

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
with Supplemental Opinion)

Injury No. 11-080587

Employee: Joseph Pentridge  
Employer: Gayman Construction, Inc. (Settled)  
Insurer: Guarantee Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

*Second Injury Fund liability – synergistic effect*

The administrative law judge awarded enhanced permanent partial disability benefits to employee based on a finding that the effects of the primary work injury combine with the effects of employee's preexisting conditions of ill-being to result in greater disability than the simple sum of disability. See § 287.220 RSMo. The Second Injury Fund appeals, arguing that the evidence was insufficiently specific or persuasive to satisfy employee's burden of proof with regard to the issue whether his primary injury and preexisting conditions of ill-being interact synergistically to result in greater disability.

The Second Injury Fund makes some valid points in its brief, and we acknowledge that this is a close case. After careful consideration, though, we are not persuaded to disturb the administrative law judge's findings, for the following reasons.

First, although the Second Injury Fund argues that employee's evaluating expert, Dr. Paul, did not identify any synergy (because he did not use that word in his report), we note that he did rate a separate and additional 15% permanent partial disability of the body as a whole referable to the combination of employee's disability from the primary injury and his preexisting conditions. Although Dr. Paul did not specifically use the word "synergy," this rating is—in and of itself—evidence of synergy, because it suggests there is *additional* disability apart from and above the simple sum of disability referable to all of employee's conditions of ill-being, and that this additional disability stems from the combination of the primary injury and preexisting conditions. While the Second Injury Fund does correctly note that Dr. Paul's opinion is conclusory and without elaboration with regard to synergy, his rating of an additional 15% permanent partial disability stands unrebutted by any conflicting expert opinion evidence on this record.

Second, employee credibly testified that he now earns less than half what he was able to earn before the primary injury. We find this severe loss in employee's income to be

Employee: Joseph Pentridge

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evidence of a synergistic combination between employee's preexisting conditions of ill-being and the primary injury. Employee also testified that his current employer (his neighbor) is aware of his limitations and allows him to "take it easy" when necessary. *Transcript*, page 17. Employee indicated that this arrangement allows him to continue to be gainfully employed despite the combination of limitations resulting from his primary injury and preexisting conditions of ill-being. We deem this credible evidence that the combination of employee's limitations has had a significant impact upon his employability and his earning capacity. We find this sufficient evidence of a synergistic interaction amongst employee's limitations.

Finally, we note that the medical treatment records memorialize employee's difficulty, as a result of his preexisting low back pain, in completing the physical therapy prescribed following the primary injury. Those records also describe the interaction between the pain stemming from employee's preexisting low back radicular symptoms and the effects of his right foot/ankle injury. In our view, these records are further evidence of a magnifying or synergistic interaction between the pain referable to those separate conditions.

In sum, although employee's evidence certainly could be more clear or specific with regard to the issue of synergy, we deem it ultimately sufficient to meet his burden of proof. For this reason, and because we otherwise agree with the administrative law judge's findings, analysis, and conclusions, we affirm and adopt as our own the award allowing permanent partial disability benefits from the Second Injury Fund.

### **Conclusion**

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued September 29, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

We approve and affirm 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 17<sup>th</sup> day of March 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Joseph Pentridge Injury No. 11-080587  
Dependents: N/A  
Employer: Gayman Construction, Inc. (Settled) Before the  
Insurer: Guarantee Insurance Company (Settled) **Division of Workers'**  
**Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri  
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund  
Hearing Date: August 5, 2015 Checked by: LTW

### 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: 09/29/2011
5. State location where accident occurred or occupational disease was contracted: Brown County, Kansas
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: While engaged in employment with the Employer, and while securing a track plow to his equipment, Employee fell to the pavement. As a consequence of this work incident, Employee sustained an injury to his right foot and heel.
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: right foot and heel
14. Nature and extent of any permanent disability: 30% to right foot/ankle at the 155-week level
15. Compensation paid to-date for temporary disability: \$13,570.32
16. Value necessary medical aid paid to date by employer/insurer? \$11,015.23

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Not Identified
- 19. Weekly compensation rate: \$425.19 (PPD)
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: N/A (Employee and Employer / Insurer entered into a Stipulation for Compromise Settlement.)
  - 22. Second Injury Fund liability: Yes
    - 23.84 weeks of permanent partial disability from the Second Injury Fund: \$10,136.53
    - Uninsured medical/death benefits: N/A
    - Permanent total disability benefits from Second Injury Fund: N/A
- TOTAL: \$10,136.53

- 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: E. Joseph Hosmer, Esq.

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Joseph Pentridge

Injury No. 11-080587

Dependents: N/A

Employer: Gayman Construction, Inc.

Insurer: Guarantee Insurance Company

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on August 5, 2015.

The employee appeared personally and through his attorney, E. Joseph Hosmer, Esq. The employer and insurer were not part of the evidentiary hearing, having previously entered into a stipulation for compromise settlement with the employee. The Second Injury Fund appeared through its attorney, Skyler Burks, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about September 29, 2011, Gayman Construction, Inc. was an employer operating under and subject to the Missouri Workers' Compensation Law, and during this time was fully insured by Guarantee Insurance Company.
- (2) On the alleged injury date of September 29, 2011, Joseph Pentridge was an employee of the employer, and was working under and subject to the Missouri Workers' Compensation Law.
- (3) On or about September 29, 2011, the employee sustained an accident, which arose out of and in the course of his employment with the employer.
- (4) The above-referenced accident occurred in the State of Kansas. However, the contract of employment was made in Missouri. Further, the parties agree to venue lying in Greene County, Missouri. The Missouri Division of Workers' Compensation possesses jurisdiction, and venue is proper.
- (5) The employee notified the employer of his injury as required by Section 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.

- (7) At the time of the claimed accident the employee's average weekly wage was sufficient to allow a compensation rate of \$425.19 for permanent partial disability compensation.
- (8) Temporary disability benefits were provided to the employee in the amount of \$13,570.32, which represents 29 4/7 weeks in disability benefits, payable for the period of September 30, 2011 to April 24, 2012.
- (9) The employer and insurer provided medical treatment to the employee, having paid \$11,015.23 in medical expenses.
- (10) The employee and employer / insurer entered into a stipulation for compromise lump sum settlement for \$30,000.00 based upon approximate disability of 30 percent to the right foot/ankle at the 155 week level, and closure of future medical care. An administrative law judge with the Division of Workers' Compensation approved this Stipulation for Compromise Settlement on or about March 11, 2014.

The sole issue to be resolved by hearing is as follows:

- (1) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation?

#### **EVIDENCE PRESENTED**

The employee testified at the hearing in support of his claim. In addition, the employee offered for admission the following exhibits:

- Exhibit 1.....Stipulation for Compromise Settlement B/T Employee & Employer / Insurer (Inj. No. 11-080587)
- Exhibit 2..... Medical Report of Robert Paul, M.D. (Inclusive of Medical Records & Attachments)
- Exhibit 3.....Stipulation for Compromise Settlement B/T Employee & Employer / Insurer (Inj. No. 02-087683)
- Exhibit 4.....Stipulation for Compromise Settlement B/T Employee & Employer / Insurer (Inj. No. 99-162526)

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses or offer any additional exhibits at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The

undersigned administrative law judge took administrative or judicial notice of the documents contained in the Legal File, which include:

- Notice of Hearing
- Stipulation for Compromise Settlement with supporting documentation (B/T Employee & Employer / Insurer)
- Notice of Commencement / Termination of Compensation
- Answer of Second Injury Fund to Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

### **FINDINGS AND CONCLUSIONS**

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

#### **I. Background**

The employee, Joseph Pentridge was 57 years of age, having been born on August 13, 1958. Mr. Pentridge resides in Urbana, Missouri.

Mr. Pentridge attended but did not graduate from high school. Notably, he dropped out of high school in the 11<sup>th</sup> grade, but in the same year obtained his GED. Following high school, Mr. Pentridge joined the military and became a career service man. He served in the U.S. Navy from 1975 to 1996. Following his military career, Mr. Pentridge worked briefly for Walmart as a stocker. He later obtained his commercial driver's license (CDL), and worked for multiple companies as a truck driver (local and over-the-road) and as a laborer.

In or around June 2009 Mr. Pentridge obtained employment with the employer, Gayman Construction, Inc. In this employment Mr. Pentridge worked as a truck driver and as a general laborer.

### *Prior Medical Conditions*

Prior to sustaining the work injury of September 29, 2011 Mr. Pentridge suffered several injuries and/or medical conditions, which caused him to present with permanent disability. These prior medical conditions include:

- Low Back: While in the Navy Mr. Pentridge sustained multiple low back sprains/strains, which necessitated receipt of medical treatment. Diagnostic studies taken in 1994 revealed degenerative disc disease of the lumbar spine at the level of L4-L5.

In 1999 Mr. Pentridge was involved in a motor vehicle accident, when his co-driver rolled the vehicle while traveling 70 mph. The accident caused Mr. Pentridge to suffer multiple traumas to his body, including his low back, as well as his head, neck, and shoulder. This incident involved a workers' compensation claim (Injury No. 99-162526), and necessitated receipt of medical care. Mr. Pentridge and the employer / insurer entered into a settlement agreement, which resolved the workers' compensation claim based upon approximate disability of 3 percent to the body as a whole.

In 2002 Mr. Pentridge was involved in a motor vehicle accident, which occurred while he was sleeping in the bunk bed and his co-driver was operating the tractor-trailer. This accident caused significant injuries, which resulted in the co-driver being killed and Mr. Pentridge being taken by ambulance and admitted into the hospital. This accident caused Mr. Pentridge to suffer injuries to his low back, both hips, both upper extremities, both lower extremities, and a concussion with residual headaches and dizziness. As to the low back, Mr. Pentridge obtained conservative care, and experienced permanent residual low back pain. The 2002 incident resulted in Mr. Pentridge entering into settlement agreements, relating both to his workers' compensation claim and to a third-party civil claim. (Through these settlement agreements Mr. Pentridge received a sum of \$200,000.00, exclusive of payment of medical expenses and temporary disability compensation.)

Mr. Pentridge testified that at the time of the September 29, 2011, work injury he experienced chronic and residual low back pain, including weakness and difficulty lifting, even moderate weight.

- Right Upper Extremity (Shoulder & Wrist): In 1980, while serving in the United States Navy, Mr. Pentridge was involved in a motorcycle accident, and sustained bilateral wrist fractures, which necessitated receipt of medical care.

The 2002 motor vehicle accident caused Mr. Pentridge to suffer a comminuted mid-shaft right clavicle fracture, and resulted in Mr. Pentridge being diagnosed with traumatic arthropathy of the acromioclavicular right shoulder joint, and a mid-shaft right clavicle fracture. This injury necessitated receipt of surgery, which included a

Mumford procedure and excision of the distal end of the clavicle or the right shoulder.

Mr. Pentridge testified that at the time of the September 29, 2011, work injury he experienced chronic right wrist pain, including popping sensation and weakness in grip strength. As to the right shoulder, Mr. Pentridge notes that since suffering the 2002 motor vehicle accident he has experienced chronic pain and weakness in his right shoulder, which caused him to present with less range of motion and strength.

- Left Shoulder: The 2002 motor vehicle accident caused Mr. Pentridge to suffer similar injury to his left shoulder, resulting in him being diagnosed with traumatic arthropathy of the acromioclavicular left shoulder joint, which necessitated receipt of surgery. This surgery included a Mumford procedure and excision of the distal end of the clavicle or the left shoulder.

Similar to the difficulties he has with his right upper extremity, Mr. Pentridge testified that at the time of the September 29, 2011, work injury he experienced chronic left wrist pain, including popping sensation and weakness in grip strength. As to the left shoulder, Mr. Pentridge notes that since suffering the 2002 motor vehicle accident he has experienced chronic pain and weakness in his left shoulder, which caused him to present with less range of motion and strength.

## II. Underlying Claim

On September 29, 2011 while engaged in employment and performing his work duties with the employer, Gayman Construction, Inc., and while securing a track plow to his equipment trailer, Mr. Pentridge fell approximately 3 feet from the trailer and onto the pavement. As a consequence of this incident Mr. Pentridge sustained an injury to his right foot and heel, resulting in Mr. Pentridge suffering comminuted fracture of the calcaneus with intra-articular extension, as well as a chip off the lateral process of the talus. The severity of the injury necessitated receipt of medical care and time off from work.

### *Medical Treatment*

The nature of the injury suffered by Mr. Pentridge caused him to experience right heel and arch pain. Initially, Mr. Pentridge underwent diagnostic studies and received conservative care and was followed by an orthopedic surgeon, Troy Caron, D.O. This conservative care included use of an air boot and non-weight bearing restrictions. He later received a prescription for and underwent a course of physical therapy. During physical therapy it was noted that Mr. Pentridge continued to present with right ankle pain, and pain across the top of his toes. This continuing pain, as noted by the physical therapist, "affected his gait and caused him to limp." Additionally, diagnostic studies documented development of arthritis in the subtalar joint.

Eventually, on or about April 24, 2012, Dr. Caron released Mr. Pentridge from his care, and referred Mr. Pentridge to occupational medicine for further follow-up. In light of this referral, on or about April 26, 2012, Mr. Pentridge presented to Thomas Corsolini, M.D. for examination and treatment, which Dr. Corsolini characterized as a "Final Medical Evaluation." Based on this examination, and relative to the work injury of September 29, 2011, Dr. Corsolini opined that Mr. Pentridge was at maximum medical improvement. Further, Dr. Corsolini opined that he would "place no limitations on his ability to work." Yet, in rendering his examination and opinions, Dr. Corsolini acknowledged that Mr. Pentridge presents with residual continuing pain in his right lower extremity, and with this type of fracture "chronic discomfort is often present." Also, Dr. Corsolini recognized that the nature of this injury may necessitate use of different style of shoes in order to improve Mr. Pentridge's comfort.

In considering the nature and extent of the permanent disability caused by this work injury of September 29, 2011, Dr. Corsolini opined that Mr. Pentridge sustained a permanent partial impairment of 15 percent, referable to the right lower extremity at the 155 week level. Additionally, Dr. Corsolini opined that "[n]o additional medical treatment is necessary."

#### *Independent Medical Examinations*

Robert Paul, M.D., performed an independent medical examination of Mr. Pentridge on December 12, 2012. At the time of this examination, Dr. Paul took a history from Mr. Pentridge, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Pentridge, Dr. Paul opined that the work incident of September 29, 2011, was the prevailing factor in causing Mr. Pentridge to sustain injury to his right foot, ankle, and heel in the nature of a comminuted calcaneal intra-articular fracture.

In addition, Dr. Paul opined this work injury caused Mr. Pentridge to sustain a permanent partial disability of 30 percent, referable to the right foot/ankle at the 155 week level. In rendering this opinion, Dr. Paul notes that Mr. Pentridge continues to present with complaints of pain in his right ankle, foot, and heel; and he is no longer capable of walking long distances, jump from heights, and walk down stairs by leading off with his right foot. Also, Dr. Paul notes that Mr. Pentridge could only walk short distances in the morning; otherwise the foot pain would increase to the point that would require him to stop. Additionally, Dr. Paul notes that Mr. Pentridge cannot walk on uneven surfaces, and is developing a trick ankle, which sometimes gives out on him.

In considering the nature and extent of the permanent disability resulting from this work injury, Dr. Paul opined that this work injury caused Mr. Pentridge to sustain a permanent partial disability of 30 percent, referable to the right ankle at the 155 week level. In rendering this opinion, Dr. Paul opines that Mr. Pentridge is governed by permanent work restrictions relative to use of his right ankle/foot. In issuing this opinion, and as it relates solely to this work injury, Dr. Paul places upon Mr. Pentridge the following restrictions:

- No walking / standing greater than 60 minutes without a 10 minute break from standing / walking.
- No excessive walking on unguarded elevations or uneven surfaces.

No excessive working on steep inclines.  
No excessive walking up or down stairs.  
No excessive working on ladders.

In considering Mr. Pentridge's overall medical condition, Dr. Paul opined that prior to September 29, 2011, Mr. Pentridge presented with several preexisting disabilities, which caused Mr. Pentridge to be governed by permanent restrictions and limitations. In issuing this opinion, Dr. Paul places upon Mr. Pentridge the following restrictions:

No use of the right / left shoulder for excessive overhead work.  
No lifting over 40 pounds with the right / left arm from waist to shoulder height.  
No repetitive use of the right / left arm or hands or for tasks away from the body or extended positions.

No lifting over 50 pounds, occasionally lifting up to 50 pounds, frequent lifting of 20 pounds or less, and constant lifting of 10 pounds or less.

Further, according to Dr. Paul these preexisting disabilities include:

- Low Back: At the time of the September 29, 2011, work injury the employee presented with a permanent partial disability of 14 percent to the body as a whole referable to low back.
- Right Shoulder: At the time of the September 29, 2011, work injury the employee presented with a permanent partial disability of 25 percent, referable to the right shoulder at the 232 week level.
- Left Shoulder: At the time of the September 29, 2011, work injury the employee presented with a permanent partial disability of 20 percent, referable to the right shoulder at the 232 week level.
- Right Wrist: At the time of the September 29, 2011, work injury the employee presented with a permanent partial disability of 10 percent, referable to the right wrist at the 175 week level.
- Left Wrist: At the time of the September 29, 2011, work injury the employee presented with a permanent partial disability of 8 percent, referable to the left wrist at the 14 week level.

In addition, Dr. Paul opined that each of the aforementioned disabilities constituted a hindrance or obstacle to employment or reemployment. Additionally, Dr. Paul opined that the disability attributable to the work injury of September 29, 2011 combines with disabilities attributable to the prior low back, right and left shoulders, and right and left wrists conditions, to result in an enhanced disability or additional permanent disability greater than the simple sum, resulting in additional permanent partial disability of 15 percent to the body as a whole.

### III. Nature & Extent of Permanent Disability

The evidence presented in this case is supportive of a finding that as a consequence of the September 29, 2011 accident, the employee, Joseph Pentridge, sustained an accident that arose out of and in the course of his employment with the employer, Gayman Construction, Inc. The evidence is further supportive of a finding that this accident was the prevailing factor in causing Mr. Pentridge to sustain injury to his right foot and heel.

Notably, the parties acknowledge and stipulate that Mr. Pentridge sustained a compensable accident on September 29, 2011. Further, the employee and employer and insurer entered into a Stipulation for Compromise Settlement, agreeing to resolve the underlying claim for payment of a lump sum of \$30,000.00 based upon, among other consideration, approximate disability of 30 percent of the right foot/ankle at the 155-week level.

After consideration and review of the evidence, I find and conclude that the work injury of September 29, 2011, caused Mr. Pentridge to be governed by certain restrictions and limitations, which constitute a hindrance or obstacle to employment. I further find and conclude that this work injury caused Mr. Pentridge to sustain a permanent partial disability of 30 percent referable to the right ankle.

In addition, I find and conclude that the work injury of September 29, 2011, considered alone and in isolation, does not render Mr. Pentridge permanently and totally disabled.

### IV. Liability of Second Injury Fund

I find and conclude that the employee, Joseph Pentridge, sustained a work injury on September 29, 2011, which caused him to sustain a permanent partial disability of 30 percent referable to the right ankle. Because of this injury, Mr. Pentridge suffers residual pain and discomfort, and is governed by limitations and restrictions. This injury presents a hindrance and obstacle to employment or potential employment.

Further, prior to September 29, 2011, Mr. Pentridge suffered from significant preexisting disabilities referable to his low back, right and left shoulders, and right and left wrists. These prior medical conditions are summarized below:

- Low Back: While in the Navy Mr. Pentridge sustained multiple low back sprains/strains, which necessitated receipt of medical treatment. Diagnostic studies taken in 1994 revealed degenerative disc disease of the lumbar spine at the level of L4-L5.

In 1999 Mr. Pentridge was involved in a motor vehicle accident, when his co-driver rolled the vehicle while traveling 70 mph. The accident caused Mr. Pentridge to suffer multiple traumas to his body, including his low back, as well as his head, neck,

and shoulder. This incident involved a workers' compensation claim (Injury No. 99-162526), and necessitated receipt of medical care. Mr. Pentridge and the employer / insurer entered into a settlement agreement, which resolved the workers' compensation claim based upon approximate disability of 3 percent to the body as a whole.

In 2002 Mr. Pentridge was involved in a motor vehicle accident, which occurred while he was sleeping in the bunk bed and his co-driver was operating the tractor-trailer. This accident caused significant injuries, which resulted in the co-driver being killed and Mr. Pentridge being taken by ambulance and admitted into the hospital. This accident caused Mr. Pentridge to suffer injuries to his low back, both hips, both upper extremities, both lower extremities, and a concussion with residual headaches and dizziness. As to the low back, Mr. Pentridge obtained conservative care, and experienced permanent residual low back pain. The 2002 incident resulted in Mr. Pentridge entering into settlement agreements, relating both to his workers' compensation claim and to a third-party civil claim. (Through these settlement agreements Mr. Pentridge received a sum of \$200,000.00, exclusive of payment of medical expenses and temporary disability compensation.)

Mr. Pentridge testified that at the time of the September 29, 2011, work injury he experienced chronic and residual low back pain, including weakness and difficulty lifting, even moderate weight without pain.

- Right Upper Extremity (Shoulder & Wrist): In 1980, while serving in the United States Navy, Mr. Pentridge was involved in a motorcycle accident, and sustained bilateral wrist fractures, which necessitated receipt of medical care.

The 2002 motor vehicle accident caused Mr. Pentridge to suffer a comminuted mid-shaft right clavicle fracture, and resulted in Mr. Pentridge being diagnosed with traumatic arthropathy of the acromioclavicular right shoulder joint, and a mid-shaft right clavicle fracture. This injury necessitated receipt of surgery, which included a Mumford procedure and excision of the distal end of the clavicle or the right shoulder.

Mr. Pentridge testified that at the time of the September 29, 2011, work injury he experienced chronic right wrist pain, including popping sensation and weakness in grip strength. As to the right shoulder, Mr. Pentridge notes that since suffering the 2002 motor vehicle accident he has experienced chronic pain and weakness in his right shoulder, which caused him to present with less range of motion and strength.

- Left Shoulder: The 2002 motor vehicle accident caused Mr. Pentridge to suffer similar injury to his left shoulder, resulting in him being diagnosed with traumatic arthropathy of the acromioclavicular left shoulder joint, which necessitated receipt of surgery. This surgery included a Mumford procedure and excision of the distal end of the clavicle or the left shoulder.

Similar to the difficulties he has with his right upper extremity, Mr. Pentridge testified that at the time of the September 29, 2011, work injury he experienced chronic left wrist pain, including popping sensation and weakness in grip strength. As to the left shoulder, Mr. Pentridge notes that since suffering the 2002 motor vehicle accident he has experienced chronic pain and weakness in his left shoulder, which caused him to present with less range of motion and strength.

Notably, the effects of these prior medical conditions caused Mr. Pentridge to avoid or not engage in certain activities, as well as perform activities differently and at a slower pace. As a consequence, the effect of these prior medical conditions physically impacted Mr. Pentridge's ability to perform activities, causing Mr. Pentridge to suffer residual limitations and restrictions that were sufficiently severe to constitute a hindrance or obstacle to employment.

After consideration and review of the evidence, including consideration of the medical opinion of Dr. Paul, I find and conclude that at the time of the September 29, 2011, work injury, Mr. Pentridge presented with preexisting disabilities, as follows:

- **Low Back:** As a consequence of suffering multiple injuries to his low back, dating back to the 1990s, Mr. Pentridge presented with a permanent partial disability of 14 percent to the body as a whole referable to low back. (56 weeks).
- **Right Shoulder:** As a consequence of suffering in 2002 a traumatic arthropathy of the acromioclavicular right shoulder joint, and a mid-shaft right clavicle fracture, which required surgery, Mr. Pentridge presented with a permanent partial disability of 25 percent, referable to the right shoulder at the 232 week level (58 weeks).
- **Left Shoulder:** As a consequence of suffering in 2002 a traumatic arthropathy of the acromioclavicular left shoulder joint, which required surgery, Mr. Pentridge presented with a permanent partial disability of 20 percent, referable to the left shoulder at the 232 week level (46.4 weeks).
- **Right Wrist:** As a consequence of suffering in 1980 a motorcycle accident, which caused him to sustain bilateral wrist fractures that necessitated receipt of medical care, and to further cause him to suffer chronic right wrist pain, including popping sensation and weakness in grip strength, Mr. Pentridge presented with a permanent partial disability of 10 percent, referable to the right wrist at the 175 week level (17.5 weeks).
- **Left Wrist:** As a consequence of suffering in 1980 a motorcycle accident, which caused him to sustain bilateral wrist fractures that necessitated receipt of medical care, and to further cause him to suffer chronic left wrist pain, including popping sensation and weakness in grip strength, Mr. Pentridge presented with a permanent partial disability of 8 percent, referable to the left wrist at the 175 week level (14 weeks).

These preexisting disabilities presented a hindrance and obstacle to employment or potential employment.

### ***Application of Second Injury Fund Liability***

In determining whether the Second Injury Fund is liable for payment of permanent partial disability compensation, consideration must be given to Section 287.220.1, RSMo,<sup>1</sup> which states:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability, whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, 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. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

The adjudication of Second Injury Fund claims under this statute historically is not without differences of opinion. Endeavoring to provide clarity and an understandable approach to determining Second Injury Fund liability in permanent partial disability cases, the Court in

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<sup>1</sup> In 2013, the General Assembly amended Section 287.220, RSMo to change eligibility for benefits for injuries occurring after January 1, 2014. 2013 Mo. Laws S.B. 1 (to be codified at section 287.220). This case is governed by the legislation at the time of the underlying claim in May 2010, and is not governed by the new legislation. See, *Treasurer of State-Custodian of Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013).

*Treasurer of State-Custodian of Second Injury Fund v. Witte*, 414 S.W.3d 455, (Mo. 2013), noted, “[t]he third sentence prescribes the requirements for triggering the fund’s liability.” *Id.* at 462. The Court then explained,

...the third sentence of section 287.220.1 permits a claimant to obtain compensation from the fund when the claimant demonstrates that: (1) the claimant has a preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment; (2) the percentage of disability attributable to the preexisting disability equals a minimum of 50 weeks of compensation for a body as a whole injury or 15 percent for a major extremity injury; (3) the combination of the preexisting disability and the disability resulting from the last injury equals a minimum of 50 weeks of compensation for a body as a whole injury or 15 percent for a major extremity injury; and (4) the combined disability is substantially greater than the disability that would have resulted from the last injury considered alone. When these requirements are met, the employer at the time of the last injury is liable for only the degree of disability that would have resulted from the last injury if there was no preexisting disability. *Id.*

*Id.* at 462-463. Later, in summarizing the requirements for determining Second Injury Fund liability in cases of permanent partial disability the court thus concluded:

This Court finds there must be a single preexisting permanent partial disability that meets the thresholds to trigger the fund’s liability and there is no threshold requirement for the last injury. Additionally, all preexisting injuries must be considered in calculating the amount of compensation for which the fund is liable. These holdings must be applied to the fund’s claims in each case.

*Id.* at 467.

***Effect of Stipulation for Compromise Settlement B/T Employee & Employer / Insurer in Injury No. 07-012183***

In assessing a permanent partial disability attributable to the right foot / ankle, it is recognized and understood that this disability relates to a work injury; and the employee and employer / insurer resolved the underlying claim against the employer / insurer by entering into a Stipulation for Compromise Settlement. In regards to this Stipulation for Compromise Settlement, I am not unmindful that my assessment of permanent partial disability referable to this work injury need not be identical to or governed by the percentage of disability identified in the Stipulations for Compromise Settlement. The Second Injury Fund was not a party to the settlement agreement, and the terms of the settlement agreement between the employee and employer / insurer are not binding on the Second Injury Fund. The traditional doctrine of res judicata is not applicable to this case, which prohibits the same parties from relitigating the same issue of action. *Peoples-Home Life Ins. Co. v. Haake*, 604 S.W.2d 1, 7 (Mo. App. W.D. 1980).

Similarly, a doctrine closely related to *res judicata*, called issue preclusion, and more commonly referred to as collateral estoppel, is not applicable to this case. This doctrine “provides that an issue judicially determined in one action may not be relitigated in another action.” *Seifner v. Treasurer of State-Custodian of the Second Injury Fund*, 362 S.W.3d 59, 64 (Mo. App. W.D. 2012), quoting, *Shahan v. Shahan*, 988 S.W.2d 529, 532 (Mo. banc 1999). In examining the meaning of this doctrine and in giving consideration to its applicability, the court noted the need to satisfy four elements:

(1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.

*Id. at 64.*

Notably, in *Seifner*, the employee sought to establish the existence of these elements and argued that the Stipulation for Compromise Settlement constituted a judgment on the merits, premised on the statutory requirement that settlement agreements must be approved by an administrative law judge or the Commission. See, Section 287.390, RSMo. Responding to this argument, and concluding that a Stipulation for Compromise Settlement approved under Section 287.390, RSMo is not a judgment on the merits, the court reasoned as follows:

Although the settlement must be approved, “[t]he ALJ has no power to coerce a settlement of a workers’ compensation claim, but only has veto power to refuse to approve the settlement already made if he deems it not in accordance with the rights of the parties.” *Conley*, 999 S.W.2d at 274; § 287.390. The settlement entered into by *Seifner* and Employer was voluntary and based upon their own stipulations. In a case involving similar circumstances, this court found that a consent order based upon the joint stipulations of the parties did not constitute a judgment on the merits for the purposes of collateral estoppel. *See State ex rel. Malan v. Huesemann*, 942 S.W.2d 424, 430 (Mo.App. W.D.1997). Although the settlement was reviewed by an administrative hearing commission, the commission merely found that the stipulations were true as agreed to by the parties. *Id. at 429*. Therefore, this court found that where the commission did not independently review the stipulations to determine whether the facts contained therein were true, the consent order did not constitute a judgment on the merits. *Id. at 429–30*.

The same reasoning applies in this case. Although section 287.390 requires an ALJ or the Commission to approve the settlement, the administrative body need only determine that the settlement is in accordance with the parties’ rights; it does not engage in independent fact-finding regarding the parties’ stipulations. Therefore, the settlement agreement between *Seifner* [Employee] and Employer did not constitute a judgment on the merits of the issue for the purposes of

collateral estoppel.

*Id.* at 65.

Preeminently, at most, the percentages of disability referenced in the Stipulation for Compromise Settlement serves as a basis for explaining the payment of the compromise lump sum amount, and nothing more. And the judge's approval of the settlement agreement is nothing more than a determination that the settlement agreement is in accordance with the rights of the parties. Notwithstanding, the evidence is supportive of a finding, and I do find and conclude that the work injury of September 29, 2011, caused the employee to sustain a permanent partial disability of 30 percent to the right lower extremity at the 155 week level.

Further, in finding that the prior medical condition associated with Mr. Pentridge's low back caused him to sustain a permanent partial disability of 14 percent to the body as a whole referable to low back. (56 weeks); and/or the prior medical condition associated with the right shoulder, which caused him to sustain a permanent partial disability of 25 percent, referable to the right shoulder at the 232 week level (58 weeks); and/or the prior medical condition associated with the left shoulder, which caused him to sustain a a permanent partial disability of 20 percent, referable to the left shoulder at the 232 week level (46.4 weeks) - the evidence is supportive of a finding that the employee satisfied the second requirement of Section 287.220.1, RSMo – that the percentage of disability attributable to the preexisting disability equals a minimum of 50 weeks of compensation for a body as a whole injury or 15 percent for a major extremity injury.

After consideration and review of the evidence, I find and conclude that the employee has met his burden of proof and has satisfied the requirements set forth in Section 287.220.1, RSMo. These requirements are met as follows:

- *Hindrance or Obstacle to Employment*: The first requirement necessitates proof of the employee having sustained a preexisting disability of such seriousness to constitute a hindrance or obstacle to employment. As previously noted, at the time of the September 29, 2011 work injury, Mr. Pentridge presented with multiple medical conditions, several of which, considered alone, were sufficiently severe to constitute a hindrance or obstacle to employment. Notably, as a consequence of suffering the injury to his low back, as well as suffering an injury to his right and left shoulders, Mr. Pentridge suffered loss of motion, loss of strength, and chronic pain, which physically impacted his ability to perform certain activities, and to be governed by work restrictions and limitations.

Notably, the employee may satisfy this requirement with proof of a single preexisting disability. Yet, Mr. Pentridge provides this proof with multiple preexisting disabilities.

- *Statutory Threshold*: At the time of the work injury of September 29, 2011, Mr. Pentridge presented with a permanent partial disability of 14 percent to the body as a whole, referable to the low back (56 weeks); he presented with a permanent partial disability of 25 percent referable to his right shoulder (58 weeks); he presented with a permanent partial disability of 20 percent to his left shoulder (46.4

weeks); he presented with a permanent partial disability of 10 percent to the right wrist (17.5 weeks); and he presented with a permanent partial disability of 8 percent to left wrist (14 weeks). The evidence satisfies the second requirement of Section 287.220.1, RSMo – that the percentage of disability attributable to the preexisting disability equals a minimum of 50 weeks of compensation for a body as a whole injury or 15 percent for a major extremity injury.

- Combined Disability of Preexisting Disabilities & Disability from Last Injury: The combined disability of the preexisting disabilities and the disability attributable to the work injury is 238.4 weeks. The combination of the preexisting disability and the disability resulting from the last injury thus equals a minimum of 50 weeks of compensation for a body as a whole injury or 15 percent for a major extremity injury. The disabilities are as follows:

**[Preexisting Disabilities]**: 14 percent of the low back (56 weeks), plus 25 percent of the right shoulder (58 weeks), plus 20 percent of the left shoulder (46.4 weeks), plus 10 percent of the right wrist (17.5 weeks), plus 8 percent of left wrist (14 weeks) = 191.9 weeks;

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**[Disability Attributable to Last Injury]**: 30 percent referable to the right foot / ankle (46.5 weeks).

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**[Combined Disability]**: 238.4 weeks.

- Synergistic Effect of the Combined Disabilities: The combination of the September 29, 2011, injury to the right foot / ankle and the preexisting disabilities referable to the lumbar spine, right shoulder, left shoulder, right wrist and left wrist caused the employee to sustain additional permanent partial disability greater than the simple sum. In rendering this decision, I further find and conclude that the combination of these injuries caused the employee to sustain additional permanent partial disability of 23.84 weeks. This assessment of additional permanent partial disability is calculated as follows: 30 percent of the right foot / ankle (46.5 weeks), plus 14 percent of the low back (56 weeks), plus 25 percent of the right shoulder (58 weeks), plus 20 percent of the left shoulder (46.4 weeks), plus 10 percent of the right wrist (17.5 weeks), plus 8 percent of left wrist (14 weeks) = 238.4 weeks x 10 percent = 23.84 weeks.

Therefore, for the foregoing reasons, I find and conclude that the employee has satisfied each of the requirements set forth in Section 287.220.1, RSMo. The Second Injury Fund is ordered to pay to the employee, Joseph Pentridge, the sum of \$10,136.53, which represents 23.84 weeks of permanent partial disability compensation, payable at the applicable compensation rate of \$425.19 per week.

This award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be provided is hereby approved, in favor of E. Joseph Hosmer Esq., and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Made by: \_\_\_\_\_  
L. Timothy Wilson  
*Administrative Law Judge*  
*Division of Workers' Compensation*