

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

Injury No.: 07-089590

Employee: Ronald Porter
Employer: Waste Corporation of America (Settled)
Insurer: New Hampshire Insurance Company (Settled)
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 31, 2012, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Vicky Ruth, issued January 31, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this ____14th____ day of June 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Ronald Porter

Injury No. 07-089590

Dependents: N/A

Employer: Waste Corporation of America (SETTLED)

Additional Party: Second Injury Fund

Insurer: New Hampshire Insurance Company (SETTLED)

Hearing Date: November 1, 2011

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

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: September 17, 2007.
5. State location where accident occurred or occupational disease was contracted: Rolla, 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 injured his left upper extremity/shoulder when he lifted trash cans that were heavier than he expected.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Left upper extremity/shoulder.
14. Nature and extent of any permanent disability: 10% of the left upper extremity at the shoulder.
15. Compensation paid to-date for temporary disability: \$3,943.90.
16. Value necessary medical aid paid to date by employer/insurer? \$4,927.04.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: N/A.

19. Weekly compensation rate: \$368.08 / \$358.54.

20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer: Previously settled.

22. Second Injury Fund liability: None.

23. Future medical awarded: N/A.

Employee: Ronald Porter

Injury No. 07-089590

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ronald Porter

Injury No: 07-089590

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Waste Corporation of America (SETTLED)

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

Additional Party: Second Injury Fund

Insurer: New Hampshire Insurance Company (SETTLED)

On November 1, 2011, Ronald Porter and the Second Injury Fund appeared for a final award hearing in Rolla, Missouri. Mr. Porter, the claimant, was represented by attorney Michael Korte. The Second Injury Fund was represented by attorney Cara Harris. Claimant testified in person at the trial. Dr. David Volarich, Mr. Gary Weimholt, and Dr. Brent Koprivica testified by deposition. The claimant and the Second Injury Fund submitted their briefs/proposed awards on November 17, 201, and the record closed at that time.

STIPULATIONS

The parties stipulated to the following:

1. On or about September 17, 2007, Ronald Porter (the claimant) was an employee of Waste Corporation of America (the employer) when he sustained an injury by accident arising out of and in the course of his employment. The accident injured his left upper extremity/left shoulder.
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was insured by New Hampshire Insurance Company.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Phelps County is proper.
5. Notice is not an issue.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. At the time of the accident, claimant's compensation rate for permanent total disability was \$368.08 per week, and for permanent partial disability it was \$358.54 per week.
8. The employer/insurer provided medical aid in the amount of \$4,927.04.
9. The employer/insurer paid \$3,943.90 in temporary total disability benefits.
10. Claimant's attorney requested an attorney's fee of 25%.

ISSUES

The parties agreed that the issues to be resolved in this proceeding are as follows:

1. Nature and extent of claimant's permanent partial or permanent total disability;
2. Liability, if any, of the Second Injury Fund.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence without objection:

Exhibit A	<i>Curriculum vitae</i> of Dr. David T. Volarich.
Exhibit B	Report (7/23/07) from Dr. Volarich.
Exhibit C	Report (1/21/09) from Dr. Volarich.
Exhibit D	Report (6/15/10) from Dr. Volarich.
Exhibit E	<i>Curriculum vitae</i> of Gary Weimholt.
Exhibit F	Report (6/11/09) of Mr. Weimholt.
Exhibit G	Deposition of Dr. Volarich.
Exhibit H	Deposition of Mr. Weimholt.
Exhibit I	Stipulation for Compromise Settlement, 06-027348.
Exhibit J	Stipulation for Compromise Settlement, 07-089590.
Exhibit K	Records from Springfield Neurological & Spine Institute.
Exhibit L	Records from Phelps County Regional Medical Center.
Exhibit M	Records from St. John's Clinic – Rolla.
Exhibit N	Records from Dale Family Medical.
Exhibit O	Records from TCMH Family Clinic.
Exhibit P	Records from Cox Occupational Medicine.
Exhibit Q	Records from TCHMH Internal Medicine.
Exhibit R	Records from Ferrell Duncan Clinic.
Exhibit S	Records of Cox Medical Center.
Exhibit T	Records from TCMH Physical Therapy.

On behalf of the Second Injury Fund, the following exhibit was admitted into the record:

Exhibit 1	Deposition of Dr. Brent Koprivica.
-----------	------------------------------------

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence. The depositions were admitted with objections contained in the record; those objections are overruled.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. Claimant is 60 years of age and his birth date is July 6, 1951. At the time of the injury he was 56 years old. He lives in Edgar Springs, Missouri.
2. Claimant quit school in the 10th grade. He does not have a G.E.D., nor does he have any specialized or vocational training.
3. Claimant's employment history largely consists of positions as a driver. Claimant has also worked in the restaurant business, in landscaping, and in construction work. He worked briefly in a furniture factory as a production worker.
4. Claimant worked for the employer as a trash truck driver. His duties included driving a trash truck by himself on a regular route, making 150 to 225 stops each day. This work required claimant to continuously climb in and out of the trash truck, move trash cans to the rear of the truck (some trash cans were on wheels), and manually lift the trash cans to dump the trash. He testified that the trash cans weighed up to 100 pounds each.
5. Claimant indicated that he worked about 11 hours per day, with a 30-minute break for lunch and two 15-minute breaks.
6. On September 17, 2007, claimant sustained an injury at work (the primary injury) when he was lifting two heavy trash cans into his truck. He felt immediate pain. On the same date, he treated with Dr. Thomas Pirrote. Dr. Pirrote imposed work restrictions, recommended that claimant wear a sling and take ibuprofen or oxycodone, requested the claimant's previous medical records, and recommended physical therapy.¹
7. Claimant was referred to Dr. Ted Lennard. The doctor examined claimant on October 16, 2007, imposed work restrictions, ordered physical therapy, recommended an injection (which the claimant declined) and prescribed a CT arthrogram. That test revealed a subacromial enthesophyte. Despite physical therapy, claimant continued to experience pain, but again declined an injection. Dr. Lennard referred claimant to an orthopedist, who recommended surgery. Claimant declined to have the surgery.
8. On February 19, 2008, Dr. Lennard released the claimant at maximum medical improvement.²

Pre-existing Injuries/Conditions

9. Claimant was injured in March 2006, when he jumped onto the rear of the thrash truck to avoid being hit by an oncoming vehicle. Claimant injured his left shoulder in this accident. He treated at Phelps County Regional Medical Center, with Dr. Furr at Texas County Family Medical Clinic, and with Dr. Weisfeld, who performed left shoulder surgery. Following the surgery, claimant had physical therapy and some injections.
10. As a result of the March 2006 injury, claimant was off work for about six months.

¹ Claimant's Exhibit P.

² Claimant's Exhibit K.

Employee: Ronald Porter

Injury No. 07-089590

Although he did later return to employment with the employer, claimant testified that he was not 100%. He continued to have pain and weakness in his left shoulder. He stated that he would use his right side more than his left, and that he was unable to use his left arm like he had before.

11. Claimant settled his Workers' Compensation claim for the March 2006 injury with the employer/insurer for 17.5% permanent partial disability to the left shoulder.
12. In July 2007, claimant began to experience extreme fatigue and sought medical treatment. It was determined that he had a low heart rate and a third degree heart block. On or about July 31, 2007, Dr. Steven Rowe performed surgery to install a pacemaker to help regulate his heart rate. Claimant was off work for approximately six weeks for the surgery and recovery. Dr. Rowe released claimant on September 12, 2007 to return to work full duty.
13. Claimant did return to work on or about September 14, 2007. Claimant testified that after the pacemaker was installed, he was "one-half the man in strength."

Current condition/complaints

14. Claimant testified that he has not looked for work since leaving his job with the employer on September 17, 2007. He does not believe he is physically capable of performing the job he had with the employer, and he does not think that he can physically do any other job. Claimant has applied for and is receiving Social Security Disability benefits.
15. Claimant is largely left-handed, although he had always performed some tasks (like writing) with his right hand. Claimant testified that he avoids carrying with his left arm and he does not use it for overhead work. He believes that his grip is weaker in his left hand. He has pain and weakness in the left shoulder, and sometimes numbness in his left arm. He has difficulty sleeping because of the pain in his left shoulder.
16. Claimant stated that he does not use a telephone because of "electrical pollution." Until the hearing day, claimant had not left his 10-acre property since July 2011, a period of three or four months.
17. Claimant acknowledged that there are animals on his farm, such as chickens, a cow, a couple of goats, and two dogs. He testified, however, that he does not take care of the animals. He also testified that his son mows his yard.
18. Claimant testified that he does not feel safe driving, and he allowed his driver's license to expire. He no longer hunts, fishes, or raises pigs like he used to do. He no longer socializes. He does work a little on growing flowers in his yard.
19. Claimant testified that his average pain is a 7 out of 10, but that some days it is worse. He testified that prior to the September 2007 injury, his worst pain was a 5 out of 10.
20. Claimant testified that the November 1, 2011 trial date was the first time he had left his farm since July 2011.

Dr. David Volarich - Independent Medical Evaluation

21. On January 21, 2009, claimant saw Dr. David Volarich for an evaluation at the request of claimant's attorney. Dr. Volarich prepared a complete medical report and testified by deposition. As to the September 2007 injury, Dr. Volarich diagnosed a left shoulder strain with recurrent frozen shoulder syndrome – S/P conservative care. Dr. Volarich made the following diagnoses as to claimant's pre-existing conditions: (1) internal derangement of the left shoulder (impingement with frozen shoulder syndrome) – S/P manipulation under anesthesia, debridement of the joint including synovectomy and open subacromial decompression; and (2) sick sinus syndrome – S/P placement of a permanent cardiac pacemaker.
22. Dr. Volarich opined that due to the September 17, 2007 work injury, claimant sustained a 15% permanent partial disability of the left upper extremity rated at the shoulder due to the recurrent strain injury and the development of frozen shoulder syndrome that required conservative treatment.
23. Dr. Volarich also indicated that at the time of the September 2007 work injury, claimant had the following pre-existing permanent partial disabilities: (1) 20% of the body as a whole referable to the cardiovascular system, due to the sick sinus syndrome causing bradycardia that required placement of a permanent pacemaker; and (2) 40% of the left upper extremity rated at the shoulder due to the impingement, labral fraying, and adhesive capsulitis that all required surgical repair.
24. In his July 23, 2007 report, Dr. Volarich imposed the following restrictions as to claimant's left shoulder (due to claimant's March 2006 work injury):
 - Limit overhead use of the left arm or prolonged use of the left arm away from his body, especially above chest level.
 - Limit pushing, pulling, and traction maneuvers with his left upper extremity.
 - Handle weight to tolerance with the left arm extended away from his body or overhead, and handle weight to tolerance with the left arm (assuming proper lifting techniques).
 - He is advised to pursue an appropriate stretching, strengthening, and range of motion exercise program daily to tolerance for the left shoulder.
25. In his January 21, 2009 report, Dr. Volarich amended his recommended restrictions to take into account the September 2007 shoulder injury. Specifically, Dr. Volarich imposed the following restrictions as to claimant's left shoulder:
 - Avoid all overhead use of the left arm and any prolonged use of the left arm away from the body, especially above chest level.
 - Minimize pushing, pulling, and traction maneuvers with the left upper extremity.
 - Do not handle weights greater than about 3 to 5 pounds with the left arm extended away from the body or overhead, and limit these tasks to as tolerated.

Employee: Ronald Porter

Injury No. 07-089590

- He can handle weights to tolerance with the left arm dependent, assuming proper lifting techniques. However, the doctor would, in general, recommend 10-15 pounds with the left arm alone.
- He should pursue an appropriate stretching, strengthening, and range of motion exercise program daily for the left arm to tolerance.

26. In his June 15, 2010 addendum, Dr. Volarich noted that after reviewing Mr. Weimholt's assessment, he concludes that claimant is permanently and totally disabled as a result of the September 2007 work injury in combination with all of his pre-existing medical conditions.

Gary Weimholt – Vocational Rehabilitation Evaluation

27. At the request of claimant's attorney, Gary Weimholt saw claimant on April 3, 2009, for a vocational rehabilitation assessment/evaluation.³ Mr. Weimholt is a vocational rehabilitation counselor. Mr. Weimholt administered the arithmetic and reading sections of the Wide Range Achievement Test to claimant. According to Mr. Weimholt, claimant scored at the average high school level for reading and arithmetic.

28. Mr. Weimholt indicated that claimant's work history has not resulted in claimant acquiring any technology-related experiences or skills other than driving. His work history as a refuse truck driver is classified as a very heavy job that is semi-skilled.

29. Mr. Weimholt opined that Dr. Volarich's restrictions would prevent the performance of a full range of work at the Light Physical Demand Level. Mr. Weimholt felt that claimant did not have any transferable job skills to a skilled or semi-skilled work at a Sedentary or Light Physical Demand Level.

30. Mr. Weimholt opined that claimant has a "total loss of access to the open competitive labor market and is totally vocationally disabled from employment."⁴ In his deposition, Mr. Weimholt explained that claimant has a total loss of access to the open competitive labor market and is totally vocationally disabled from employment as a result of the combination of the March 2006 and 2007 work-related injuries and the intervening sick sinus syndrome.⁵ On cross-examination, Mr. Weimholt acknowledged that claimant could at least perform the position of a parking lot attendant.

Dr. Brent Koprivica – Independent Medical Evaluation

31. Dr. Brent Koprivica preformed a records review evaluation of claimant at the request of the Second Injury Fund. He issued a report dated August 14, 2010. Dr. Koprivica opined that the September 2007 injury is not one that is totally disabling.

³ Claimant's Exh. D.

⁴ Claimant's Exh. F.

⁵ Claimant's Exh. H, p. 12.

32. Dr. Koprivica noted that the compromise settlement in the 2007 case was based on an approximate disability of 10% of the left shoulder and that this is the upper limits of what he would have recommended. He also opined that as to the March 2006 injury, he would assign a 27.5% permanent partial disability at the left shoulder.⁶ He determined that the sick sinus syndrome resulted in no industrial disability. Dr. Koprivica noted that claimant denied being chronically fatigued associated with this condition. He also indicated that the symptoms that claimant was manifesting prior to the placement of the pacemaker were attributable to his cardiac rhythm disturbance in terms of bradycardia; his underlying cardiovascular function was entirely normal. Dr. Koprivca believes that with the placement of the pacemaker, there is no reason that claimant would have any reduction in his work capacity. The doctor indicated that claimant could even drive commercially.
33. Dr. Koprivica opined that claimant was not permanently and totally disabled.⁷ Dr. Koprivica pointed out that the records show that after the successful pacemaker placement, claimant was not having fatigue from a cardiovascular standpoint, that claimant had normal cardiac function objectively, and that he was able to drive.
34. Dr. Koprivica acknowledged that because of the pacemaker, claimant is no longer able to work around welding equipment, but he opined that this causes very minimal impact vocationally. According to the doctor, claimant had normal heart function with the pacemaker in place.⁸ Dr. Koprivca stated that medically, claimant can use ordinarily power tools like drills and that kind of equipment.⁹ He testified that claimant can drive and can use a cell phone. He stated that he doesn't believe that the fact that a person is limited above shoulder level on the left with one arm is a totally disabling condition from a physical capacity standpoint. Moreover, Dr. Koprivica didn't believe that all the restrictions outlined in the vocational report were a true reflection of the objective limitations of claimant.
35. In his testimony, Dr. Koprivica further explained his opinion as to the restrictions imposed on claimant. The doctor stated that he agreed that Dr. Lennard's restrictions were appropriate, specifically, that claimant was to avoid overhead use of the left upper extremity and avoid prolonged reaching forward with the left arm.¹⁰ Dr. Koprivica agreed with some of Dr. Volarich's restrictions; he agreed with the restriction limiting overhead use or prolonged use away from the body, limiting pushing, pulling, and handling weight to tolerance with the left arm extended away from the body.
36. However, Dr. Koprivica testified that the following restrictions (to the left upper extremity) imposed by Dr. Volarich were excessive: not handling weights greater than about three to five pounds when the arm is extended away from the body or overhead,

