of all permanent total disability benefits awarded herein, including future benefits, as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits.

Employer is also ordered to provide Claimant with future medical benefits per Section 287.140, RSMo.

Any past due compensation shall bear interest as provided by law.

Claimant's Claim for Compensation against the Second Injury Fund is denied in full.

Made by /s/Robert J. Dierkes 05/18/2015
Robert J. Dierkes
Chief Administrative Law Judge
Division of Workers' Compensation