

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

Injury No.: 09-066344

Employee: Kevin Phillips
Employer: M & S Painting, Inc. (Settled)
Insurer: Firstcomp Underwriters Group (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. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Findings of Fact

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact as to the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modifications herein.

Permanent total disability

The administrative law judge found that employee is not permanently and totally disabled based on her finding that employee's medical expert, Dr. Liss, did not provide credible testimony. The administrative law judge found that because employee's disabilities involve physical and psychiatric components, the question of how these conditions combine is beyond the understanding of the lay person, and therefore expert testimony is required for employee to meet his burden of proof. The administrative law judge found that Dr. Liss, a psychiatrist, did not provide credible opinions to establish any combination of employee's physical and psychiatric disabilities, because he did not perform a physical examination of the employee, and because he is not a vocational expert. For the following reasons, we disagree.

Dr. Liss testified that employee is permanently and totally disabled owing to a combination of his preexisting disability in combination with the effects of employee's work injuries. Dr. Liss's testimony is not rebutted anywhere in the record, nor was he impeached. While the courts have suggested we are generally entitled to disbelieve uncontradicted and unimpeached testimony, see, e.g., *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525, 527 (Mo. 1993), we can find no reason on this record to disbelieve Dr. Liss's conclusion that employee is permanently and totally disabled owing to a combination of his preexisting disabilities and the effects of the work injury.

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Instead, the record provides evidence supporting Dr. Liss's conclusion. Employee credibly testified (and we so find) that he did not finish high school and never obtained a GED; that he has a very erratic work history; that all of his prior jobs involved physical abilities such as lifting, bending, stooping, and climbing; that he's never had a desk job or a job involving a computer; that his work injuries have left him with pain and limited use of his dominant right upper extremity; and that he doesn't believe he would be able to go back to his prior jobs. Employee's testimony is fully supported by the medical record and expert medical opinions. Employee's testimony suggests that he was marginally employable prior to his last injury, and that it is doubtful that any employer in the ordinary course of business would hire him now.

Section 287.190.6(2) RSMo states that "[p]ermanent partial disability or permanent total disability shall be demonstrated and certified by a physician," but does not require vocational expert testimony to establish permanent total disability. We acknowledge that vocational expert testimony can be helpful in these cases, but especially when we apply the strict construction of Chapter 287 mandated by § 287.800 RSMo, we cannot hold that the absence of a vocational expert opinion is fatal to this employee's claim for permanent total disability benefits.

We believe the administrative law judge raised valid concerns regarding Dr. Liss's qualifications, as a psychiatrist, to assess employee's physical disabilities and overall ability to compete in the labor market. We additionally take note of Dr. Liss's failure, in his report or in his testimony, to articulate the bases for his ultimate conclusions. In our final analysis, however, these weaknesses go to the weight, rather than the credibility, of Dr. Liss's opinions. We note that, despite her finding that Dr. Liss's opinions were not credible, the administrative law judge appears to have partially relied on them in finding a synergistic combination to exist between employee's preexisting psychiatric condition and his physical injuries.

In sum, although we are of the opinion that Dr. Liss's testimony on the topic of permanent total disability is not entitled to great weight, absent some contradictory evidence, we are not persuaded that it is entitled to no weight. We find that employee has met his burden of proof with respect to the issue of permanent total disability. We adopt the opinion from Dr. Liss that employee is permanently and totally disabled owing to a combination of his preexisting conditions and the effects of the work injury.

Conclusions of Law

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "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..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

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[T]he proper focus of the inquiry 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.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have adopted the administrative law judge's findings that, at the time he sustained the work injury, employee suffered from preexisting permanent partially disabling conditions referable to his psychiatric conditions, his lumbar spine, and his left arm. We are convinced each of these conditions was serious enough to constitute hindrances or obstacles to employment. This is because we are convinced employee's preexisting conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of these conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Having found that employee suffered from preexisting permanent partially disabling conditions that amounted to hindrances or obstacles to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove his entitlement to such an award, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have adopted the administrative law judge's finding that employee sustained 112.22 weeks of permanent partial disability as a result of the primary injury, and credited the expert opinion from Dr. Liss that employee's permanent total disability results from a combination of his preexisting disabling conditions with the effects of the primary injury. We find that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

We conclude employee is permanently and totally disabled owing to a combination of his preexisting disabling conditions in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total, rather than permanent partial, disability benefits.

The parties stipulated that employee reached maximum medical improvement on December 6, 2010. Because the rates for permanent partial and permanent total disability benefits are equal in this case, the Second Injury Fund is liable for permanent

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total disability benefits beginning 112 weeks and 2 days after December 6, 2010, or January 30, 2013.

Conclusion

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

Beginning January 30, 2013, the Second Injury Fund is liable for weekly permanent total disability benefits at the permanent total disability rate of \$283.79. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Suzette Carlisle, issued July 9, 2013, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of an 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 14th day of January 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Kevin Phillips

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the administrative law judge's award assessing permanent partial disability benefits against the Second Injury Fund was correct and should be affirmed without modification.

I disagree with the majority's choice to disturb the administrative law judge's credibility findings as to the issue of permanent total disability. In its decision, the majority acknowledges the multiple deficiencies in the opinions of employee's rating psychiatrist, Dr. Liss, so there is no need to repeat them here. But the majority goes on to overlook these deficiencies because, while they may affect the "weight" to be afforded Dr. Liss's conclusions, they do not affect the "credibility" of those conclusions. I fail to appreciate the difference between the weight and the credibility of Dr. Liss's opinions.

The primary problem I perceive with employee's case for permanent total disability is that Dr. Liss opined employee's preexisting psychiatric disability combines with the physical effects of the work injury to render employee permanently and totally disabled, but at the same time failed to identify what physical disabilities he believes employee sustained as a result of the work injury. It stands to reason that Dr. Liss, who did not physically examine employee, was deferring to the findings of other doctors as to the physical effects of the work injury. But which doctors? Unfortunately, nobody asked Dr. Liss this question at his deposition.

At the time Dr. Liss performed his psychiatric evaluation of employee on April 25, 2012, the evidence on this topic was in stark conflict. On the one hand, Dr. Liss had the records from employee's treating physician, Dr. Emanuel, who opined that the work injury caused employee to suffer 5% permanent partial disability of the right shoulder and 5% permanent partial disability of the right elbow, and who released employee to return to work with no restrictions. On the other hand, Dr. Liss had the report of employee's rating expert, Dr. Volarich, who opined that employee suffered far more significant permanent partial disability, and who assigned an array of extremely limiting restrictions. Did Dr. Liss defer to the treating physician Dr. Emanuel or to the paid expert Dr. Volarich as to the physical effects of the work injury? Given the record before us, we can only speculate.

It is well-established that an award of workers' compensation benefits cannot rest upon mere speculation and surmise. *Griggs v. A. B. Chance Co.*, 503 S.W.2d 697, 703 (Mo. App. 1973). And the Missouri courts have declared that an employee fails to meet his burden of proof where his expert "fail[s] to provide any legitimate, persuasive explanation ... making only conclusory and unsupported statement[s]." *Royal v. Advantica Rest. Group, Inc.*, 194 S.W.3d 371, 378 (Mo. App. 2006). Because employee has provided a conclusory medical expert opinion that requires us to speculate in order to render an award in his favor, I am convinced that the administrative law judge correctly determined that employee failed to meet his burden of proof with respect to the issue of permanent total disability.

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For the foregoing reasons, I would affirm the award of the administrative law judge without modification. Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

AWARD

Employee:	Kevin Phillips	Injury No.: 09-066344
Dependents:	N/A	Before the
Employer:	M & S Painting, Inc. (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Firstcomp Underwriters Group (Settled)	Department of Labor and Industrial
Hearing Date:	April 4, 2013	Relations of Missouri
		Jefferson City, Missouri
		Checked by: SC

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: July 21, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant fell down the steps and injured his right shoulder, right elbow, and right ankle.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right shoulder, right elbow, and right ankle
14. Nature and extent of any permanent disability: 25% right shoulder, 22.5% right elbow, and 4.5% right ankle (Settled)
15. Compensation paid to-date for temporary disability: \$8,427.08
16. Value necessary medical aid paid to date by employer/insurer? \$179,982.00

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$425.69
- 19. Weekly compensation rate: \$283.79
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:
Settled prior to hearing.

22. Second Injury Fund liability: Yes

41.77 weeks of permanent partial disability from Second Injury Fund

TOTAL: \$11,853.90

23. Future requirements awarded: N/A

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: Robert J. Keefe

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Kevin Phillips	Injury No.:	09-066344
Dependents:	N/A	Before the	
Employer:	M & S Painting, Inc. (Settled)	Division of Workers'	Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial	Relations of Missouri
		Jefferson City, Missouri	
Insurer:	Firstcomp Underwriters Group (Settled)		

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on April 4, 2013 for a final hearing to determine the liability of M & S Painting, Inc., ("Employer") and Firstcomp Underwriters Group ("Insurer"), at the request of Kevin Phillips ("Claimant"). Attorney Robert J. Keefe represented Claimant. Assistant Attorney General Maria Daugherty represented the Second Injury Fund ("SIF").

The Employer and Insurer settled with Claimant prior to the hearing for 25% of the right shoulder, 22.5% of the right elbow, and 4.5% of the right ankle, and they did not participate in the hearing. Jurisdiction lies with the Division of Workers' Compensation. The record closed after presentation of the evidence. The court reporter was Kathy Rethemeyer.

The parties stipulated that on or about July 21, 2009:

1. Claimant was employed by Employer and sustained an accident, which arose out of and in the course of employment in St. Louis County.
2. Venue is proper.
3. Employer and Claimant operated under the Missouri Workers' Compensation Law¹.
4. Employer received timely notice of the injury.
5. A Claim for Compensation was timely filed.
6. Employer's liability was fully insured.
7. Claimant's average weekly wage was \$425.69, resulting in a compensation rate of \$283.79 for temporary total disability ("TTD"), permanent total disability ("PTD"), and permanent partial benefits ("PPD").
8. Employer paid TTD benefits totaling \$8,427.08, for 29 4/7 weeks, and Employer paid medical benefits totaling \$179,982.00.
9. Claimant achieved maximum medical improvement ("MMI") on December 6, 2010.

The issues for disposition are:

1. What is the nature and extent of SIF liability PPD benefits, if any?
2. What is the nature or extent of SIF liability for PTD benefits, if any?
3. Should Claimant's Exhibit B be admitted?

¹ All references in this award are to the 2005 Revised Statutes of Missouri unless otherwise stated.

Exhibits

Claimant's Exhibits A and C through N were received into evidence without objection. Exhibit B was admitted after a review of the evidence.² Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, they were made before becoming a part of this record, and were not placed there by the undersigned administrative law judge.

SUMMARY OF THE EVIDENCE

All evidence was reviewed but only evidence that supports this award is discussed below.

Background

At the time of the hearing, Claimant was 43 years old, and divorced twice, with six children. None of his children or ex-wives is dependent on him for financial support. While in relationships, Claimant argued often with his partners. Claimant lives in his parent's basement.

Claimant attended five elementary schools, and had difficulty understanding class material. His grades consisted of D's and F's, and he fought other students on a regular basis. Claimant started high school but did not finish it because of high absenteeism and fighting. He did not pass the GED test because he could not focus on the material. Claimant has trouble controlling his anger if he feels he is being picked on. His tendency is to react aggressively.

Currently, Claimant receives Social Security disability and Food Stamps.

Preexisting Disabilities

In 1981, Claimant fractured his left thumb. Currently he has limited range of motion. The thumb injury did not prevent Claimant from performing his job duties.

In 1991 Claimant fractured his back when he slipped and fell. Claimant has residual back pain with bending, stooping, sitting, or leaning.

Claimant takes medication for a thyroid condition. Complaints include coldness and sweating.

Claimant has hemophilia, which makes it difficult for his blood to clot. If he cuts himself, he takes a blood coagulator. The condition did not affect Claimant's ability to perform his job duties.

In 2004 Claimant fractured his left arm while wrestling. Damp and cold weather irritate his left arm, and he has decreased strength with lifting.

In 2005 Claimant began treatment at the Crider Center for depression and a sleep disorder caused by his bipolar condition. The bipolar condition affected Claimant's relationships at work, school, and home.

² See the discussion contained in "Additional Findings of Fact and Rulings of Law."

In 2007 Claimant treated with Dr. Bassett due to a change in insurance. In 2010 Claimant returned to the Crider Center.³ He continues to have difficulty sleeping because his brain does not rest. Thoughts race through his head. In school he bragged and thought he was invincible. When Claimant stops taking medication he becomes moody, loud, confrontational, irritable, and difficult to get along with. The cycles are unpredictable.

Prior work history

Before 2009 Claimant worked more than 20 jobs for about six months on each job. Claimant was often terminated due to confrontations on the job with co-employees and supervisors. Most jobs were physical in nature and included work in warehouses, painting, moving furniture, temporary agencies, and nursing homes. No particular training was required. Claimant supervised two people as a painter. However, he has no office skills, or computer skills. Claimant cannot return to his former employment because of decreased grip strength.

It is important for Claimant to remain on his bipolar medication. However, it is difficult for him to remain on medication due to limited funds. Also, Claimant stops taking medication when he improves, becomes angry, and cannot get along with others.

The work accident

On July 21, 2009, Claimant fell down stairs at work and injured his right shoulder. The first medical treatment was received on August 26, 2009, at Missouri Baptist Medical Center for pain to his right shoulder and right ankle. He returned for right shoulder treatment on March 4, 2010 and March 8, 2010 for psychological treatment.

Medical treatment – primary injury

Claimant treated with Dr. Milne and Dr. Nogalski, and attended physical therapy.⁴ However, he ran into problems with the medical providers and they threatened to call the police if he returned. Claimant ran out of bipolar medication, he was not working, and there were problems with lost time benefits. Claimant attributes these circumstances to the deterioration of his relationship with the doctors. Claimant was not improving from the work injury and he changed doctors.

On April 26, 2010 James Emanuel, M.D. examined Claimant and diagnosed osteoarthritis of the AC joint with aggravation of preexisting disease, subacromial bursitis with impingement, and a right elbow contusion, caused by the July 21, 2009 work accident.

A January 2010 MRI revealed minimal degenerative changes. However, Dr. Emanuel disagreed with the radiologist's findings.

During examination, Dr. Emanuel noted Claimant's movements were exaggerated: Body posturing, grimacing, retraction and pulling away. The slightest touch of the elbow generated a

³ Medical evidence shows Claimant received psychiatric treatment from the Crider Center from 2005 to 2007 and in 2010. Claimant treated with Dr. Bassett in 2007 and 2008.

⁴ The medical records are not in evidence for Drs. Milne and Nogalski.

disproportionate amount of pain. Claimant's movements were not inconsistent, but they seemed exaggerated. During Dr. Emanuel's deposition he retracted the accusation.

To prepare Claimant for surgery, he was given special medicine to prevent him from bleeding to death. On May 5, 2010, Dr. Emanuel debrided the glenohumeral joint and repaired the rotator cuff tear, glenoid labrum, performed subacromial decompression and excised the distal clavicle. During surgery, Dr. Emanuel identified a frayed labrum and an arthritic AC joint. Later, he prescribed physical therapy.

On September 23, 2010, Dr. Emanuel suspected cubital tunnel syndrome and ordered a nerve conduction/EMG study of the right elbow. He performed an ulnar nerve transposition on October 8, 2010.

Dr. Emanuel released Claimant from care for his right elbow on December 6, 2010 and opined Claimant had reached MMI for his "overall condition," and could return to work with no restrictions. In March 2011, Dr. Emanuel rated 5% PPD of the right shoulder, with 2% preexisting,⁵ and 5% PPD of the right elbow.

In June and July 2011, Dr. Emanuel re-evaluated Claimant for ongoing shoulder pain but his opinion remained unchanged.

Claimant's right shoulder complaints include pain with any lifting, including overhead. Arm extension increases pain. Right elbow complaints include tingling. His right hand swells with activity and he has weakness. The right ankle pops, snaps and hurts. Climbing steps bothers his ankle, so he stopped jogging.

Initially, Claimant testified the accident did not affect his psychological condition, but he continues to see a psychiatrist twice a month at the Crider Center. The psychiatrist prescribes lithium and Celexa. Later, Claimant testified the lack of medical treatment and other stressors increased his depression.

Claimant's current medication includes lithium for the bipolar disorder, Celexa for mood disorder, thyroid medicine to offset the effect of lithium on his thyroid, Neurontin for restless leg syndrome, and Advil for various pains.

After surgery, Claimant returned to work for a month, but quit after the Employer reduced his hours.⁶ Claimant does not believe he can return to his prior jobs or any job due to his bipolar condition, hemophilia, and right shoulder. He considers himself to be a high risk employee. Also, he has limited education and sporadic employment, is not a good reader or writer and he cannot use a computer.

Now, Claimant receives Social Security benefits.

⁵ Dr. Emanuel rated 2% preexisting PPD of the right shoulder because the accident aggravated degeneration of the AC joint but did not cause it.

⁶ Claimant reported this history to Dr. Volarich.

Expert medical evidence

David Volarich, M.D., performed an Independent Medical Examination on March 7, 2011, at the request of Claimant's attorney. Right shoulder examination revealed 15% decreased range of motion. For the primary injury, Dr. Volarich diagnosed and rated the following:

1. Right shoulder impingement with partial tears of the rotator cuff and labrum, surgically repaired, - 40% PPD of the right shoulder,
2. Right ulnar nerve neuropathy and transposition, traumatic, - 35% PPD of the right elbow, and
3. Right ankle strain, sprain, 15% PPD of the right ankle

Dr. Volarich opined the July 21, 2009 work accident was the prevailing factor that caused the disability stated above.

Dr. Volarich identified the following preexisting medical conditions:

1. L3 fracture,
2. Left humerus fracture in 1984,
3. Left thumb fracture of the first phalanx in 1981,
4. Von Willebrand disease,
5. Clubbed fingers and toes

Dr. Volarich rated the following preexisting medical conditions:

1. 20% PPD of the body for the L3 fracture.
2. 15% PPD of the left arm at the 222 week level,
3. 15% PPD the left thumb at the proximal phalanx.
4. Psychiatric disorder – deferred to psychiatry

Dr. Volarich further opined Claimant's disabilities, including psychiatric disability, is a hindrance to employment or reemployment, and combines to create more disability than their simple sum; therefore, a loading factor should be applied.

For the right arm, Dr. Volarich restricted all overhead and prolonged use of the arm away from the body, minimized pushing, pulling, and traction movements, and limited weight to 20 pounds. For the right elbow, he advised proper mechanics, avoid awkward positions, minimize repetitive actions, avoid impact and vibration, limit weight to 5 pounds away from the body, and 20 pounds close. For the spine: Twist, handle weight, engage in overhead activity and fixed positions to tolerance.

Dr. Volarich did not know if Claimant was PTD, and recommended a vocational assessment to determine his ability to return to work. If the assessment identified appropriate work, Dr. Volarich was in favor of Claimant returning to work.

In the absence of appropriate work, Dr. Volarich would conclude Claimant was PTD due to the primary injury and preexisting medical conditions, including psychiatric disability.

Expert psychiatric evidence

Jay L. Liss, M.D., a board certified psychiatrist, evaluated Claimant on April 25, 2012, and testified at the request of his attorney. Dr. Liss conducted a mental status examination and administered a series of tests.

Dr. Liss diagnosed the following preexisting medical conditions: Axis I – bipolar illness, and attention deficit hyperactivity disorder, and rated 50% PPD of the body as a whole. Dr. Liss testified the bipolar condition was a hindrance or obstacle to seeking or maintaining employment. Dr. Liss noted the bipolar condition contributed to Claimant's inability to maintain employment before July 2009. Dr. Liss explained the bipolar condition limited Claimant's success personally and professionally. Also, Dr. Liss diagnosed hemophilia and Attention-Deficient Hyperactivity Disorder, lifelong and congenital.

Dr. Liss concluded Claimant sustained permanent disability from the primary injury, which combined with the preexisting psychiatric disability to render Claimant totally and permanently disabled.

ADDITIONAL FINDINGS OF FACT and RULINGS OF LAW

SIF asserts Exhibit B, the Social Security award, is not admissible based on relevance, hearsay and lack of foundation. SIF further asserts an award from a federal agency is not relevant in a state workers' compensation case. Also, the document contains hearsay because it is offered to prove Claimant is PTD. Finally, the document lacks a proper foundation because it is not certified and the person that completed it will not testify.

The Social Security Award is Admitted

Claimant contends the document is relevant because it addresses his disability, which is the subject of this hearing. Also, it is not hearsay because it is not offered to prove he is PTD, but to show income. Finally, there is no indication the document has been forged and Claimant testified he received it in the mail.

For the following reasons, I find Exhibit B is admissible. SIF relies on *Douglas Kaempfer v. G.A. Rich & Sons, Inc.*, 2011 WL 1090411 (Mo.Lab.Ind.Rel.Com), which is dispositive for different reasons than those stated by SIF. To establish total disability, it is well established that the Social Security Administration applies a different standard than the Missouri Division of Workers' Compensation.

Here, Claimant offered the document as a relevant factor that affects his total disability claim. Although the document is not dispositive of the issue, I find it is relevant to the issue to be decided. Furthermore, there is no evidence the document is forged and Claimant testified he received the document in the mail. Therefore, I find a proper foundation has been made. Finally, I find the document does not contain hearsay as it was not submitted to prove Claimant is PTD, but to show the source of his income. For these reasons, Exhibit B is admitted.

Claimant sustained PPD from the last injury

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of the claim, including SIF Liability. ***Meilves v. Morris***, 422 S.W.2d 335, 339 (Mo. 1968). Claimant must establish a compensable work injury was sustained and prove the nature and extent of disability to a reasonable degree of certainty. ***Downing v. Willamette Industries, Inc***, 895 S.W.2d 650, 655 (Mo. App. 1995).⁷

In deciding whether SIF has any liability, the first determination is the degree of disability from the last injury considered alone. ***Hughey v. Chrysler Corp.***, 34 S.W.3d 845, 847 (Mo. App. 2000). [P] re-existing disabilities are irrelevant until the employer's liability for the last injury is determined. ***Id.*** If the last injury in and of itself rendered Claimant permanently and totally disabled, then the SIF has no liability. ***Id. (Citations omitted).***

I find Claimant's testimony was generally credible. Claimant testified he continues to have pain in his right shoulder and right ankle, right wrist tingling, and swelling and decreased strength. For the primary injury, Dr. Volarich rated 40% of the right shoulder, 35% of the right elbow, and 15% of the right ankle. Dr. Emanuel rated 3% of the right shoulder and 5% of the right elbow. I find Claimant sustained 25% PPD of the right shoulder, 22.5% PPD of the right elbow, and 4.5% PPD of the right ankle.

Claimant's preexisting disability creates a hindrance or obstacle to employment or reemployment

Dr. Volarich opined Claimant's preexisting disabilities created a hindrance to his employment or reemployment. I find the following disabilities existed before July 21, 2009 and were a hindrance or obstacle to Claimant's employment or reemployment. In 2005, Claimant sought treatment for depression and was diagnosed as being bipolar. Claimant testified he quit school in the 10th grade because of absenteeism and fighting. He did not pass the GED test because he could not concentrate. Before 2009, Claimant held over 20 jobs. Each job terminated after about six months, often because of disagreements with co-employees and supervisors. Claimant has two failed marriages, where he spent a considerable amount of time arguing with each spouse. Damp and cold weather irritate Claimant's left arm, and he has residual back pain with bending, stooping, sitting or leaning.

Claimant is not permanently and totally disabled from the primary and preexisting disabilities

To establish entitlement to permanent total disability benefits, Claimant must also prove all of the injuries and conditions combined, including the last injury, resulted in him being permanently and totally disabled. ***Boring v. Treasurer***, 947 S.W. 2d 483 (Mo. App. 1997).

The test for permanent 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. ***Sutton v. Vee Jay Cement Contracting Co.***, 37 S.W.3d 803, 811 (Mo. App. 2000). The primary determination is whether an employer can reasonably be expected to hire the employee, given his present physical

⁷ Several cases herein were overruled by ***Hampton*** on grounds other than those for which the cases are cited. No further reference will be made to ***Hampton***.

condition, and reasonably expect them to successfully perform the work. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo.App.2007).

Section 287.190.6 (2) states permanent partial disability and permanent total disability shall be demonstrated and certified by a physician. I find Claimant failed to provide a credible physician opinion that certifies he is PTD.

Here, Dr. Emanuel, a board certified orthopedic surgeon selected by Claimant, released Claimant to return to work full duty, no restrictions, and certified Claimant sustained partial disability from injury to his right shoulder and right elbow. Dr. Volarich testified he “wasn’t sure” if Claimant was PTD, and deferred to a vocational expert to decide “how (Claimant) might best get back to the open labor market.” However, a vocational assessment was not performed.

The only doctor that found Claimant to be PTD is Dr. Liss, the psychiatrist. I find Dr. Liss’ opinion is not credible. Dr. Liss is not a vocational expert. He is not familiar with jobs in the labor market. Dr. Liss did not evaluate Claimant’s employment prospects in light of Dr. Volarich’s work restrictions or Claimant’s transferable skills.

Expert medical testimony is mandatory in a workers’ compensation case where a specific medical conclusion is not clear, simple, or well recognized by lay persons and is not a matter within the expertise of the fact finder. *Mayfield v. Brown Shoe Co.*, 941, S.W.2d 31, 34 (Mo.App. 1997).

Here, Claimant’s disabilities involve psychiatric, shoulder, elbow, and ankle injuries, and the synergistic effect is not readily apparent. Establishing how these prior injuries combine with the primary injury is beyond the understanding of the lay person, and therefore expert testimony is needed for Claimant to meet his burden.

In the first paragraph of Dr. Liss’ report, he gave a history of the accident and the injury to Claimant’s arm and shoulder which required surgery. However, he did not perform a physical examination, identify which shoulder or arm was injured, and did not identify injuries to the right elbow and right ankle.

In the last sentence of the report, Dr. Liss summarily concluded Claimant was PTD due to the bipolar condition and the work injury without explaining how he reached the conclusion. This is especially important in light of Dr. Liss’ opinion that Claimant’s bipolar condition alone resulted in “significant disability,” and Claimant’s testimony that he quit work because he was not getting enough hours.

Furthermore, Dr. Volarich had no objection to Claimant returning to work within his limitations, if identified through vocational assessment. However, no assessment was made of Claimant’s presentation during an interview, review of test scores, education, training, age, and other factors generally considered by vocational experts. Dr. Volarich noted Claimant was a younger worker at age 41.

Nor is it within Dr. Liss’ expertise to determine what jobs, if any, Claimant is able to perform in the open labor market.

Although results from vocational assessments may vary, they provide the interviewer an opportunity to observe the employee's presentation during the interview, pain level, test scores, ability to process information, perform work, and interact with others. The fact finder considers these factors, and others, when determining total disability. However, the assessment was not available in this case.

Based on less than credible testimony by Dr. Liss, I find Claimant did not meet his burden to show no employer can reasonably be expected to hire him, given his present physical condition, and reasonably expect him to successfully perform the work. I find Claimant did not meet his burden to prove he is PTD due to the combination of the work accident and his preexisting disabilities.

Once a determination is made that a claimant is not PTD, the inquiry turns to what degree, if any, is an individual permanently partially disabled for purposes of SIF liability. *Leutzinger v. Treasurer of the State of Missouri*, 895 S.W.2d 591, 593 (Mo. App. 1995).

Section 287.220.1 RSMo., provides that SIF is triggered in all cases of PPD where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the preexisting disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and the preexisting conditions must produce additional disability greater than the last injury standing alone.

For the reasons stated above, I make the following findings:

1. Claimant sustained a compensable last injury which resulted in PPD equivalent to the following:
 - a. 25% of the right shoulder (58 weeks).
 - b. 22.5% of the right elbow (47.25 weeks).
 - c. 4.5% of the right ankle (6.97 weeks).

Total primary disability: 112.22 weeks

2. As of the time the last injury was sustained, Claimant had the following preexisting permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:
 - a. 40% of the body as a whole - psychological (160 weeks).
 - b. 12.5% of the body - lumbar spine (50 weeks).
 - c. 15% of the left humerus (33.30 weeks).

Total weeks for preexisting disability: 243.30 weeks

3. The credible evidence establishes that the last injury, combined with the preexisting permanent partial disabilities, created the following greater overall disability than the independent sum of the disabilities:

<i>Primary injuries</i> ⁸				
a. Right shoulder	25% PPD	58 weeks	15% load	8.70
b. Right elbow	22.5%	47.25	15%	7.08
Total primary disabilities				15.78

<i>Preexisting injuries</i>				
c. Psychological	40%	160.00	10%	16.00
d. Left humerus	15%	33.30	15%	4.99
e. Lumbar spine	12.5%	50.00	10%	5.00
Total preexisting disabilities				25.99

The Second Injury Fund liability is calculated as follows: 15.78 weeks for last injury + 25.99 weeks for preexisting injuries = 41.77 weeks of overall greater disability.

CONCLUSION

The Second Injury Fund is liable to Claimant for \$11,853.90 in permanent partial disability benefits. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

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Made by: _____
Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

⁸ The disability to Claimant's right ankle is 4.5%, which is below the threshold required to trigger SIF liability.