⁶ IN his testimony, Dr. Koprivca appears to mistakenly believe that claimant settled his March 2006 injury for 27.5% PPD of the left upper extremity. In fact, the settlement was for 17.5% PPD. See SIF Exh. 1, p. 15.

⁷ SIF Exh. 1, p.11 and attached exhibit B.

⁸ SIF Exh. 1, p. 13.

⁹ SIF Exh. 1, p. 14.

¹⁰ SIF Exh. 1, p. 16.

Employee: Ronald Porter

Injury No. 07-089590

and to limit these tasks as tolerated, and generally limiting lifting to 10 to 15 pounds with the left arm alone.¹¹

CONCLUSIONS OF LAW

Based upon the findings of fact, I find the following:

Issue 1: Nature and extent of permanent partial disability or permanent total disability.

Issue 2: Second Injury Fund liability, if any.

Claimant seeks an Award of permanent total disability against the Second Injury Fund. Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.¹² Proof is made only by competent and substantial evidence, and may not rest on speculation.¹³ Medical causation not within lay understanding or experience requires expert medical evidence.¹⁴ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.¹⁵

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹⁶ Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.¹⁷

Section 287.020.7, RSMo, provides that "total disability" is the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident.¹⁸ The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.¹⁹ The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.²⁰ When the claimant is disabled by a combination of the work-related event and pre-existing disabilities, the responsibility for benefits lies with the Second Injury Fund.²¹ If the last injury in and of itself renders a claimant

¹¹ SIF Exh. 1, p. 17.

¹² *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

¹³ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

¹⁴ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

¹⁵ *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

¹⁶ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

¹⁷ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

¹⁸ See also *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).

¹⁹ *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

²⁰ *Id.*

²¹ Section 287.200.1, RSMo.

Employee: Ronald Porter

Injury No. 07-089590

permanently and totally disabled, the Second Injury Fund has no liability and the employer is responsible for the entire compensation.²²

That is, Second Injury Fund liability exists only if the employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a disability greater than the simple sum of disabilities.²³ When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities.²⁴ In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as the result of the last compensable injury, and that the disability has combined with a prior permanent partial disability to result in total disability.²⁵

Where a pre-existing permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the disability resulting from the work-related injury.²⁶ In determining the extent of disability attributable to the employer and the Second Injury Fund, an administrative law judge must determine the extent of the compensable injury first.²⁷ If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made.²⁸ Therefore, it is necessary that the employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability.

Various factors have been considered by courts attempting to determine whether or not an employee is permanently totally disabled. It is not necessary that an injured employee be rendered, or remain, wholly or completely inactive, inert or helpless in order to be entitled to receive compensation for permanent total disability.²⁹ An employee's ability or inability to perform simple physical tasks such as sitting,³⁰ bending, twisting,³¹ and walking³² may prove that the employee is permanently totally disabled. An employee's age may also be taken into consideration.³³

On September 17, 2007, claimant sustained a compensable injury to his left upper

²² *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App.W.D. 2003).

²³ Section 287.220.1, RSMo.; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo. App. 1985).

²⁴ *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990).

²⁵ Section 287.220.1, RSMo.; *Brown* at 482; *Anderson* at 576.

²⁶ *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 366 (Mo. App. 1992).

²⁷ *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-743 (Mo. App. 1996).

²⁸ *Id.*

²⁹ *Maddux v. Kansas City Public Service Co.*, 100 S.W.2d 535 (Mo. 1936); *Grgic v. P & G Const.*, 904 S.W.2d 464 (Mo.App. E.D. 1995); *Julian v. Consumers Markets, Inc.*, 882 S.W.2d 274 (Mo.App. S.D. 1994); *Groce v. Pyle*, 315 S.W.2d 482 (Mo.App. 1958).

³⁰ *Brown v. Treasurer of Missouri*, 795 S.W.2d 479 (Mo.App. E.D. 1990).

³¹ *Sprung v. Interior Const. Service*, 752 S.W.2d 354 (Mo.App. E.D. 1988).

³² *Keener v. Wilcox Elec. Inc.*, 884 S.W.2d 744 (Mo.App. W.D. 1994).

³³ *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo.App.S.D. 1997); *Reves v. Kindell's Mercantile Co., Inc.* 793 S.W.2d 917 (Mo.App. S.D. 1990). See also *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919 (Mo.App. S.D. 1982).

Employee: Ronald Porter

Injury No. 07-089590

extremity/shoulder; this injury occurred during the course and scope of his employment with the employer. I find that as a result of this September 2007 injury, claimant sustained a permanent partial disability of 10% of the left shoulder.

I also find that prior to the September 2007 work injury, claimant sustained an injury to his left shoulder. That injury occurred in March 2006. As a result of the 2006 injury, claimant sustained a permanent partial disability of 17.5% of the left shoulder.

On July 31, 2007, less than two months before the primary injury, claimant underwent surgery for the insertion of a pacemaker. Dr. Steven Rowe performed the surgery and diagnosed claimant with sick sinus syndrome. I find that claimant sustained a permanent partial disability of 5% as a result of this injury/illness.

After considering all of the evidence, I find that claimant has not met his burden that he is permanently and totally disabled. In making this determination, I find that the opinion of Dr. Koprivica is more credible and persuasive than those of Dr. Volarich and Mr. Weimholt. Dr. Volarich's final set of restrictions are excessive and not credible. As Mr. Weimholt relied on the opinion and restrictions of Dr. Volarich, his opinion is also flawed.

Claimant sustained two injuries to his left upper extremity; one resulted in permanent partial disability (PPD) of 17.5% and the other of PPD of 10%. Claimant also suffered a PPD of 5% of the body as a whole referable to his heart condition. Nevertheless, the only restrictions on claimant's physical abilities are to his left upper extremity. Claimant has no limitations on sitting, standing, or on his right upper extremity. Although he cannot work on certain machinery/welding equipment due to his pacemaker, this imposes very a minimal limitation. Claimant's testimony as to his activity level, especially on his farm, and his pain level is not entirely credible. Although claimant testified that he has a high level of pain, one that average 7 out of 10 but sometimes goes higher, he chooses not to take any pain medication.

Neither claimant's injuries nor his presentation fit the criteria of someone who is permanently and totally disabled. Claimant sat throughout the hearing without any discernible difficulty or discomfort. Although it is true that claimant cannot return to the physically demanding work he was doing for the employer, his own vocational expert, Mr. Weimholt, acknowledges that considering Dr. Volarich's restrictions and claimant's background, claimant is capable of certain jobs. More importantly, Mr. Weimholt's opinion is based on the excessive restrictions imposed by Dr. Volarich and is therefore flawed.

Claimant appears to have chosen a life of relative seclusion. He rarely leaves his 10-acre property. At trial, he testified that he had not left the property since July 2011, three or four months prior. Claimant has chosen to not use landline telephones or cell phones. He allowed his driver's license to lapse. These choices do not entitle claimant to Second Injury Fund benefits.

As claimant settled his last injury with the employer for only 10% permanent partial disability of the left shoulder, he is not entitled under the statute for any Second Injury Fund benefits for permanent partial disability. Section 287.220.1 requires that the primary injury result in at least a 15% permanent partial disability to a major extremity (or 12.5% to the body as a whole). Claimant's last injury was to a major extremity – his left upper extremity – however,

Employee: Ronald Porter

Injury No. 07-089590

he has failed to prove that the disability from that injury rises to the level of 15%. Therefore, claimant's claim fails.

Any pending objections not expressly ruled on in this award are overruled.

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation