

FINAL AWARD ALLOWING COMPENSATION

(Affirming Amended Award and Decision of Administrative Law Judge
by Supplemental Opinion)

Injury No.: 05-058991

Employee: Ozie C. Prier
Employer: Doe Run Company
Insurer: American Home Assurance Company
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.¹ Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the amended award of the administrative law judge (ALJ) 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 amended award and decision of the ALJ dated November 22, 2011, as supplemented herein.

Preliminaries

The ALJ awarded employee permanent total disability benefits against the Second Injury Fund. The ALJ further found that employee reached maximum medical improvement (MMI) on December 20, 2007, and granted employer/insurer a credit for temporary total disability benefits paid between December 20, 2007, and December 9, 2009. Employee and the Second Injury Fund appealed to the Commission, alleging, among other things, that the ALJ erred in granting employer/insurer a credit for overpayment of temporary total disability benefits.

Discussion

We must first address an evidentiary issue raised by employer/insurer.

After employee filed his brief with the Commission, employer/insurer filed a "Motion to Strike Employee's Brief" due to a minute entry employee cited. Employee subsequently filed a response. On July 25, 2012, we issued an order denying employer/insurer's motion, but indicated that we would consider the merits of employer/insurer's arguments regarding the admissibility of the minute entry with our review of the amended award.

Having reviewed the minute entry cited in employee's brief and considering the merits of employer/insurer's arguments, we find that the minute entry is inadmissible hearsay and was not considered for purposes of our review.

With respect to the primary issue on appeal, employee and the Second Injury Fund argue, based upon the opinions of Dr. Emanuel, that the very earliest employee

¹ Statutory references are to the Revised Statutes of Missouri 2004 unless otherwise indicated.

Employee: Ozie C. Prier

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reached MMI was October 13, 2009. Employee and the Second Injury Fund further argue that employer/insurer's attorney stipulated to an MMI date of October 13, 2009, at the July 11, 2011, hearing. As evidence of the alleged MMI date stipulation, employee and the Second Injury Fund point to pages 11-12 of the transcript, on which the following statements appear:

ALJ Robbins: I have been advised by the employer/insurer that they think max medical improvement is October 13th, 2009, as that is contained in the medical of Dr. Emanuel. (Tr. 11, Lines 20-22).

...

Second Injury Fund Attorney, Gregg N. Johnson: [Employee's attorney] said earlier that the [MMI] date he believed (sic) July 6th, 2010. [Employer/insurer's attorney] said he thought the date was October 13th, 2009, (sic) he had been paid through December 9th of 2009, (sic) it sounds like a reasonable division of the decisions if the Court finds that December 9th, 2009.

ALJ Robbins: [Employer/insurer's attorney], do you have anything to add on that?

Employer/insurer attorney, Jay Lory: No, Your Honor. (Tr. 12, Lines 17-24).

Despite the foregoing, when issues were later recited by the ALJ on page 15 of the transcript, the ALJ noted that issue number two was temporary total disability and stated that, "this is an issue that if it is developing further other than the evidence today, that [employee's attorney], you will address that in your proposed award...." (Tr. 15, Lines 9-12).

After a thorough reading of the ALJ's recitation of the stipulations and issues to be decided at the July 11, 2011, hearing, we do not find that employer/insurer stipulated to an MMI date of October 13, 2009. The ALJ and the Second Injury Fund's attorney may have stated that employer/insurer's attorney **thought** the MMI date was October 13, 2009, and employer/insurer's attorney may, in fact, have stated off the record that he **thought** employee's MMI date was October 13, 2009, but there was no definitive stipulation by employer/insurer that employee reached MMI on that date. Further, the ALJ cleared up any ambiguity as to whether an MMI date was stipulated to by unmistakably listing temporary total disability as an issue to be decided. Lastly, we find that the ALJ thoroughly reviewed and weighed the evidence regarding employee's MMI date and properly came to the conclusion that employee reached MMI on December 20, 2007.

Award

We affirm the amended award of the ALJ, as supplemented herein.

Employee: Ozie C. Prier

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The amended award and decision of Administrative Law Judge Gary L. Robbins, issued November 22, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the ALJ'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 27th day of September 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AMENDED FINAL AWARD

Employee: Ozie C. Prier

Injury No. 05-058991

Dependents: N/A

Employer: Doe Run Company

Additional Party: Second Injury Fund

Insurer: American Home Assurance Company

Hearing Date: July 11, 2011

Checked by: GLR/rf

SUMMARY OF FINDINGS

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? May 25, 2005.
5. State location where accident occurred or occupational disease contracted: Iron County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was driving a scaler when he struck a large boulder causing him to be jerked around the cab of the scaler and injured. The boulder was hidden in a pool of water and was not seen prior to the impact.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Neck, right arm and right shoulder.
14. Nature and extent of any permanent disability: Permanent partial disability as to the employer-insurer. See Award.
15. Compensation paid to date for temporary total disability: \$70,390.24.
16. Value necessary medical aid paid to date by employer-insurer: \$134,267.92.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$610.32.
19. Weekly compensation rate: \$406.88 per week for temporary total and permanent total disability. \$354.05 per week for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: Permanent total disability. See Award.
23. Future requirements awarded: At trial the parties advised the Court that the employer-insurer has agreed to provide future medical care.

The Compensation awarded to the employee 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 employee: Kenneth A. Seufert.

FINDINGS OF FACT AND RULINGS OF LAW

On July 11, 2011 the employee, Ozie C. Prier appeared in person and with his attorney, Kenneth A. Seufert for a hearing for a final award. The record was left open after trial and was closed on August 9, 2011. The employer-insurer was represented at the hearing by its attorney, Jay C. Lory. Assistant Attorney General Gregg N. Johnson represented the Second Injury Fund. The Court took judicial notice of all records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below:

UNDISPUTED FACTS

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by American Home Assurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Doe Run Company and was working under the Workers' Compensation Act. The parties agree that the employer in this case is Doe Run Company a/k/a Doe Run Resources Corporation even though in some of the documentation it might have been referred as to another name, but they are all the same entities.
3. On or about May 25, 2005 the employee sustained an accident or occupational disease arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The parties agree that the average weekly wage is \$610.32, giving a rate for temporary and permanent total disability of \$406.88 and a rate for permanent partial disability of \$354.05.
7. The employee's injury was medically causally related to his accident or occupational disease.
8. The employer-insurer paid \$134,267.92 in medical aid.
9. The employer-insurer has paid temporary disability in the amount of \$70,390.24, which has been identified as a period of 173 weeks beginning on June 27, 2006 and ending on through December 9, 2009.
10. The employee made no specific claim for prior medical bills.
11. The parties agreed that the employer is responsible to provide future medical care for the employee that is reasonably necessary to cure and relieve the employee's injuries from the May 25, 2005 work accident. It is agreed this future medical care includes pain management as is presently being provided by Dr. Guarino.
12. The parties agreed that the employer-insurer will be responsible for the medical expenses incurred by the employee for pain management by Dr. Guarino, including treatment provided, ordered or directed by him including treatment at any other medical facility or by any other medical care provider as well as pharmacy expenses.
13. After the close of the evidence, the employee filed written Stipulation of the Parties concerning the employee's pre-existing medical condition to his right and left knee. By

mistake, the employee's attorney forgot to question the employee concerning the same. In lieu of re-opening the case the parties agreed that the employee would testify in conformance with his statements to Dr. Volarich. Specifically, the employee would testify as follows:

His knee difficulties began sometime in 2004 when he experienced pain and swelling in both of his knees, right greater than left, with prolonged walking on concrete. He treated himself with over-the-counter medications and knee wraps.

He was seen at Medical Arts Clinic by nurse practitioner, Pat Koppeis, on 4/12/05. X-rays of his knees were normal. An MRI of his right knee on 5/17/05 demonstrated degenerative changes and he was prescribed Mobic.

Leading up to and continuing beyond 5/25/05, he experienced intermittent soreness in his right knee when walking on concrete floors for longer than five hours and had to sit down. His knee occasionally gave way when walking, climbing steps or ladders; however he followed no medical restrictions and took no days off work. He followed self-imposed restrictions by being very careful with any of these exertions such as walking or climbing, wore his knee brace and always guarded his right knee.

ISSUES

1. Mileage
2. Temporary Total Disability.
3. Permanent Total Disability.
4. Permanent Partial Disability.
5. Liability of the Second Injury Fund for Permanent Total of Permanent Partial Disability as appropriate.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Report of David T. Volarich, D.O.
- B. Report of David T. Volarich, D.O.
- C. CV of David T. Volarich, D.O.
- D. Letter written by Ken Seuffert.
- E. Various medical records.
- F. Records from the Division of Workers' Compensation.

- G. Various medical records.
- H. Various medical records.
- I. Claim for Compensation for injury of July 1, 2003.
- J. Report of Injury for injury of May 25, 2005.
- K. Claim for Compensation for injury of May 25, 2005.
- L1. Report of James M. England, Jr.
- L2. CV of James M. England, Jr.
- L3. Records provided to Mr. England.
- M. Various medical records.
- N. Deposition of David T. Volarich, D.O.
- O. Deposition of James M. England, Jr.
- P. Social Security records.
- Q. Pharmacy records.
- R. Letter of termination.
- S. Mileage.
- T. Stipulation and Agreement.

Employer-Insurer's Exhibits

- 1. CV of James J. Coyle, M.D.
- 2. CV of James P. Emanuel, M.D.
- 3. Stipulation for Compromise Settlement in Case 03-147732.
- 4. Medical records of Joseph Huck, DC.

Second Injury Fund Exhibits

None.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACTS-

The employee was the only person to personally testify at trial. All other evidence was presented in the form of written records, medical reports or deposition testimony.

Ozie Prier

Ozie C. Prier, the employee was born August 7, 1965 and is presently 45 years old. He is married and has one child who is 22 years old. His wife and child are dependents. He is a member of Operators Union 513. He was a member of the United States Navy and received an honorable discharge in 1984 for medical reasons. He claims no military disability.

He last worked on June 23, 2006. He officially was terminated by the employer, Doe Run Company on June 23, 2007. He is presently supported by his wife as well as Social Security

Disability income. His onset of disability was determined by the Social Security Administration to be June of 2006.

The employee lives with his wife in Belleview, Missouri in a modular home on approximately 43 acres. He graduated from Arcadia Valley High School in 1984. He has received vocational training as a welder for three years. As a result of his employment, he has learned how to operate heavy equipment as well as perform heavy equipment mechanical repair work. He can read and he can perform basic math.

His prior work history consists of manual labor such as a laborer at Missouri Red Quarry or employment as a heavy equipment mechanic for Barnhart Limestone, Weber Construction or Doe Run Company or an equipment operator working out of Union 513 for J.H. Berra Company, Sierra Bravo Construction or McAninch Company.

In February or March of 2004, he went to work for Doe Run Company in its maintenance department as a heavy equipment mechanic. The skills involved were knowing and repairing equipment as well as welding. Mr. Prier described this as extremely physically demanding including heavy lifting, bending, squatting, climbing and crawling. He worked at Doe Run Resources through June 23, 2006. On May 25, 2005 he sustained his work related injury, which is the subject of this workers' compensation claim.

The employee testified that in the late 1980's he dislocated his right thumb while pulling a piece of steel out of the bed of a truck. He received medical care and his thumb was reduced. Leading up to May 25, 2005, he continued to have problems with the thumb. While threading nuts and bolts the hand would become fatigued or cramped and he would have to stop, rest, and recover. When in a cold environment, the thumb and hand would ache. He testified that it caused problems with performing his work at Doe Run Company. At times, he would have to stop in order to get feeling back into the hand and thumb or stretch it out to accomplish the same. It impeded the performance of his duties by slowing him down. In order to manage his symptoms, he often would take over-the-counter medication.

In the late 1990s Mr. Prier developed chronic sinusitis. These were severe sinus infections which required routine office visits. Symptoms included sinus headaches, runny nose, and itchy eyes. These symptoms have caused him to avoid dusty conditions or, in the alternative, wear masks in order to perform work. This often slowed his pace at work because the mask would reduce visibility and was cumbersome. At times, he would seek fresh air because of his chronic sinusitis. The mask would also impair breathing. The chronic sinusitis affected his ability to concentrate. From time to time he is required to take antibiotics.

In early 2000, Mr. Prier was diagnosed with sleep apnea and was treated by Dr. Bonaquisti. His symptoms included partially waking up after falling asleep because he stopped breathing. In 2002 and 2003, he underwent three separate surgeries, the last being a reconstruction of his nose. The affect of his symptoms was to cause him to wake unrested, tired and fatigued. During the day while at work, he found that he was dragging and his concentration was lacking. This would often slow the performance and pace of his work.

Mr. Prier also has had knee difficulties since 2004 when he experienced pain and swelling in both of his knees, with the right greater than the left. He attributed this to prolonged walking on concrete. He self-treated initially with over-the-counter medication and knee wraps. On April 12, 2005, he was seen by a nurse practitioner, Pat Koppeis. X-rays of the knees were normal. A MRI of his right knee on May 17, 2005 demonstrated degenerative changes. The employee was prescribed Mobic. Leading up to and continuing to May 25, 2005, he experienced intermittent soreness in his right knee when walking on concrete floors for longer than five hours and had to sit down. His knees occasionally gave way when walking, climbing steps or ladders; however, he followed no medical restrictions and took no days off work. He followed self-imposed restrictions by being very careful with any of these exertions such as walking or climbing, wore his knee brace and always guarded his right knee.

In July of 2003, Mr. Prier was employed by McAninch and his duties were to operate a 50 ton haul truck on a road project in Butler County. A large boulder was dropped into the bed of the truck, which caused him to be tossed around inside the cab of the vehicle. Shortly thereafter, he started developing severe headaches, worse with activity. He initially consulted with his primary care physician, Dr. Gary Grix, who performed tests to see whether or not he suffered any brain malady. The tests were negative. In February or March he took the job with Doe Run Company.

In the summer of 2004 he consulted with Dr. Huck, a chiropractor. He ordered an MRI, which documented a large central C4-C5 disc herniation. Mr. Prier was then referred to Dr. Boland who is a neurosurgeon. He took a leave of absence from Doe Run in order to obtain treatment. Dr. Boland recommended surgery. On August 20, 2004 he underwent decompression and fusion at the C4-5 level. He pressed Dr. Boland to release him back to work in September 2004 being fearful he would lose his job. In late September, Doe Run sent the employee to the "company physician", Dr. Punzalan, to determine fitness for work. Dr. Punzalan directed that he undergo work hardening. Upon completion, he was allowed to return to his former duties.

Before the first surgery his headaches were severe to the back side of his head and he suffered from neck pain as well as tingling in his arm. The August 20, 2004 surgery did relieve pressure improving his headaches and stopped the tingling in his arms. Even so, he continued to have headaches at times as well as neck pain. As a result of the fusion, he had loss of motion. Upon returning to work, he found it difficult to look up, which was problematic because he worked underground and on heavy equipment. The stiffness and the neck pain slowed him down. Headaches sometimes were severe depending on his activities. As a result, he took over-the-counter medication such as Advil and Aleve. He indicated that his job performance was affected by his inability to concentrate and he was slowed down because of his headaches.

Mr. Prier reported the effects of his surgery on his personal activities. After the surgery he had to stop riding horses. He continued to hunt, but he used less powerful rifles or shotguns. He described his average pain on a scale of zero to ten being two. Even so, he continued to fly fish and he continued to work regular hours with some overtime.

On May 25, 2005, Mr. Prier was working as a mechanic/maintenance person in one of Doe Run's underground mines located in Iron County, Missouri. The mine consisted of various levels,

which are accessed in a manner similar to a parking garage. A scaler on a lower level had a flat tire. It was the employee's job, along with a co-worker, to go down to that level, change the tire and return the scaler to the shop. He left with the co-worker, found the scaler and changed the tire. Mr. Prier was driving the scaler when he had an accident. His co-worker was following in a truck. A scaler is a device with a large boom that is used to remove ore from the ceiling of the mine after it has been loosened by explosives. A scaler is top-heavy. As the employee drove the scaler back up the various levels, he described the surface as being rough and at times covered with water. There was an area with a depression covered with water. The front tires entered the depression without problems, but the rear tires, which are used for steering, struck a boulder obscured by the water. As a result, he was shaken around in the cab with his body and appendages striking the inside of the cab. He stopped the scaler and got out to inspect the machine for damage. As he did so, he noticed he was developing a severe headache and his right shoulder was killing him because of pain. He also had pain at the base of his skull.

Mr. Prier got the equipment back to the shop and reported the injury, but he did not initially ask for treatment. Rather, he just simply continued to work. Over time, his symptoms worsened. His headaches became more severe, his right shoulder pain worsened. He finally asked for and was sent for treatment to the company doctor, Dr. Punzalen on June 3, 2005. On August 6, 2005, Dr. Punzalen ordered an MRI that was performed on August 30, 2005. Thereafter, he was referred to Dr. Boland, who was his original neck surgeon. Dr. Boland sent the employee to Dr. Guarino for C5-6 facet blocks that were provided twice and were followed by a nerve ablation at C5-6. During this time Mr. Prier was losing use of his right arm and could no longer perform the duties of his employment. As a result, he bid into a forklift job that was less physically demanding.

Eventually Dr. Guarino referred Mr. Prier back to Dr. Boland who saw him again on May 9, 2006. Dr. Boland ordered x-rays and thereafter recommended surgery. During this time Mr. Prier worked originally as a mechanic, but later as a forklift operator.

On July 18, 2006, Dr. Boland performed a C5-C6-C7 neck fusion. According to Mr. Prier, the surgery helped with the headaches, but provided no help to the right shoulder or arm. He could not even raise his arm. Dr. Boland ordered an MRI of the shoulder. As a result of the MRI, Mr. Prier was referred to Dr. Hulsey who is an orthopedic surgeon.

As of June 23, 2006 the employee could no longer perform even his duties as a forklift operator and was placed on temporary total disability benefits and remained off work. Eventually by a letter dated July 23, 2007, his job was terminated by Doe Run because of his inability to perform his job duties.

Dr. Hulsey ordered an arthrogram that was performed on December 15, 2006. On April 6, 2007, Dr. Hulsey performed a right shoulder surgery.

Mr. Prier was placed on temporary total disability benefits. On June 23, 2006 he applied for Social Security Disability. He was awarded disability benefits with his first benefit received December of 2006. Onset of disability was approximately June of 2006.

The employee indicated that the surgery of the right shoulder helped with the pain, but it did not allow him to freely move the arm above the shoulder height. Although the arm can be forced higher, it can only be done so with extreme pain. This condition has remained the same through the date of the hearing.

Dr. Hulsey released Mr. Prier on September 27, 2007 with the following permanent restrictions:

1. Not to lift more than 30 pounds floor to waist.
2. No pushing or pulling over 25 pounds.
3. No activities at shoulder level or above.
4. Restrict ladder climbing.
5. Use of Ultram extended release.

Dr. Hulsey also told Mr. Prier to continue to perform a home exercise program including light range of motion and stretching. These limitations are only to the right shoulder.

On October 17, 2007 Dr. Boland referred Mr. Prier to Dr. Guarino for pain management with no follow-up appointments to be scheduled with Dr. Boland. Dr. Guarino then took over treatment for the purpose of providing pain management for the employee's neck and shoulder. He has remained continuously under the care of Dr. Guarino since that time and is seen on a regular basis. By stipulation of the employer-insurer and the employee it was agreed that the employee is to continue to receive pain management in the future and that the employer-insurer would be responsible for that care. In short, the employer-insurer is to provide future medical treatment for the employee's injuries of May 25, 2005.

Since that time, Mr. Prier has not worked. He has remained under the care of Dr. Guarino for pain management. On November 27, 2007 Dr. Guarino recommended opioid therapy. As of December 21, 2007, he noted that Mr. Prier suffered from intractable pain and could not work.

On February 12, 2008, the employee was started on Kadian, a morphine drug. Over the course of his treatment with Dr. Guarino up until the date of the hearing, he had taken various types of pain medication or other medications prescribed by Dr. Guarino including the following: Norco, Kadian, Lidoderm patches, Cymbalta, Amrix, Flexeril, Opana-morphine, Medrol Dose Pak, Percocet, Methadone, Prozac, Oxycontin, Ranitidine/Prilosec. In addition, Dr. Guarino has performed cervical facet blocks, epidural steroid injections as well as other injections.

On February 9, 2011, according to Dr. Guarino's records he reported that Mr. Prier had indicated that he "seems like things are going downhill". On February 6, 2011, Dr. Guarino gave the following report:

Mr. Prier has chronic neck pain that I believe is the consequence of a pre-existing problem prior to his work related incidence of 05-25-05 as well as the result of the injury of 5-25-05. I believe the injury of 05-25-05 is the predominant event leading to his current persistent pain state. It is due to his pain that he is unable to work. This is evidenced by his report of being unable to do various things around the house that one would expect that he could do if he was able to return to his previous form of employment. His previous employment was a heavy demand type of job. I feel that due to his persistent pain state he may not be able to do much of any type of work due to the his continued pain and need for breaks.

His inability to return to work is due to a combination of pre-existing and subsequent neck problems related to 5/25/05.

Over the course of his treatment, the employer-insurer has sent Mr. Prier for multiple independent medical evaluations including the following:

1. October 27, 2008: Dr. Yadava.
2. September 22, 2009: Dr. James Emanuel, M.D.
3. February 23, 2010: Dr. James Coyle, M.D.

On February 25, 2010 he returned to Dr. Boland. He was seen by Dr. Boland through August 11, 2010. Dr. Boland offered Mr. Prier nothing further and simply told him to continue pain management.

The employee indicated that presently his pain is significantly worse than it was as compared to after the first neck surgery on August 20, 2004 leading up to the May 25, 2005 work related injury. Presently, his average daily pain level is four, but at times it worsens to an extreme level of ten. His loss of range of motion is worsened. He can no longer move his head up or down or from right to left; rather, he must move his body in order to gain site to his left or right or up or down.

Presently he has right shoulder pain and cramps, his headaches are now worse, more intense, harder to get rid of, requiring him to lie down. The strength and stamina of his body is significantly diminished.

Mr. Prier reported that he presently is taking Norco and Flexeril as well as Zantac for his stomach as a side effect of the medication. In addition, any physical activity exacerbates all of his symptoms making them extremely worse.

He also indicated that he suffers from depression as the consequences of his inability to work and because of the various symptoms he suffers from. At one time he was taking anti-depressants, but presently he is not taking any. He tries to cope with his situation by simply not thinking about it. His overall effect is one of sadness, which he attributes to his inactivity. His sleep has also been affected by his injury. He indicated that he does not get any rest even with medication. He also has to prop himself up with pillows or other devices. This has complicated the fact that he continues to use a C-pap machine because of the sleep apnea.

Now as a result of his injuries of May 25, 2005 he needs help dressing. He has to have help getting his shirt off as well as assistance with buttons. After May 25, 2005 he stopped hunting. He stopped fly fishing. Mr. Prier is right-handed. In order to fly fish, he has to use his right arm. The right shoulder has loss of range of motion. As a result, he cannot make the sufficient motion to cast. A typical day consists of him spending time watching television and feeding his animals consisting of 3 dogs, 13 chickens and 1 horse.

Mr. Prier has requested that the employer-insurer pay all of Dr. Guarino's bills as well as all pharmacies that have been prescribed by Dr. Guarino for pain management or side effects thereof. The employer-insurer has agreed that it is responsible for Dr. Guarino's medical expenses including all services directed by Dr. Guarino.

Mr. Prier also requests that he be reimbursed for mileage for travel from his home to Dr. Guarino's office or for other treatment that remains unpaid as well as reimbursement for pharmacies prescribed by Dr. Guarino.

Dr. David T. Volarich, D.O.

At the employee's attorney's request, Dr. Volarich performed an independent medical evaluation. Dr. Volarich reviewed records in preparation of his original report dated May 4, 2009. Dr. Volarich also interviewed and examined Mr. Prier on May 4, 2009. He made an original report dated May 4, 2009 and a supplemental report dated February 8, 2010. Dr. Volarich also testified by deposition on July 16, 2010.

Dr. Volarich provided the following medical opinions:

1. Diagnosis of injury of May 25, 2005:
 - a. Cervical spine instability C5-6 and C6-7 with subluxation-S/P posterior C5-6 and C6-7 arthrodesis with bone grafting and instrumentation.
 - b. Right shoulder internal derangement (posterior dislocation)-S/P arthroscopic open posterior capsular reconstruction.

2. Opinions on causation:
 - a. It was Dr. Volarich's opinion that the work accident that occurred on May 25, 2005 when Mr. Prier was driving a scaler removing loose rock from the mines when he struck a large boulder hidden in water causing him to be forcefully jerked around inside the vehicle after which he experienced an increase in neck pain and right shoulder pain as well as pain radiating to the right arm is the substantial contributing factor as well as the prevailing or primary factor causing the instability at C5-6 and C6-7 levels that required posterior fusion with bone grafting and instrumentation at C5-6 and C6-7. As a result of this injury he also suffered right shoulder

posterior capsular instability that required surgical repair and open reconstruction of the capsule.

3. Disability rating of the May 25, 2005 injury:
 - a. Dr. Volarich opined that Mr. Prier sustained the following industrial disability as a result of the May 25, 2005 injury:
 1. 45% permanent partial disability of the body as a whole rated at the cervical spine due to the instability at C5-6 and C6-7 that required posterior fusion with bone grafting instrumentation. The rating accounts for this injury's contribution to lost motion, pain and recurrent upper extremity paresthesias, weakness and occasional radicular symptoms.
 2. 40% permanent partial disability of the right upper extremity rated at the shoulder due to the posterior instability that required open capsular reconstruction. The rating accounts for ongoing pain, lost motion, crepitus, weakness, and ongoing impingement in this shoulder.
4. Pre-existing medical conditions to May 25, 2005 injury were diagnosed and rated by Dr. Volarich as follows:
 - a. 5% permanent partial disability of the right hand due to the metacarpal phalangeal joint thumb strain/sprain causing weakness to pinch and grip.
 - b. 5% permanent partial disability of the body as a whole due to his chronic sinusitis causing recurrent headaches.
 - c. 10% permanent partial disability of the body as a whole due to his sleep apnea causing disrupted sleep as well as tiredness and easy fatigability throughout the work day.
 - d. 15% permanent partial disability of the right lower extremity rated at the knee due to his patellofemoral syndrome causing knee pain.
 - e. 5% permanent partial disability of the left lower extremity rated at the knee due to his mild patellofemoral syndrome causing knee pain.

Dr. Volarich also opined each was an obstacle or hindrance to his employment leading up to the May 25, 2005 injury.
5. In Dr. Volarich's opinion the combination of his disabilities created a substantially greater disability than the simple sum or total of each separate injury/illness, and a loading factor should be added.

6. It was Dr. Volarich's opinion based on his medical assessment alone, that Mr. Prier is permanently and totally disabled as a direct result of the injuries of July 1, 2003 and May 25, 2005 in combination with each other as well as in combination with all pre-existing medical conditions. Dr. Volarich's opinion did not consider the effect of the subsequent right knee or right elbow surgical repairs. In addition, he also took into consideration in formulating his opinion Mr. Prier's age, education and work history.
7. Dr. Volarich opined that Prier needed pain management the same as he was presently receiving from Dr. Guarino. That further, in order to maintain his current state, he required the use of narcotics and non-narcotic medications as well as muscle relaxants, some of those which he is presently taking including Amrix, Norco, over-the-counter Tylenol, and Cymbalta. In addition, he felt he would benefit from treatment from the pain clinic including epidural steroid injections, foraminal nerve root blocks, trigger point injections, TENS units and similar treatments all indicated to help control his pain syndrome.
8. Dr. Volarich in his supplemental report also opined that his opinions were not affected by the additional opinions of Dr. Coyle, or Dr. Emanuel.

James M. England, Jr.

At the request of the employee's attorney, Mr. England performed a vocational rehabilitation evaluation on March 11, 2010. He personally interviewed Mr. Prier and administered vocational testing. Mr. England also reviewed records.

Mr. England's report stated that:

- “Mr. Prier is a 44-year-old gentleman placing him in the younger worker category.
- Although he has a high school education he is functioning at a grade school level academically.
- Based on any of the doctor's restrictions he would not be able to go back to his prior work as a heavy equipment operator or a mechanic. With just the restrictions from Dr. Hulsey or Dr. Boland as well as the restrictions of Dr. Coyle or Dr. Emanuel there would be some types of entry-level service employment he could still perform.
- Considering, however, Dr. Volarich's restrictions he would be limited to less than a full range of even sedentary activity and taking into consideration Dr. Guarino's opinion, as well as the employee's description of his day-to-day functioning and the presentation he makes I do not believe he would be successful in competing for or sustaining employment in the long run.
- His pain level simply appears to be too limiting to allow him to sustain even sedentary to light activity on a consistent, day-to-day basis. His presentation alone would cause employers, in my opinion,

to be very reluctant to consider hiring him, especially for entry-level, unskilled positions since there is no reason to pick him over virtually any other candidate who is not so physically limited and who does not present as Mr. Prier does.

-Someone only getting four hours of sleep a night is likely to have grave difficulty being awake and alert during the day which is still required even in sedentary to light forms of work activity.

-As Mr. Prier appears to be functioning, I believe he is likely to remain permanently and totally disabled from a vocational standpoint.”

In addition, Mr. England also testified that it was his opinion that he was permanently and totally disabled because of the combination of his problems and, therefore, was unemployable in the open labor market. He had problems competing for work as well as sustaining work. He felt in giving this opinion it was caused by the combination of his last injury of May 25, 2005 as well as his pre-existing medical conditions.

Dr. Michael Boland, M.D.

Dr. Boland is a neurosurgeon. On August 20, 2004 he operated on Mr. Prier performing a C4-5 anterior discectomy and fusion. After the May 25, 2005 work related injury, Mr. Prier again saw Dr. Boland on September 29, 2005. Dr. Boland referred him to Dr. Guarino who administered two cervical facet blocks at C5 and C6 followed by a C5 and C6 denervation. Thereafter he was sent back to Dr. Boland who on July 18, 2006 performed a C5-C6-C7 fusion. After surgery Dr. Boland referred Mr. Prier to Dr. Hulsey for treatment of his right shoulder. He also ordered more physical therapy. On September 26, 2007 Dr. Boland reported that Mr. Prier complained of increasing cervical and right shoulder pain with paresthesias extending to the medial elbow and forearm to second and third fingers. At that time he was taking Norco. Dr. Boland recommended additional treatment, i.e., pain management as well as additional testing including MRI and EMG/nerve conduction velocity studies. After testing on October 17, 2007, Dr. Boland recommended continued pain management for treatment of chronic cervical and shoulder pain. Mr. Prier was directed to continue to follow with Dr. Hulsey.

On December 20, 2007, Dr. Boland provided a permanent partial disability rating of 15% of the cervical spine injury. He also placed Mr. Prier at maximum medical improvement but only for neurosurgical treatment.

On February 25, 2010, Mr. Prier called Dr. Boland complaining of recurrent headaches that were gradually worsening causing pressure on the back of his neck while lying down; he reported that at times he felt like his head was going to explode. He again called Dr. Boland on July 22, 2010 asking for help, complaining of neck pain with severe headaches. He told Dr. Boland he was now on Methadone and remained under the care of Dr. Guarino. He asked Dr. Boland to admit him to a hospital for pain. On July 26, 2010 he saw Dr. Boland in person. In spite of pain management, Dr. Boland reported his pain was increasing and that the employee believed he could not take it much longer. Dr. Boland ordered a MRI. The MRI showed no new problems and Mr. Prier was told on August 11, 2010 he would just simply have to continue pain

management with Dr. Guarino. No further contact between Dr. Boland and Mr. has occurred since that time.

Dr. Richard Hulsey, M.D.

Mr. Prier was referred to Dr. Hulsey by Dr. Boland with an initial office visit on December 6, 2006. His main complaint was painful right shoulder especially with motion overhead. Dr. Hulsey ordered an arthrogram that was performed on December 15, 2006. Afterwards Dr. Hulsey treated the right shoulder with injections and ordered physical therapy. Upon returning to see Dr. Hulsey on February 26, 2007, Dr. Hulsey recommended surgery.

On April 6, 2007, the employee underwent arthroscopic surgery followed with open posterior reconstruction of the right shoulder. He again was seen on May 3, 2007 and at that time Dr. Hulsey recommended physical therapy. On May 31, 2007, he returned complaining of significant pain with any activity involving the right shoulder joint. The shoulder was injected. Mr. Prier returned on June 28, 2007 complaining of discomfort. He was advised to continue physical therapy. He was next seen on August 9, 2007 complaining of difficulty with therapy and pain. Mr. Prier complained of the shoulder catching. His progress was noted as slow. He was advised not to return to previous activities or work.

Mr. Prier returned to see Dr. Hulsey on September 6, 2007 complaining of increasing pain with activity. Dr. Hulsey ordered a Functional Capacity Evaluation. He further prescribed Ultram and advised Mr. Prier to avoid use of narcotics, if possible.

Mr. Prier was last seen by Dr. Hulsey on September 27, 2007 after the Functional Capacity Evaluation. He reported soreness and complained of pain with the right shoulder especially with range of motion. He also had complaints of popping and pain in the shoulder joint. It was noted his range of motion was limited to ninety degrees.

Dr. Hulsey determined that the employee was at maximum medical improvement and released him with the following permanent restrictions:

1. No lifting more than 30 pounds from floor to waist.
2. Limit pushing or pulling to 25 pounds.
3. Do not perform activities shoulder level or above on the right side.
4. Restrict in ladder climbing.
5. Continue use of Ultram extended release, 200 mg, which may be needed on a chronic basis.
6. Encourage Prier to continue some light range of motion and stretching exercises.

Subsequently, Dr. Hulsey provided a rating on November 2, 2007 of 20% permanent partial disability of the right upper extremity at the level of the shoulder related to the May 25, 2005 injury. Dr. Hulsey did not recommend any further surgical treatment.

Dr. James Coyle, M.D.

Mr. Prier sought a second opinion concerning his neck and was directed by the employer-insurer to be seen by Dr. Coyle on September 2, 2009. Dr. Coyle recommended a separate evaluation of the right shoulder and a myelogram CT scan. The Myelogram and CT scan was performed on September 24, 2009. After review, Dr. Coyle offered no further treatment and on October 30, 2009, he recommended permanent restrictions as follows:

1. No repetitive lifting greater than 30 pounds.
2. No pushing and pulling over 25 pounds.
3. No overhead work.

Each restriction was attributed to the cervical spine.

On February 23, 2010 Dr. Coyle determined that Mr. Prier was at maximum medical improvement on July 6, 2010. Dr. Coyle provided a rating of 25% permanent partial disability of the body as a whole referable to the cervical spine. Dr. Coyle did not recommend any further surgical treatment.

Dr. James Emanuel, M.D.

Mr. Prier was referred to Dr. Emanuel based on Dr. Coyle's recommendation. He was first seen by Dr. Emanuel on September 22, 2009. Dr. Emanuel diagnosed scapular thoracic bursitis, crepitus and aggravation of pre-existing arthritic changes related to the May 25, 2005 injury. He ordered another MRI/arthrogram. He also believed the May 25, 2005 injury aggravated pre-existing subluxation of the right shoulder.

On October 13, 2009, Mr. Prier followed-up with Dr. Emanuel. The MRI revealed early arthritic changes in the acromioclavicular joint with fluid. Mr. Prier complained of pain deep in the joint. Upon examination, he complained of pain upon manipulation with findings of crepitus and grinding. Dr. Emanuel felt he was at maximum medical improvement. Even so, he recommended that Mr. Prier continue to follow the permanent restrictions outlined by Dr. Hulsey and added the following:

1. No repetitive lifting greater than 30 pounds.
2. No pushing/pulling greater than 25 pounds.
3. No shoulder level or above activities.

On June 15, 2007, Dr. Emanuel provided a rating report to the employer-insurer that provided a 10% permanent partial disability of the right shoulder with 2% being pre-existing. Dr. Emanuel did not recommend any additional surgical treatment.

Dr. Anthony Guarino, M.D.

On October 17, 2007, for a second time, Mr. Prier was referred by Dr. Coyle to Dr. Guarino for pain management. Since that date he has remained under the care of Dr. Guarino for pain management. By stipulation of the parties, the employer-insurer has agreed that the employee is entitled to future medical care as a result of his work related injury. The employer-insurer also

agreed that it is responsible for the cost and expenses of any medical treatment provided by Dr. Guarino as well as any treatment he directed that the employee undergo. This necessarily includes pharmacies that were prescribed by Dr. Guarino for pain management. The employer-insurer has agreed that it will pay these medical expenses in the event any remain unpaid at the time of the hearing. This is acceptable to Mr. Prier so long as in fact these bills are paid.

Highlights of the treatment by Dr. Guarino since October 17, 2007 include the following:

1. 11-27-07: Guarino recommends opiate therapy.
2. 12-21-07: Guarino diagnosis intractable pain; recommends that the employee not work.
3. 02-12-08: Guarino starts Prier on Kadian (Morphine drug).

From thereafter to the present, Mr. Prier has seen Dr. Guarino on a regular basis. Dr. Guarino has prescribed various medications including the following:

1. Norco.
2. Kadian.
3. Lidoderm Patches.
4. Cymbalta.
5. Amrix.
6. Flexeril.
7. Opana-Morphine.
8. Medrol Dose Pak.
9. Percocet.
10. Methadone.
11. Stomach Medicine-Ranitidine/Prilosec.
12. Prozac.
13. Oxycontin.

He has also provided medical services including cervical facet blocks, epidural steroid injections, as well as other injections. On October 9, 2011 Dr. Guarino noted that Mr. Prier believed that “things are going downhill”. Dr. Guarino issued a final report on May 16, 2011, which was previously mentioned.

Mr. Prier testified there was a period of time where the employer-insurer refused to pay the medical expenses of Dr. Guarino as well as his pharmacies. By the Stipulation entered into by the employer-insurer and the employee, this is now resolved and Dr. Guarino can feel free to prescribe any medications he deems appropriate for pain management.

RULINGS OF LAW-

Mileage

At trial the parties listed mileage as one of the issues. However, the employer-insurer has now agreed to pay mileage related the employee’s injury. The employer-insurer indicated that the employee is entitled to payment of \$1,731.00, representing 3,642 miles. The employer-insurer is

ordered to pay the employee said mileage compensation if they have not already done so prior to the writing of this decision.

Future Medical Care

Future medical care was not listed as an issue at trial as the employer-insurer agreed to pay future medical care. The employer-insurer is directed to pay future medical care as is needed to cure and relieve the employee from the effects of his injury and /or to provide appropriate pain management care.

Temporary Total Disability

The employee has been paid temporary total disability benefits in the amount of \$70,390.24. The parties stipulated that the payments were for a period of 173 weeks beginning on June 27, 2006 and terminating on December 9, 2009. The parties disagree as to the date of maximum medical improvement. The employer-insurer is seeking a credit for any overpayment of temporary total disability benefits that they have paid.

The burden of proving entitlement to temporary total disability benefits lies with the employee. **Boyles v. USA Rebar Placement**, 26 S.W. 3d 418, 424 (Mo. App W.D. 2000). The purpose of a temporary total disability award is to cover the employee's healing period from a work related injury. **Tilley v. USF Holland**, 325 S.W. 3d 487, 492 (Mo. App. E.D. 2010). Temporary total disability is to be paid until an employee can return to work, the condition stabilizes, or the employee reaches maximum medical improvement. When further medical progress is not expected, a temporary award is not warranted as temporary total disability is only to be paid during the healing period.

A temporary award is not appropriate for a disability for which further improvement is not expected. **Williams v. Pillsbury Co.**, 694 S.W. 2d 488, 489 (Mo. App. 1985).

The employee has been treated by multiple doctors for his neck and right shoulder problems. Dr. Hulsey treated his shoulder. Dr. Hulsey found the employee to be at maximum medical improvement for his shoulder as of September 27, 2007. The employee has not received any further medical treatment deemed to cure and relieve the effects of his injury to his shoulder since then. He has received pain management care.

Dr. Boland treated the employee for his neck. He placed the employee at maximum medical improvement for his neck as of December 20, 2007. Dr. Boland evaluated the employee as of August 4, 2010. Testing showed a solid fusion and Dr. Boland did not recommend any further surgery for the employee. He has received pain management care.

The employee was evaluated by Dr. Volarich who found the employee to be at maximum medical improvement as of May 4, 2009. He testified that the pain management treatment that the employee was receiving from Dr. Guarino was to maintain his current state.

Dr. Coyle also evaluated the employee's neck. His opinion was that the employee reached maximum medical improvement as of September 23, 2009. He also did not recommend any further surgical treatment.

Dr. Emanuel evaluated the employee's shoulder. No treatment was offered and no further surgery was recommended by Dr. Emanuel. Dr. Emanuel felt that the employee reached maximum medical improvement as of October 13, 2009.

Dr. Guarino is a pain management specialist. He has been providing pain management treatment for the employee since 2005. The treatment that Dr. Guarino has provided included medications and injections. There has been little or no improvement to the employee's condition during the period that Dr. Guarino has been providing treatment. It is obvious that his treatment is to maintain the employee. No further improvement is expected or has ever happened.

There has been no testimony nor has there been any evidence that the treatment by Dr. Guarino has made the employee any better. Dr. Volarich provided his opinion that the pain management was to maintain the employee's current state.

After a consideration of all of the evidence in this case the Court finds that the employee reached maximum medical improvement as of December 20, 2007 when Dr. Boland released the employee. Any medical care since that time has been in the form of pain management and was provided to maintain the employee's condition. This care was not expected to improve the employee's condition or return him to work.

The Court finds that the treatment that has been provided by Dr. Guarino has been in the form of pain management. Based on the Court's determination of the date of maximum medical improvement, the employer-insurer is entitled to a credit for any overpayment of temporary total disability benefits that were paid after the employee reached maximum medical improvement.

Permanent Partial Disability, Permanent Total Disability, Liability of the Second Injury Fund

The employee is claiming that he is permanently and totally disabled due to a combination of the disabilities resulting from his May 25, 2005 accident and his pre-existing disabilities. The employer-insurer argues that if the employee is permanently and totally disabled it is due to a combination of disabilities with Second Injury Fund liability. While the Second Injury Fund may be denying liability, they did not file proposed findings in the case and did not specifically address the issue.

The term "total disability" in Section 287.020.7 RSMo, means inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. See Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919,

922 (Mo. App. 1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. See Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the "inability to return to any reasonable or normal employment." An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of State of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990).

The key question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she entered. See Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo. App. 1993), and Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995). The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo.

The first question that must be addressed is whether the employee is permanently and totally disabled. If the employee is permanently and totally disabled, then the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the pre-existing injuries and conditions and the employee's last injury of May 25, 2005. Under Section 287.220.1, the pre-existing injuries must also have constituted a hindrance or obstacle to the employee's employment or re-employment.

The employee's testimony was credible and consistent with his pre-existing medical conditions as well as the last injury of May 25, 2005. It was also consistent with the medical evidence provided in this case.

Based on the credible testimony of the employee and the supporting medical and vocational rehabilitation evidence, the Court finds that no employer in the usual course of business would reasonably be expected to employ the employee in his present physical state and reasonably expect the employee to perform the work for which he is hired. The Court therefore finds that the employee is unable to compete in the open labor market and is permanently and totally disabled.

The Court rejects any evidence that the employee is not permanently and totally disabled as unreliable and totally lacking in credibility. The real issue in this case is not whether the employee is permanently and totally disabled, but whether such disability was caused by his accident alone or is due to a combination of his pre-existing disabilities in combination with the disabilities from his accident.

The medical providers provided their opinions on the employee's disabilities that existed prior to May 25, 2005 and those from the accident. The Court has already listed those opinions and will not do so again.

The Court finds that the employee reached maximum medical improvement as of December 20, 2007 which is the time that Dr. Boland had again seen the employee and released him. According to the stipulation of the parties the employer-insurer paid temporary total disability

payments through December 9, 2009. The employee was still in a healing period and had not reached a point where further progress was not expected until that date. After that date the Court believes that any care that was provided to the employee was in the form of pain management.

Based on a consideration of all of the evidence, the Court finds the employee has the following permanent partial disabilities that resulted either from his pre-existing injuries or the injuries that he sustained as a result of his May 25, 2005 accident:

Pre-existing disabilities:

- 2003 neck injury while working for McAnich that resulted in a 2004 neck fusion surgery. 25% permanent partial disability.
- 1985 right shoulder injuries-no rating.
- 1989 right thumb injury-10% of the thumb.
- 1990s/2000 sinus problems and sleep apnea-10% of the body as a whole.
- 2004 bilateral knees-7 ½% of the right knee and 5% of the left knee.
- 2005 right knee surgery-15% of the knee.

Injuries after the primary accident are not rated.

Disabilities resulting from the May 25, 2005 accident:

- 35% permanent partial disability to the employee's neck
- 30% permanent partial disability of the right shoulder.

The Court has determined that the combined permanent partial disabilities represent a total of 209.60 weeks of permanent partial disability. Therefore, the employer-insurer shall pay to the employee \$74,208.88 as permanent partial disability benefits from this accident. This amount represents 209.60 weeks of disability at the permanent partial disability rate of \$354.05 per week. (35% x 400 = 140 weeks. 30% x 232 = 69.60 weeks. 140 + 69.60 = 209.60 weeks. 209.60 x \$354.05 = \$74,208.88.

The next issue to be addressed is whether the employee's pre-existing conditions were a hindrance or obstacle to his employment or reemployment.

After a careful review of the evidence, the Court finds that the employee's pre-existing conditions combine synergistically with the injuries from the May 25, 2005 accident to cause the employee's overall condition and symptoms to be greater. The Court specifically finds that the employee's pre-existing disabilities are a hindrance or obstacle to employment or reemployment.

In addition, the Court finds that the employee is permanently and totally disabled as a result of the combination of his pre-existing conditions and the May 25, 2005 accident and injury which resulted in pain and other physical problems to the employee's right shoulder, neck and body as a whole. The Court finds that the employee's pre-existing disabilities synergistically combines with the employee's disabilities from his May 25, 2005 accident that make him more disabled than he might have been from the May 25, 2005 accident alone. In summary, the Court finds the employer-insurer to be liable for the permanent partial disabilities that the employee received as a result of his accident. The employer-insurer is not responsible for permanent total disability.

Liability of the Second Injury Fund

The Court has found that the employee is permanently and totally disabled as a result of the synergistic combination of the disabilities resulting from his pre-existing problems and his May 25, 2005 accident. The Court has assessed permanent partial disability as to the employer-insurer in the amount of \$74,208.88 for May 25, 2005 accident.

The Second Injury Fund's liability for permanent total disability begins as of December 21, 2007. However, the Second Injury Fund is entitled to a credit for the permanently partial disability compensation payments that are to be made by the employer-insurer. The Second Injury Fund's liability for permanent total disability in the amount of \$406.88 should begin 209.60 weeks after December 21, 2007. The Court has calculated this date to be December 28, 2011.

There is a difference of \$52.83 per week between the permanent partial disability rate of \$354.05 per week and the permanent total disability rate of \$406.88 per week. The employee reached maximum medical improvement as of December 21, 2007. The Second Injury Fund's responsibility for permanent total disability rates begins at that point. The Second Injury Fund is also responsible to pay the difference between the permanent partial and permanent total disability rates for a total of 209.60 weeks. In addition to the other compensation, the Second Injury Fund shall also make a lump sum payment to the employee of \$11,073.17.

Since the employee has been awarded permanent total disability benefits, Section 287.200.2 mandates the Division "shall keep the file open in the case during the lifetime of any injured employee who has received an award of permanent total disability". Based on this section and the provisions of Section 287.140 RSMo., the Division and Commission should maintain an open file in the employee's case for the purposes of resolving medical treatment issues and reviewing the status of the employee's permanent disability pursuant to Sections 287.140 and 287.200 RSMo.

Summary

Mileage: The parties made mileage a trial issue but have since indicated that the employer-insurer is responsible to reimburse mileage costs. The Court has ordered the employer-insurer to pay to the employee \$1,731.00 for mileage expenses.

Temporary Total Disability: The Court has determined the date of maximum medical improvement and has found that the employee was entitled to temporary disability benefits; however the Court has ordered that the employer-insurer shall receive credit for any temporary disability overpayments that were made.

Permanent Total Disability: The Court has found that the employee is permanently and totally disabled with said disability resulting from a combination of his pre-existing disabilities and the disabilities he received from his May 25, 2005 accident.

Permanent Partial Disability: The Court has ordered the employer-insurer to pay to the employee permanent partial disability payments that resulted from the accident of May 25, 2005.

Second Injury Fund Liability: The Second Injury Fund has been ordered to pay the employee \$406.88 per week as permanent total disability payments as the employee is permanently and totally disabled due to a combination of his pre-existing disabilities and his disabilities resulting from his May 25, 2005 accident. Those payments should begin after the credit created by the payment of permanent partial disability payments paid by the employer-insurer has expired. The Second Injury is also responsible for the difference between the permanent partial and permanent total disability rates.

Future Medical: The parties stipulated that employer-insurer shall be responsible for future medical care consisting of pain management care and such other care that is authorized and ordered by Dr. Guarino. Because of the injuries to his neck as well as his right shoulder, the employee is in need of the care that is presently being provided by Dr. Guarino. Therefore the employee is awarded future medical treatment to be provided by the employer-insurer.

Medical Bills: The parties stipulated that the employer-insurer shall pay the authorized medical bills of Dr. Guarino. The employer-insurer has agreed that it is responsible for any past medical expenses for any treatment provided or directed by Dr. Guarino for the care and treatment of the employee through the date of this trial. The employee is awarded and the employer-insurer is directed to pay all past medical expenses that have been incurred through the date of trial reasonably necessary to cure and relieve the employee's injuries from the May 25, 2005 event. The employer-insurer is specifically responsible for the reasonable costs and expenses for treatment of the neck and right shoulder, including pain management by Dr. Guarino, as well as any treatment ordered or directed by him regardless if it was performed at his office, by other medical care providers or at other medical facilities. These costs and expenses shall include pharmacy expenses that remain unpaid or have been paid by the employee for medications prescribed by Dr. Guarino.

ATTORNEY'S FEE

Kenneth A. Seufert, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation