

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

Injury No. 10-054964

Employee: Frank Ponticello
Employer: D & D Distributors
a/k/a Grey Eagle Distributors
Insurer: Sentry Casualty Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 22, 2015. The award and decision of Administrative Law Judge Margaret D. Landolt, issued January 22, 2015, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 4th day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Frank Ponticello

Injury No.: 10-054964

Dependents: N/A

Employer: D & D Distributors AKA Grey Eagle Distributors

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

Additional Party: Second Injury Fund

Insurer: Sentry Casualty Co.

Hearing Date: October 27, 2014

Checked by: MDL

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 14, 2010
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant was reaching to move cases of beer when he felt pain in his right shoulder.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right shoulder
14. Nature and extent of any permanent disability: 25% PPD of the right shoulder
15. Compensation paid to-date for temporary disability: \$10,087.17
16. Value necessary medical aid paid to date by employer/insurer? \$34,655.27

Employee: Frank Ponticello

Injury No.: 10-054964

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$799.11/\$418.58
- 20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

58 weeks of permanent partial disability from Employer	\$24,277.64
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22. Second Injury Fund liability: No

TOTAL:	\$24,277.64
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23. Future requirements awarded: None

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: Mr. James S. Haupt

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Frank Ponticello

Injury No.: 10-054964

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: D & D Distributors AKA Grey Eagle Distributors

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

Additional Party: Second Injury Fund

Insurer: Sentry Casualty Co.

Checked by: MDL

PRELIMINARIES

A hearing was held on October 27, 2014 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Frank Ponticello ("Claimant") was represented by Mr. James S. Haupt. D & D Distributors AKA Grey Eagle Distributors ("Employer") and its insurer Sentry Casualty Co. were represented by Mr. Michael Banahan. The Second Injury Fund (SIF) was represented by Assistant Attorney General Maria Daugherty. This case was tried concurrently with Injury No. 11-108606, which is the subject of a separate award. Mr. Haupt requested a fee of 25% of Claimant's award.

The parties stipulated that on or about July 14, 2010 Claimant sustained an accidental injury arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Employer received proper notice of the injury; the claim was timely filed; Claimant's rates of compensation are \$799.11 for Temporary Total Disability ("TTD") benefits and \$418.58 for Permanent Partial Disability ("PPD") benefits; and Employer paid medical benefits of \$34,655.27 and TTD benefits of \$10,087.17.

The issues to be determined are medical causation; nature and extent of PPD; and liability of the SIF.

SUMMARY OF EVIDENCE

Claimant is a 56 year old man who worked for Employer as a delivery truck driver from 2000 until 2010. Claimant's job involved heavy manual labor. On July 14, 2010 Claimant was making a delivery when he grabbed a case of beer from an overhead compartment and felt a pop in his right shoulder. Claimant finished his route, returned to the warehouse and reported the injury. Claimant was referred to Dr. Cynthia Byler for medical treatment. Dr. Byler ordered an MRI which was performed on July 22, 2010, and revealed mild acromioclavicular and glenohumeral joint osteoarthritis; moderate supraspinatus and infraspinatus tendinopathy, but no full thickness tear; long head biceps tendon and labrum were grossly negative; and some possible mild partial thickness tearing of the far anterior supraspinatus. The labrum was grossly negative. After the MRI, Claimant was referred to Dr. James Burke, a board certified orthopedic surgeon, for further medical treatment.

Following a course of conservative treatment Dr. Burke performed surgery on September 3, 2010. Dr. Burke performed a right shoulder arthroscopy with arthroscopic subacromial decompression and a limited intraarticular debridement of mild undersurface thinning of the supraspinatus tendon. Claimant completed a course of physical therapy and work hardening following the surgery and was released to full duty on December 13, 2010. Claimant returned to work as a delivery driver but because of persistent symptoms in his right arm and shoulder, he bid on and took a lighter job in the warehouse as a forklift or tow operator in January 2011. The job of a forklift driver did not involve heavy lifting with the right arm or overhead use.

Dr. David Volarich examined Claimant on October 5, 2011 and June 26, 2012, prepared reports, and testified on behalf of Claimant. At his examination on October 5, 2011 Claimant had persistent symptoms of pain, loss of motion, weakness, crepitus, decreased endurance and stiffness in his right shoulder. These symptoms made it difficult for him to reach, work overhead, push, pull and lift with his right shoulder. He had difficulty washing between his shoulder blades, and difficulty performing personal hygiene. He had difficulty looping his belt and putting on clothing overhead. Yard work and housework were more difficult and he often took breaks. His sleep was disrupted and he awakened with pain in his right shoulder when he rolled over on his right side. His right shoulder was very stiff in the morning. He avoided playing softball and golf since his injury to his dominant right arm. Dr. Volarich diagnosed Claimant with internal derangement of the right shoulder (impingement and partial rotator cuff tear), status post arthroscopic subacromial decompression with debridement of the supraspinatus. Dr. Volarich rated the disability at 35% of the right shoulder due to the impingement and rotator cuff tear that required arthroscopic repair. The rating accounted for ongoing discomfort, lost motion, weakness, crepitus and atrophy in the dominant arm.

At his second examination of Claimant on June 26, 2012, Dr. Volarich noted a worsening of the condition in Claimant's right shoulder. Claimant had more loss in range of motion, impingement testing was moderately positive, there was more weakness in the muscle groups and his symptoms had worsened. Since Claimant's symptoms had worsened, Dr. Volarich's modified his rating to 40% PPD of the right shoulder.

Dr. Burke testified on behalf of Employer. Dr. Burke described Claimant's September 3, 2010 surgery as a general cleanup and decompression. Dr. Burke found a moderate to small sized spur in his shoulder, but no significant thinning or fraying of the rotator cuff. The rest of the shoulder looked very good. Dr. Burke testified Claimant responded well to surgery and physical therapy, and he released Claimant without permanent restrictions on December 13, 2010. Dr. Burke's December 13, 2010 physical examination was normal. He found Claimant had a small decrease in internal rotation, but there was no instability or impingement in his shoulder. Claimant reported some pain in his shoulder with overuse. Dr. Burke rated Claimant's disability at 5% PPD of the right shoulder.

Currently Claimant has constant pain and decreased range of motion in his right shoulder especially with overhead motion and behind his back. He has weakness and crepitus in his right shoulder and decreased endurance in his right arm. It is difficult for him to reach overhead, push, pull or lift. Sleep is disrupted because of this right shoulder injury. He avoids golf and hunting

because of right shoulder pain. Claimant takes over the counter medication for pain. Claimant had no prior injuries to the right shoulder.

RULINGS OF LAW

Based upon a comprehensive review of the evidence my observations of Claimant at hearing, and the application of Missouri law, I find:

Claimant met his burden of proving the work accident of July 14, 2010 caused his shoulder injury and the need for surgery. Although medical causation was raised as an issue, there is no evidence to suggest that Claimant's need for treatment and disability was caused by anything other than the work injury of July 14, 2010. The treatment and resulting disability to Claimant's right shoulder is causally related to the described work injury.

Claimant sustained 25% PPD of the right shoulder as a result of the work injury of July 14, 2010. Claimant's work injury caused him to bid on a less demanding physical job. He also experiences pain, and has modified his activities of daily living as a result of his work injury. Claimant is entitled to 58 weeks of compensation at the rate of \$418.58 or \$24,277.64.

There is no expert medical evidence to rate any prior disabilities. Although Claimant had some minor pre-existing injuries, Dr. Volarich did not diagnose or rate them and there is no evidence to suggest they were a hindrance or obstacle to employment or re-employment. The claim against the SIF is denied.

CONCLUSION

Claimant sustained an accident on July 14, 2010, arising out of and in the course of his employment for Employer which resulted in permanent disability to his right shoulder. Claimant's medical treatment was required to cure or relieve him from the effects of his injury. Employer shall pay PPD benefits in the amount of \$24,277.64.

This award is subject to an attorney's lien of 25% in favor of Claimant's attorney, Mr. James S. Haupt.

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation

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

Injury No. 11-108606

Employee: Frank Ponticello
Employer: D & D Distributors
a/k/a Grey Eagle Distributors
Insurer: Sentry Casualty Co.
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.

Preliminaries

The parties asked the administrative law judge to determine the following issues: (1) medical causation; (2) nature and extent of permanent partial disability referable to the primary injury; (3) whether employee is permanently and totally disabled; (4) whether employer or the Second Injury Fund are liable for permanent total disability benefits; and (5) whether the Second Injury Fund is liable for permanent partial disability benefits.

The administrative law judge rendered the following determinations: (1) employee sustained a mild left shoulder strain and a left elbow traction injury with ulnar neuritis as a result of the work injury of August 9, 2011; (2) employee sustained a 30% permanent partial disability of the left elbow and a 5% permanent partial disability of the left shoulder as a result of the work injury of August 9, 2011; (3) employee is not permanently and totally disabled; and (4) the Second Injury Fund is liable for 26.52 weeks of enhanced permanent partial disability benefits.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred in finding employee is not entitled to permanent total disability benefits.

For the reasons stated below, we modify the award of the administrative law judge referable to the issues of (1) permanent total disability; and (2) Second Injury Fund liability.

Discussion

Permanent total disability

The administrative law judge determined that employee is not permanently and totally disabled. In reaching this determination, the administrative law judge relied on the

Employee: Frank Ponticello

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opinions of employer's experts, Dr. Burke, Ms. Thaler, and Mr. Mierink, and found that employee is capable of competing for and obtaining employment in the open labor market. We disagree for the following reasons.

Employee left school in the 7th grade, and never obtained his GED. Employee is unable to read a book, perform basic math, or write a paragraph. Other than a few years working at a family restaurant, and a brief stint loading trucks, employee worked either for employer or for Anheuser Busch performing heavy manual labor for his entire work history. Employee was 57 years of age on February 14, 2012, the stipulated date of maximum medical improvement.

Employee had to switch jobs after the 2010 injury to his right shoulder because he was no longer able to tolerate the heavy and overhead lifting required of a delivery driver. He then suffered a subsequent injury affecting the opposite upper extremity that left him with further restrictions and limitations that, combined with the results of a functional capacity evaluation, ultimately prompted employer to discharge him on February 23, 2012. Employee hasn't worked since.

We acknowledge that Dr. Burke minimized the effects of employee's work injuries and opined that employee had a basically normal physical examination of the upper extremities, while Dr. Volarich found significant deficits on physical examination and imposed numerous restrictions. The parties suggest this circumstance presents us with a battle of the experts. We note, however, that the administrative law judge (despite summarily crediting Dr. Burke in her award) appears to have found employee's own testimony credible with regard to the nature and extent of his current limitations referable to the upper extremities.

We are convinced that employee's credibility with respect to his complaints and limitations is the most significant issue before us. After careful consideration, we agree with the administrative law judge's implied finding that employee is credible regarding his pain complaints and limitations. Indeed, at oral argument in this matter, employer's counsel conceded that employee made a credible witness at the hearing. Because Dr. Burke obviously ignored or minimized employee's subjective complaints in rendering his remarkably conservative permanent partial disability ratings and restrictions, we must therefore disclaim the administrative law judge's reliance on Dr. Burke's opinions.

Turning to the argument from the Second Injury Fund that employee is permanently and totally disabled as a result of the work injury considered alone and in isolation, we are not persuaded, for the following reasons. First, we note that employee's symptoms and limitations referable to the primary 2011 left upper extremity injury are similar and are not shown on this record to be more severe than those referable to employee's prior 2010 injury to the dominant right upper extremity. Specifically, employee complains of constant pain, reduced range of motion especially with overhead work, weakness, and disrupted sleep as a result of the 2010 injury; and constant pain, trouble with overhead use, and weakness with respect to the 2011 injury. Employee's demonstrated willingness and ability to return to work following the 2010 injury to his dominant right upper extremity strongly suggests to us that employee would not have been permanently and totally disabled by the comparable 2011 left upper extremity injury considered in isolation.

Employee: Frank Ponticello

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Second, we note that Dr. Volarich imposed significant restrictions with respect to the bilateral upper extremities referable to both the 2010 and 2011 work injuries; we are not persuaded that his restrictions solely referable to the 2011 work injury would be sufficient to render employee unable to compete for work in the open labor market absent the prior significant injury affecting employee's dominant right upper extremity. In this regard, we deem persuasive the opinion from employer's vocational expert, Karen Kane-Thaler, that employee is not permanently and totally disabled by the effects of the 2011 work injury considered in isolation; we so find. Rather, we find appropriate and hereby adopt as our own the administrative law judge's findings that the 2011 work injury resulted in a 30% permanent partial disability referable to the left elbow, and a 5% permanent partial disability of the left shoulder.

Meanwhile, the vocational expert James England acknowledged that employee's restrictions referable to both upper extremities play a role in his opinion that employee is unable to compete for work in the open labor market. While Mr. England shied away from offering the explicit opinion that employee is permanently and totally disabled based on a combination of the primary injury and his preexisting disabling conditions, we feel comfortable making that inference from his credible opinions. We also deem Mr. England's opinion that employee is permanently and totally disabled more persuasive than the contrary opinion from Ms. Kane-Thaler, because, in our view, Mr. England more realistically accounted for employee's age, poor academic background, and utter lack of transferable skills below the medium-demand level. After careful consideration, we are persuaded (and so find) that employee is unable to compete for work in the open labor market as a result of his primary injury in combination with his preexisting disabling conditions of ill-being.

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":

[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 deem reasonable and hereby adopt the administrative law judge's finding that employee suffered from a preexisting permanent partially disabling condition referable to his right shoulder. After careful consideration, we are convinced that this condition was serious enough to constitute a hindrance or obstacle to employment. This is because we

Employee: Frank Ponticello

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are convinced employee's preexisting condition had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of this preexisting condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995). Indeed, this potential was borne out by the very facts of this case; it was employee's inability to use either upper extremity for heavy lifting that partially motivated employer's choice to discharge him.

Fund liability for PTD under Section 287.220.1 occurs when [the employee] establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. For [the employee] to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.

Lewis v. Treasurer of Mo., 435 S.W.3d 144, 157 (Mo. App. 2014).

Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). 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. *Id.*

We have found that employee is not permanently and totally disabled as a result of the primary injury considered in isolation. Instead, we have inferred from the credible vocational opinion of Mr. England that employee is unable to compete for work in the open labor market as a result of his primary injury in combination with his preexisting disabling conditions of ill-being. We conclude, therefore, that the Second Injury Fund is liable for permanent total disability benefits.

Conclusion

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

The Second Injury Fund is liable for weekly permanent total disability benefits beginning on the stipulated date of maximum medical improvement, February 14, 2012, at the differential rate of \$386.53 for 74.6 weeks, and thereafter at the stipulated weekly permanent total disability rate of \$811.72. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued January 22, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an attorney's fee herein as being fair and reasonable.

Employee: Frank Ponticello

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

Given at Jefferson City, State of Missouri, this 4th day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Frank Ponticello

Injury No.: 11-108606

Dependents: N/A

Employer: D & D Distributors AKA Grey Eagle Distributors

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

Additional Party: Second Injury Fund

Insurer: Sentry Casualty Co.

Hearing Date: October 27, 2014

Checked by: MDL

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: August 9, 2011
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
While moving a case of beer, Claimant slipped and grabbed a handle to prevent himself from falling
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left upper extremity
14. Nature and extent of any permanent disability: 30% PPD of the left elbow and 5% PPD of the left shoulder
15. Compensation paid to-date for temporary disability: \$21,974.11
16. Value necessary medical aid paid to date by employer/insurer? \$18,425.44

Employee: Frank Ponticello

Injury No.: 11-108606

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$811.72/\$425.19
- 20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

74.6 weeks of permanent partial disability from Employer	\$31,719.17
6 weeks of disfigurement from Employer	\$2,551.14

22. Second Injury Fund liability: Yes

26.52 weeks of permanent partial disability from Second Injury Fund	\$11,276.04
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TOTAL:	\$45,546.35
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23. Future requirements awarded: None

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: Mr. James S. Haupt

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Frank Ponticello

Injury No.: 11-108606

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: D & D Distributors AKA Grey Eagle Distributors

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

Additional Party: Second Injury Fund

Insurer: Sentry Casualty Company

Checked by: MDL

PRELIMINARIES

A hearing was held on October 27, 2014 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Frank Ponticello ("Claimant") was represented by Mr. James S. Haupt. D & D Distributors AKA Grey Eagle Distributors ("Employer") and its insurer Sentry Casualty Co. were represented by Mr. Michael Banahan. The Second Injury Fund (SIF) was represented by Assistant Attorney General Maria Daugherty. This case was tried concurrently with Injury No. 10-054964, which is the subject of a separate award. Mr. Haupt requested a fee of 25% of Claimant's award.

The parties stipulated that on or about August 9, 2011 Claimant sustained an accidental injury arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Employer received proper notice of the injury; the claim was timely filed; Claimant's rates of compensation are \$811.72 for Temporary Total Disability ("TTD") and Permanent Total Disability ("PTD") benefits and \$425.19 for Permanent Partial Disability ("PPD") benefits; and Employer paid medical benefits of \$21,974.11 and TTD benefits of \$18,425.44.

The issues to be determined are medical causation; nature and extent of PPD; and liability of the SIF for Permanent Partial Disability or Permanent Total Disability benefits.

SUMMARY OF EVIDENCE

Claimant is a 60 year old man who worked for Employer on August 9, 2011. Claimant testified he attended a special school when he was a child because he had learning difficulties. Claimant left school in the 7th grade, and never obtained a GED. Claimant testified he is unable to perform math problems without a calculator, and cannot read a book or write a paragraph. Testing revealed Claimant's arithmetic and reading skills were at the 4th grade level, and his reading comprehension was at the 6th grade 9 month level.

After leaving grade school, Claimant worked in his parents' restaurant washing dishes and making pizzas. After leaving his parents' restaurant he went to work as a dock hand loading freight on trailers or pallets. From 1976 to 1982 Claimant went to work for Employer delivering

beer. In 1982 Claimant went to work for Anheuser Busch as a truck driver transporting the Clydesdales. In addition to truck driving, he also took care of the horses and set up and tore down fencing when they arrived at their destinations. In 2000 Claimant returned to work for Employer where he worked as a delivery driver until 2010. All of Claimant's jobs have involved heavy labor.

Before 2010, Claimant had several minor work injuries. Sometimes Claimant had flare ups of back pain.

On July 14, 2010 Claimant was making a delivery when he grabbed a case of beer from an overhead compartment and felt a pop in his right shoulder.¹ Claimant finished his route, returned to the warehouse and reported the injury. Claimant was referred to Dr. Cynthia Byler for medical treatment. Dr. Byler ordered an MRI which was performed on July 22, 2010, and revealed mild acromioclavicular and glenohumeral joint osteoarthritis; moderate supraspinatus and infraspinatus tendinopathy, but no full thickness tear; long head biceps tendon and labrum were grossly negative; and some possible mild partial thickness tearing of the far anterior supraspinatus. The labrum was grossly negative. After the MRI, Claimant was referred to Dr. James Burke, a board certified orthopedic surgeon, for further medical treatment.

Following a course of conservative treatment Dr. Burke performed surgery on September 3, 2010. Dr. Burke performed a right shoulder arthroscopy with arthroscopic subacromial decompression and a limited intraarticular debridement of mild undersurface thinning of the supraspinatus tendon. Claimant completed a course of physical therapy and work hardening following the surgery and was released to full duty on December 13, 2010. Claimant returned to work as a delivery driver but because of persistent symptoms in his right arm and shoulder, he bid on and took a lighter job in the warehouse as a forklift or tow operator in January 2011. The job of a forklift driver did not involve heavy lifting with the right arm or overhead use.

Currently Claimant has constant pain and decreased range of motion in his right shoulder especially with overhead motions and behind his back. He has weakness and crepitus in his right shoulder and decreased endurance in his right arm. It is difficult for him reach overhead, push, pull or lift. His sleep is disrupted. He avoids golf and hunting because of right shoulder pain. Claimant takes over the counter medication for pain. Claimant had no injuries to his right shoulder before this accident.

Between July 14, 2010 and August 9, 2011 Claimant had trouble sleeping on his right shoulder. This affected him on the job. Because of his right shoulder injury it took him longer to perform his tasks at work. He had trouble stacking cases of beer on a two wheeler because of his right arm, and he had to switch arms a lot.

On August 9, 2011 Claimant was unloading beer. He slipped, and grabbed a hand rail with his left arm to keep from falling and felt immediate pain in his left elbow and shoulder. Claimant reported the accident, and was referred to Concentra for treatment on August 11, 2011. Upon examination Claimant had tenderness of the supraspinatus muscles, and his shoulder range of motion was normal in all planes. He was diagnosed with medial epicondylitis; and biceps and triceps strain. Claimant was referred to Dr. Burke for additional treatment.

¹ This injury is the subject of the award in Injury No. 10-054964.

Dr. Burke examined Claimant on September 2, 2011, and his left shoulder was normal with no bruising, swelling, or tenderness. He had full passive range of motion, full strength in the rotator cuff and biceps, and no instability. No additional diagnostic studies of the shoulder were indicated. Dr. Burke diagnosed a medial elbow strain with a secondary ulnar neuritis and a mild shoulder strain. Dr. Burke opined the work injury was the prevailing factor in generating his symptoms. After some conservative treatment Dr. Burke ordered a nerve conduction study that showed Claimant had ulnar neuropathy at the left cubital tunnel with acute and chronic denervation. Dr. Burke performed an anterior subcutaneous ulnar nerve transposition on November 3, 2011. The post operative diagnosis was cubital tunnel syndrome left elbow.

After his surgery, Claimant underwent some work hardening and was released to full duty on January 19, 2012. Dr. Burke believed Claimant could return to work as a tow motor operator. When Claimant continued to experience symptoms in left arm and hand, Dr. Burke recommended a Functional Capacity Examination which was performed on February 7, 2012. The results of the FCE showed that Claimant did not meet the demand levels of a package driver, but he did meet the criteria for his job as a tow motor operator. Based upon the results of the FCE Dr. Burke placed permanent restrictions on Claimant of no lifting greater than 40 pounds occasionally; no lifting greater than 30 pounds on a constant basis; no frequent reaching overhead; no pulling; no double stacking of kegs; no steering a vehicle with more than 200 seconds with force of 3.6 pounds; and no working harder than energy of 3.4 METS. Dr. Burke released Claimant at MMI on February 9, 2012 with restrictions. Employer was unable to accommodate Claimant's restrictions and he was terminated on February 23, 2012.

Claimant filed for long term disability and Social Security Disability benefits. Claimant planned to continue working until he was 66. Claimant testified he has been unable to return to work since he was terminated by Employer.

As a result of his work injury of August 4, 2011 Claimant has constant left shoulder pain at a level of 3 or 4, and it increases to a 9 or 10 if he attempts to perform overhead work. Claimant testified they stopped treating his left shoulder six weeks after the injury, but he continued to have problems. His left arm is weak. He is unable to open a pickle jar. His left elbow is swollen, and he has a large knot in his left shoulder. His left hand frequently cramps, and his strength is reduced. He does very little cooking now. His grandson cooks for him. He no longer uses a weed eater or hand tools of any kind. He takes Alleve for pain. Claimant has a large surgical scar on his left elbow.

In a typical day, Claimant takes frequent naps because he has trouble sleeping at night. He has difficulty getting comfortable, and has trouble sleeping on either side. He has limited computer skills. His grandson set up an e-mail account for him, and he is able to check his e-mails and pay some bills on line. He is unable to fill out a job application online. He spends very little time on the computer. He only uses his right hand on the computer. He doesn't use his left hand because he has no feeling in it.

Dr. David Volarich examined Claimant on October 5, 2011 and June 26, 2012, prepared reports, and testified on behalf of Claimant. After his first examination of Claimant on October 5, 2011, Dr. Volarich diagnosed right shoulder impingement and partial rotator cuff tear that

required surgical repair. He found the injury was an industrial disability that was a hindrance or obstacle to employment or re-employment and rated Claimant's disability at 35% PPD of the right shoulder. He did not diagnose or rate any pre-existing injuries or illnesses.

Dr. Volarich examined Claimant again on June 26, 2012. Dr. Volarich diagnosed a traction/twisting injury of the left upper extremity causing post traumatic left elbow ulnar neuropathy and medial epicondylitis – status post left elbow ulnar nerve transposition as well as causing mild left shoulder impingement and rotator cuff tendonitis as a result of the injury of August 9, 2011. He found Claimant sustained 45% PPD of the left elbow and 20% PPD of the left shoulder, and found the injuries were industrial disabilities that constituted a hindrance or obstacle to employment or re-employment. With respect to Claimant's July 14, 2010 injury Dr. Volarich rated Claimant's right shoulder disability at 40% PPD of the right shoulder because he found Claimant's symptoms had worsened since October 5, 2011. Dr. Volarich opined the combination of his disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness, and a loading factor should be added.

Dr. Volarich opined Claimant is permanently and totally disabled from returning to his previous job as a delivery driver for Employer due to his August 9, 2011 work related injury to his left upper extremity. Dr. Volarich recommended a vocational assessment to see if Claimant was able to return to the open labor market in any capacity in the future. Dr. Volarich recommended numerous restrictions on Claimant's use of his upper extremities.

Dr. Burke testified on behalf of Employer. Dr. Burke described Claimant's surgery of September 3, 2010 as a decompression or general cleanup. He testified he found a small to moderate sized spur and no significant thinning or fraying of the rotator cuff. He called it a very benign exam, and testified the shoulder looked very good. At the time of Claimant's last examination with Dr. Burke on December 13, of 2010 Claimant had a normal physical examination. He had normal rotator cuff strength and normal range of motion. He released Claimant to full duty with no restrictions and rated Claimant's disability at 5% PPD of the right shoulder.

Dr. Burke examined Claimant again on January 14, 2013. Claimant's right shoulder examination was normal. His range of motion was equal on both sides. He had full strength in the rotator cuff and biceps tendon. His left shoulder examination was also normal. He had excellent range of motion. Claimant had full range of motion in his left elbow and some tenderness in his scar. He had minimal decreased grip strength on the left hand side, with no atrophy in his left upper extremity. Dr. Burke testified Claimant had a very benign postoperative examination which was basically unchanged from the last time he had seen him. Dr. Burke diagnosed status post right shoulder scope and decompression for persistent subjective complaints of right shoulder pain and impingement with operative findings showing little if any significant rotator cuff pathology, and certainly no tearing in his rotator cuff. He also diagnosed left elbow traction injury with ulnar neuritis and status post anterior ulnar nerve transposition. Dr. Burke rated Claimant's disability as a result of the August 9, 2011 injury at 5% PPD of the left elbow.

Dr. Burke testified the FCE showed Claimant functioned at a medium, heavy, and very heavy physical demand in several categories, but he was limited to light work due to his cardio

respiratory fitness. He also discussed 12 different test criteria for Claimant's job as a package driver. Claimant was able to meet 10 of the 12 criteria. He was able to carry, push, and pull weight in the heavy demand category. He was able to stand in the static standing category, and also met the requirements under mobility and sitting. He met the balancing requirement. He was able to walk and get in and out of his truck cab. He did not meet the criteria for above shoulder work. Dr. Burke testified Claimant's cardiovascular fitness was a clear factor in his decision to assign restrictions that placed him in the light category.

Mr. William Meirink, an occupational therapist testified on behalf of Employer. Mr. Meirink administered the FCE on February 7, 2012 to determine if Claimant had the functional capabilities to perform the job of a package driver. Mr. Meirink concluded Claimant met 10 of the 12 criteria for the package driver position. Mr. Meirink found Claimant performed in the light physical demand level for the cardio respiratory test which did not meet the very heavy level of his occupation. Claimant was able to lift and carry in the medium heavy and in some instances the very heavy level. In his opinion Claimant has the ability to work, but not as a package driver.

Mr. James England, a certified rehabilitation counselor testified on behalf of Claimant. Mr. England performed a vocational evaluation on September 20, 2012, and issued a report on October 1, 2012. Mr. England administered academic testing that showed Claimant's arithmetic and reading were at a 4th grade level. His reading comprehension was at the 6th grade 9 month level. Mr. England concluded Claimant did not have any transferable skills below a medium demand level, and the use of those skills has been negated by his physical problems. Mr. England testified Claimant would likely remain totally disabled from a vocational standpoint due to the combination of his physical problems and limited academic background. Mr. England reviewed the restrictions assigned by Dr. Burke and Dr. Volarich, but he did not review the FCE. Mr. England relied on the restrictions of Dr. Volarich in arriving at his opinion on Claimant's employability. Mr. England agreed the results of the FCE would not preclude Claimant from all types of employment, and Dr. Burke's restrictions would not preclude all types of employment.

Ms. Karen Kane-Thaler, a vocational rehabilitation specialist testified on behalf of Employer. Ms. Thaler considered Claimant's transferable skills, physical limitations, education, reasoning, language and arithmetic capability to determine if he is employable. Her analysis concluded Claimant is employable in a semi-skilled category. She performed a labor market survey, contacted several employers, and found multiple jobs that would fit within Claimant's reported physical limitations, skill set, and academic aptitude. Based upon her analysis and labor market survey, Ms. Thaler concluded Claimant could compete in the open labor market.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

Claimant sustained a mild left shoulder strain and a left elbow traction injury with ulnar neuritis, status post anterior ulnar nerve transposition as a result of the injury of August 9, 2011. I find the opinions of Dr. Burke regarding the diagnosis and treatment of Claimant's injury to be credible and persuasive.

Claimant sustained PPD of 30% of the left elbow and 5% of the left shoulder as a result of the work injury of August 9, 2011. Claimant continues to have limitations and pain as a result of the injury.

Claimant is not permanently and totally disabled. I find Claimant is capable of competing in and obtaining employment in the open labor market. I find the opinions of Employer's experts Dr. Burke, Ms. Thaler, and Mr. Meirink the most persuasive. I find the results of the FCE to be credible. There is no question Claimant is unable to return to the very heavy job of package driver for Employer, but there are jobs in the open labor market Claimant could perform.

The SIF is liable for PPD benefits. Claimant has established a right to recover from the Second Injury Fund. A claimant in a workers' compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 W.W.3d 902, 911 (Mo.App. E.D. 2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

I find Claimant sustained a compensable last injury which resulted in PPD of 30% of the left elbow (63 weeks) and 5% of the left shoulder (11.6 weeks). At the time the last injury was sustained, Claimant had 25% PPD of his right shoulder, (58 weeks) which meets the statutory threshold and was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment.

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, and causes a 20% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 74.6 weeks for last injury + 58 weeks for the preexisting injuries = 132.6 weeks x 20% = 26.52 weeks of overall greater disability x \$425.19 PPD rate = \$11,276.04

CONCLUSION

Employer is liable for 74.6 weeks of PPD benefits plus 6 weeks of disfigurement at \$425.19 a week or \$34,270.31. Claimant is not permanently and totally disabled. The SIF is liable for 26.52 weeks of PPD benefits at the rate of \$425.19 or \$11,276.04.

This award is subject to an attorney's lien of 25% in favor of Claimant's attorney Mr. James S. Haupt.

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation