

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

Injury No.: 04-095189

Employee: Charles P. Reese
Employer: T. J. O'Neil Painting, Incorporated (Settled)
Insurer: Missouri Employers Mutual 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 section 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 22, 2010. The award and decision of Administrative Law Judge Gary L. Robbins, issued February 22, 2010, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 29th day of July 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Charles P. Reese

Injury No. 04-095189

Dependents: N/A

Employer: T.J. O'Neil Painting Incorporated

Additional Party: Second Injury Fund

Insurer: Missouri Employers Mutual Insurance Company

Hearing Date: December 9, 2009

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? September 8, 2004.
5. State location where accident occurred or occupational disease contracted: Perry 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 using a spraying apparatus painting fire escapes with

epoxy. Wind blew the epoxy into his eyes causing dizziness and burning. He fell backwards and struck the back of his head on a steel beam.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Head, eyes, ears and body as a whole.
14. Nature and extent of any permanent disability: The employee settled his case with the employer-insurer by stipulation for compromise settlement on October 13, 2009. The parties settled for 17% of the body as a whole referring to the head, eyes and hearing.
15. Compensation paid to date for temporary total disability: Not disclosed at trial.
16. Value necessary medical aid paid to date by employer-insurer: Not disclosed at trial.
17. Value necessary medical aid not furnished by employer-insurer: None.
18. Employee's average weekly wage: The parties stipulated that the employee's average weekly wage was approximately \$1,000.00 per week.
19. Weekly compensation rate: \$679.50 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: None.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Chris N. Weiss.

FINDINGS OF FACT AND RULINGS OF LAW

On December 9, 2009, Charles P. Reese, the employee, appeared in person and by his attorney, Chris N. Weiss, for a hearing for a trial for a final award. The employee had settled the primary case with the employer-insurer by stipulated settlement on October 13, 2009. The Second Injury Fund/SIF was represented at the hearing by Assistant Attorney General Clifton K. Verhines, Jr. The Court took judicial notice of all of the 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 as follows:

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 Missouri Employers Mutual Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of T.J. O'Neil Painting Incorporated and was working under the Workers' Compensation Act.
3. On or about September 8, 2004 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 stipulated that the employee's average weekly wage was approximately \$1,000.00 per week. The employee's rate for temporary total and permanent total disability was stipulated to by the parties as \$675.90 per week. His rate for permanent partial disability is \$354.05 per week.
7. The employee's injury was medically casually related to his accident or occupational disease.
8. The parties agreed that the amount of medical aid paid by the employer-insurer was not an issue.
9. The parties agreed that the amount of temporary disability benefits paid by the employer-insurer was not an issue.
10. The employee has no claim for any past medical bills, future medical care or mileage.
11. The employee has no claim for temporary disability benefits.

ISSUES

Liability of the Second Injury Fund for either permanent partial or permanent total disability.

EXHIBITS

The following exhibits were offered and admitted into evidence without objection:

Employee's Exhibits

- A. Prior Stipulations, pages 1-32.
- B. Social Security Administration Notice of Award.
- C. Stipulation for Compromise Settlement in Case 04-095189.
- D. Deposition of Raymond F. Cohen, D.O.
- E. Deposition of Jeffrey Francis Magrowski, PhD.
- F. St. Thomas of Aquin - Grade School Record (1964-1965).
- G. Medical records of Joan M. Pernoud, M.D.
- H. Medical records of Aamir J. Siddiqi, M.D.
- I. Medical records of David M. Peoples, M.D.
- J. Medical records of John W. McKinney, M.D.
- K. Medical records of Gregg J. Berdy, M.D.
- L. Medical records of Ste. Genevieve Memorial Hospital.
- M. Medical records of BJC HealthCare.
- N. Medical records of BarnesCare-West.
- O. Medical records of JMH Rehab Center.
- P. Medical records of James E. Benecke, Jr., M.D.
- Q. Medical records of James D. Gould, M.D.
- R. Medical records of Mujtaba A. Qazi, M.D.

Second Injury Fund Exhibits

None.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT-

Charles P. Reese, the employee, and his wife were the only persons who testified live at trial. All other evidence was presented in the form of medical records, written records and reports, or by deposition testimony.

Mr. Reese was born in 1957 and was 52 years old at the time of trial. He married his wife Sherry in 1995 and they have two children. Mr. Reese testified that he only completed the 8th grade and has difficulty with reading, writing and math. He indicated that he was enrolled in special education and left school after the 8th grade as he could not keep up and due to the teasing of other kids. Mr. Reese has had no further education since leaving the 8th grade.

Mr. Reese started construction work at age 16 and has worked in that general area his entire life. He testified that his family worked at Anheuser-Busch and he tried to work there but was not

hired because he could not pass the aptitude test. He also indicated that he was not able to join the armed forces for the same reason.

Mr. Reese has had many job-related injuries beginning in the 1970's. The following list reflects the documentation that was presented as evidence at trial:

1. 78-76675 - the employee settled a claim with the SIF for 20% permanent partial disability/PPD of the right knee. The employee had previously settled a claim with his employer for 10% PPD of the body as a whole/BAW (low back).
2. 80-89172 - the employee settled a claim with his employer for 2 ½ % PPD of the BAW (low back).
3. 82-61763 - the employee settled a claim with his employer for 5% PPD of the BAW (low back).
4. 84-4017 - the employee settled a claim with his employer for 7 ½% PPD of the right shoulder and with the SIF for pre-existing disabilities.
5. 85-47575 - the employee settled a claim with his employer for 25% PPD of the left knee and with the SIF for pre-existing disabilities.
6. 85-95199 - the employee settled a claim with his employer for 12 ½% PPD of the left shoulder.
7. 90-23500 - the employee settled a claim with his employer for 7 ½% PPD of the BAW (low back).
8. 91-108246 - the employee settled a claim with his employer for 10% PPD of the right knee and with the SIF for pre-existing disabilities.
9. 92-080845 - the employee settled a claim with his employer for 6% PPD of the BAW (neck and eyes).
10. 93-148926 - the employee settled a claim with his employer for 10% PPD of the right shoulder.
11. 95-152445 - the employee settled a claim with his employer for 25% PPD of the right knee.

In general, the employee testified that even though he continued working, performing physical labor, his pre-existing injuries continued to give him problems throughout his working history. He testified that he had a lot of jobs that needed a back and not brains. He further testified that as a result of prior injuries he had two right knee surgeries, one left knee surgery as well as multiple strains to his back and shoulders. There are also other settlements over the employee's work history including a finding by Social Security that the employee was permanently and totally disabled/PTD as of March 1, 1993. Mr. Reese testified that he received social security benefits up until the time he got married in 1995. He testified that his physical situation did not change but he returned to work finding something he could do as his wife and kids could not live on the money they had.

In 1995, the employee opened up his own business called CR Painting and Power Washing. He indicated that this was an easier job than those he'd had in the past. He indicated that he hired his stepson to do the heavier work that he could not do. In addition, he testified that his wife had to do all the paperwork as he could not read, write or do math well enough to properly prepare such things as bids and contracts. He testified that his reading and writing problems kept him

from getting some jobs as he tried to write the contracts and due to incorrect information did not get the jobs.

After Mr. Reese started his own business he also began receiving painting jobs from the union. He indicated that many of these jobs were short term jobs of a couple of months that did not involve heavy lifting.

Mr. Reese received a job through the union to work for T.J. O'Neil Painting. He was working for this employer when he had the accident that is the subject of this case. Mr. Reese's duties involved using a spraying apparatus and painting fire escapes before they left the factory. On September 8, 2004 he was working underneath fire escapes spray painting when the wind blew epoxy into his eyes. He indicated that when he tried to move away he struck the back of his head on a steel beam. Mr. Reese testified that he felt symptoms such as immediate burning and dizziness immediately after the accident.

This event was reported and the employee was immediately sent to Ste. Genevieve Memorial Hospital for treatment. By history, the employee had burning and itching to both eyes with a hard blow to the head causing nausea and lightheadedness that persists. Emergency room records indicate that the employee was seen in the emergency room for chemical irritation to both eyes and a head injury. A CT scan was performed with a negative result. Mr. Reese was released to return to work pending follow up care. Mr. Reese has seen several doctors for treatment and/or evaluations for eye problems, headaches, dizziness and hearing problems.

BJC HealthCare records indicate that they provided care to the employee on September 10, 13, and 16, 2004. On September 10th, X-rays were performed that were negative. A CT scan was ordered. The employee was diagnosed with a parietal head concussion and was released to work with restrictions. The employee was treated again on September 13th and he reported that he was worse and still had dizziness and headaches. As the CT scan had not been performed, the employee was again returned to work with restrictions. As of September 16th, the CT scan was completed and was reported as normal. The employee was released to work with restrictions of no driving or operating machinery with ground level work only. A neurologist's opinion was to be obtained.

Dr. Siddiqi is a neurologist who saw the employee on September 24, 2004. The doctor took a history from the employee and performed a physical examination. He reported that:

1. Mr. Reese reported immediate pain, nausea, and vertigo following the accident.
2. Mr. Reese complained of throbbing headaches sometimes associated with nausea and photophobia.
3. Mr. Reese also complained of episodes of spinning that got worse with a change of position.
4. Mr. Reese also complained of blurred vision.
5. Mr. Reese complained of pressure in his ears but denied any hearing deficit or tinnitus.
6. During the Hallpike maneuver Mr. Reese reported vertigo on the left side but the test was reported as negative.

Dr. Siddiqi formed several impressions:

1. Post traumatic migraines which are stable.
2. Post traumatic benign positional vertigo which is resolving.

He recommended that the employee perform the Epley maneuver at home, prescribed Valium and recommended that he have his hearing evaluated.

Dr. Siddiqi saw the employee again on October 18, 2004 and provided a progress note stating that the employee reported that his dizziness was better and that he had some hearing tests performed. The doctor again performed the Hallpike maneuver and reported it was negative on both sides. His impressions were:

1. Post traumatic vestibular neuronitis that was stable.
2. Patient has subjective feelings of vertigo, although the examination was completely normal.
3. The subjective vertigo without nystagmus is likely due to closed head injury.
4. The CT scan of the employee's head was normal.

Dr. Siddiqi returned the employee to work as tolerated.

Dr. Gould is an otolaryngologist who evaluated the employee in his office on October 7, 2004 for hearing loss and dizziness. This is approximately one month after the accident. At this time the employee reported nausea and dizziness since the accident. There was no mention of headaches. The Hallpike maneuver was performed and it was normal. His impressions were:

1. Subjective vertigo without nystagmus.
2. Hearing loss-unspecified.
3. H/o closed head injury.

He recommended that:

1. An audiogram be done to evaluate hearing.
2. The patient continue home vestibular exercises for dizziness.

Dr. Pernoud is an ophthalmologist who first saw Mr. Reese on October 19, 2004 and treated him through at least the end of 2005. Dr. Pernoud provided the most actual treatment for the employee's eye problems. She inserted permanent bilateral punctal plugs into the employee's eyes as of September 28, 2005 and recommended that the employee use various ocular drops and lubricants throughout her treatment and beyond. Dr. Pernoud gave opinions about the employee's ability to work on several occasions during her treatment process. On February 18, 2005 she reported that the employee had called her regarding his ability to work. She reported that the employee physically can work, but there would be some irritation to his eyes from potential fumes that he could be exposed to. She indicated that she does not believe that any normal fumes such as paint or other usual normal work fumes would further irritate his eyes. She also indicated that Mr. Reese may need additional artificial tears in the work day. It was at that time that she indicated that the employee needed punctal plugs. On December 14, 2005, Dr. Pernoud reported that it was impossible for her to determine if Mr. Reese could return to a

painting job. She recommended that he try a position that did not burn his eyes. This report was generated due to the employee's persistent complaining of burning and eye irritation.

Dr. Pernoud prepared a medical report at the request of the employer-insurer dated February 25, 2009. She saw the employee again and indicated that he had developed a chronic ocular irritation that she felt was due to damage to his tear producing cells. She reported that he was still complaining of stinging, burning and red, sore eyes. At that time she performed a physical evaluation and reviewed the reports of Dr. Qazi. She reported:

1. Normal visual fields.
2. Visual acuity was improvable to 20/20 in both eyes with a mild hypertrophic prescription.
3. The employee did require additional refractive power for near.
4. Pupils, muscles and intraocular pressures were all within normal limits.
5. She had placed bilateral punctual plugs in the past and some were missing.
6. There were additional findings.

Dr. Pernoud opined that the employee had continued ocular symptoms from damage to his conjunctival cells due to his injury of September 2004. She recommended further care including Systane ointment and TheraTears Nutrition on an ongoing basis. She reported that the employee's condition will not improve and that he needs an annual eye appointment. In addition, she reported that Mr. Reese did not have a visual impairment according to Missouri regulations.

Dr. Peeples first saw the employee on November 2, 2004 for a neurological examination, with a follow up on January 28, 2005. By history, the employee reported that his headaches had resolved but he continued to have dizziness that was worse with movement. The doctor reported that the employee told him he had no problems with tinnitus or incoordination. The doctor performed a physical and reported that neurological testing was normal including the Hallpike test. His clinical impression was that the employee sustained a Grade 1 concussion with post traumatic headaches that had resolved and post traumatic dizziness with residual symptoms. Dr. Peeples recommended that, due to the employee's persistent subjective complaints, he should avoid climbing or working at heights.

Dr. Peeples saw the employee again on January 28, 2005. At that time, the employee reported he was still dizzy but had no other symptoms; he wanted to return to work and indicated he felt safe and capable to paint and work at heights on scaffolds. Dr. Peeples released Mr. Reese to regular duty with no restrictions.

Dr. Berdy is an ophthalmologist who saw the employee on February 1, 2006. He noted that the employee had bilateral punctual plugs since February 18, 2005. He also noted that Dr. Pernoud was considering additional plugs. He took a history where the employee reported that he still had discomfort when outside trying to paint and inside due to fumes rising from the paint, as well as irritation and discomfort due to the environment such as heat and gusty wind conditions.

Dr. Berdy's assessment was:

1. History of chemical conjunctivitis/keratitis, O.U.
2. Dry eye disease secondary to No. 1.

3. Blepharitis/Ocular rosacea, O.U.
4. Acne rosacea.
5. Keratitis, O.U.

His recommendations were:

1. The employee sustained a chemical conjunctivitis due to the accident.
2. It is possible that the employee has an underlying mild dry eye associated with acne rosacea, which would still allow normal tear film.
3. The chemical conjunctivitis may have caused a conjunctival goblet cell deficiency leading to mucus abnormalities and a dry eye.
4. The treatment given by Dr. Pernoud was excellent and correct.
5. Further treatment may be necessary to improve the employee's tear film. Restasis will help.
6. The employee needs Omega 3-fatty acid to help improve oil secretion.
7. The employee needs Doxycycline.
8. The employee needs silicone plugs to give better tear film.

Dr. McKinney is an ENT doctor who evaluated the employee's hearing on May 2, 2006, June 21, 2006 and June 22, 2006. He noted that the employee's major complaint was that his hearing is off on his left side and he had an intermittent ringing sound in his left ear since the injury. The employee reported that he did not recall if he had the ringing prior to the injury.

Dr. McKinney performed three hearing tests as required under Missouri regulations. He reported that the employee had zero percent hearing loss. He also reported that the presence of tinnitus is based on patient history taken at face value. He provided a rating of .05 % PPD of the whole person for tinnitus. Dr. McKinney opined:

1. The employee has no compensable hearing loss under Missouri Workers Compensation rules.
2. The employee does not require any medical treatment for his ears.
3. The employee is at maximum medical improvement regarding his hearing.

Dr. Qazi examined the employee and reviewed the records of Dr. Berdy and Dr. Pernoud on December 30, 2008. By history, the employee reported that the symptoms of burning and stinging have stayed such that he requires artificial tear drops (Real Tears) and Systane, eight to ten times a day. The employee also indicated that on his most recent attempt to paint he had to stop because the fumes caused stinging and burning. He described the same thing when exposed to other chemicals around the house such as nail polish remover.

Dr. Qazi provided his impressions:

1. History of chemical exposure.
2. Ocular examination is significant for ocular rosacea with blepharitis and concomitant dry eyes bilaterally. It is possible these conditions were present to some degree prior to his injury, but it does appear that the acute injury to the eye due to chemical exposure has aggravated these such that he now requires frequent lubricant without full benefit.

3. The employee will require ongoing treatment given that these conditions while partly independent from the injury are chronic in nature.
4. The employee will need frequent application of typical lubrication such as Soothe and Freshkote.
5. The employee needs treatment for blepharitis with Azasite.
6. The employee will need periodic monitoring; an exam every two to four months.

The doctor also reported that testing confirmed a moderate to severe dry eye syndrome which was consistent with the employee's symptoms that could require treatment for life. He summarized by stating:

1. The employee has received appropriate treatment for the injury in 2004.
2. That while the chemical burn itself had fully resolved; it appeared that there may be sequelae related to this injury that have aggravated an underlying propensity to develop dryness to ocular rosacea and blepharitis.
3. The doctor could not exclude that his symptoms are part of the injury.

The evidence makes reference to hearing examinations performed by Dr. Hanaway and Dr. Mikulec, however neither doctor provided any narrative records.

Dr. Cohen and, Dr. Magrowski provided deposition testimony in this case.

Dr. Cohen is a neurologist who was retained by employee's counsel. He saw the employee one time on October 6, 2008. He took a history from the employee, conducted a physical exam, reviewed medical records, prepared reports dated October 6, 2008 and February 26, 2009, and testified by deposition on August 25, 2009.

After his initial evaluation, Dr. Cohen formed his diagnosis:

1. Closed head injury with post-traumatic vascular headaches.
2. Tinnitus.
3. Gait disorder.
4. Chronic ocular or eye pain secondary to the chemical exposure to his eyes.
5. Hearing loss.
6. Vertigo.

Dr. Cohen gave his recommendations:

1. The employee needs medication to help with the burning pain such as Gabapentin or Lyrica. These can also help with headaches.
2. The employee needs to see a doctor for medications for his acute headaches and prevention of headaches.

In addition to his other opinions, Dr. Cohen recommended restrictions:

1. The employee should be restricted from any work in which he is exposed to any fumes, dust, dirt or similar type environment, outside types of work, bright lights, loud noises as the bright lights and noises are due to the headaches, any type of ladder work, climbing work, heights, operating any type of dangerous equipment or walking on uneven surfaces.

2. Due to the severity and frequency of the headaches the employee will need to lie down or be able to go to a quiet room on an as needed basis.

Dr. Cohen provided his opinions on causation and disability:

1. The employee has a 40% PPD of the whole person.
2. The accident of September 8, 2004 was the substantial and prevailing factor in causing the medical treatment that the employee received.
3. The accident of September 8, 2004 was the substantial and prevailing factor in causing his diagnosis.
4. The accident of September 8, 2004 was the substantial and prevailing factor in causing the disability he assessed.

Dr. Cohen also provided his opinions regarding the employee's pre-existing conditions:

1. The employee was status-post left knee surgery for internal derangement.
2. The employee was status-post right knee surgery for internal derangement.
3. Chronic lumbosacral pain.

He testified that the above matters were the most notable but the employee had others reported in settlement documents.

Dr. Cohen issued a report dated October 6, 2008 and a supplemental report dated February 26, 2009. The second report was completed after additional records were received by him from Dr. Mikulec and Dr. Qazi, as well as audiology and x-ray reports. They did not change his mind.

Dr. Cohen assessed disabilities for the employee's pre-existing conditions:

1. 35% PPD at the left knee.
2. 35% PPD at the right knee.
3. 20% PPD of the whole person at the lumbar spine.

Dr. Cohen's further opinions were that:

1. The pre-existing conditions have a synergistic effect with the primary injury.
2. The employee is permanently and totally disabled and not capable of gainful employment in today's open labor market. This is a result of a combination of the primary work related injury of September 8, 2004 with his pre-existing conditions and disabilities.
3. They create a synergistic effect or a greater effect than their simple sum.

The attorney for the employer-insurer questioned Dr. Cohen's opinions, the basis for those opinions and asked him about the finding of other physicians who had examined the employee.

Dr. Cohen testified that all diagnostic testing that had been done in the past was reported as negative. This included x-rays, CT scans an ENG and all neurological exams. He agreed that no compensable impairment was shown for the employee's ears or eyes. He also testified that he did not asses any disability on the employee's 1985 left shoulder injury, his 1984 or 1993 right shoulder, and that the employee reported no complaints about these prior injuries.

Dr. Cohen testified that it is important to get an accurate history from a patient, and if they are not truthful it could impact findings as to the extent of disability and restrictions and could play a role in whether someone is employable in the open labor market. He agreed that his rating for

closed head injury with post-traumatic vascular headaches, tinnitus, gait disorder, ocular pain, hearing loss and vertigo were all subjective and were based on the employee reporting these complaints.

On the subject of headaches, Dr. Cohen testified that there is no part of the general physical exam or the neurological examination that supports the diagnosis of post traumatic vascular headaches if you just consider those examinations. He agreed that there are no tests that demonstrate that a person has migraines or vascular post-traumatic headaches. He indicated that with all types of migraines he would expect the patient's examinations to be normal. He testified that such a finding then indicates that the patient has some other process going on. He testified that you have to totally rely on the patient to make this diagnosis; you have to hear it from the employee. Dr. Cohen also agreed that that when he read the deposition of Dr. Hanaway, a neurologist that the employee was treating with on his own, the employee never mentioned headaches or tinnitus.

On the subject of vertigo, Dr. Cohen testified that there is no conclusive test that demonstrates that a person has vertigo. He testified that his diagnosis of vertigo was subjective and he relied on the employee reporting these symptoms. He testified that a big part of the employee's vertigo is coming from his migraine headaches in that the employee has vertiginous migraines. He further testified that such migraines are more consistent with hitting your head than from any type of ear, inner ear, nose or throat problems. He opines that vertigo is treatable, depending on where the vertigo is coming from. He indicated that if any treatment that had been suggested helped the employee's vertigo, then it is possible that his work restrictions may be affected. However, Dr. Cohen did agree that in 2004 Dr. Siddiqi's records indicate that the employee's post-traumatic migraines were stable and that the vertigo was resolving.

Further on the issue of vertigo, Dr. Cohen was questioned about the Hallpike maneuver. He testified that this is an office test to see if a person has complaints of vertigo. The test is where a patient turns their head to certain positions to see if they develop involuntary eye movements or a nystagmus test to try to localize the possible cause of vertigo or other brain stem functions, but particularly for vertigo. He testified that the Hallpike test is an objective test that was given to the employee multiple times by several doctors. He further testified that in every instance the results of the test were negative.

Dr. Cohen testified that while the employee reported ringing in both ears, there is no testing for tinnitus. He indicated that it is more important that the employee has tinnitus, not that in the past he told doctors that he only had ringing in the left ear. He agreed that Dr. Siddiqi's records indicated that the employee denied tinnitus or any hearing deficit. He further agreed that Dr. McKinney did not diagnose a compensable hearing loss according to workers' compensation records. However, he pointed out that the audio testing documented a hearing loss; he said there is a difference. He also agreed Dr. Mikulec found no compensable hearing loss.

Dr. Cohen was asked whether he had any reason to dispute Dr. Pernoud's finding that the employee had no visual impairment. He testified that he has no reason to dispute the opinion of Dr. Pernoud; however, he indicated that he is not familiar with 8 CSR 50-020 and does not

evaluate people with that regulation in mind. He testified that his impairment is related to a different process of the nervous system.

The Second Injury Fund attorney also questioned Dr. Cohen about his opinion that the employee's pre-existing conditions were a hindrance or obstacle to employment and that the combination of the pre-existing conditions and his primary injury is what makes the employee unemployable in the open labor market. Dr. Cohen agreed that:

1. He did not review any treatment regarding the employee's knees or lumbar spine and that the employee was not treating for either of them as the time of his examination.
2. The employee was working full time until his September 2004 injury.

Dr. Cohen testified that his diagnosis was based on the entire record.

Dr. Magrowski is a vocational expert who was retained by employee's counsel. He saw the employee one time on May 25, 2009. He interviewed the employee and his wife, reviewed medical records and depositions, performed testing, prepared a report dated June 29, 2009 and testified by deposition on October 5, 2009.

Dr. Magrowski took an employment history from the employee and tested his transferable skills. He testified that:

1. Most of the employee's work has been physical.
2. The employee has some transferable skills involving construction such as painting and carpentry skills.
3. The employee could bid on work and has some skills in ordering supplies.
4. The employee has a license to drive a truck.
5. The employee tried to be a contractor but he did not have the educational background or the skills to be successful in that area.
6. The employee reported that he has dyslexia.

The doctor provided opinions about his testing of the employee:

1. The employee's education/special education classes and his learning disability are a hindrance or obstacle to his employment.
2. The employee would have difficulty completing job applications and participating in job searches, therefore, finding an employer would be hard for him.

After his review of medical records, Dr. Magrowski testified that only Dr. Cohen performed a complete evaluation. He opined that based on the work restrictions assigned by Dr. Cohen, the employee is unemployable in the open labor market; and that the employee is permanently and totally disabled from the vocational standpoint.

Dr. Magrowski testified that the employee received social security disability compensation. He opined that such disability was from severe knee problems and possibly his back and that there was a head injury. He further opined that the employee's pre-existing conditions are a hindrance or obstacle to employment. In addition, Dr. Magrowski testified that the employee is

unemployable from a combination of his pre-existing conditions and the conditions from his accident of September 8, 2004.

When asked about the employee trying to find other or lighter work, Dr. Magrowski pointed out that there are free vocational rehabilitation services, but he said he was not hopeful that the employee could be successful and indicated that the employee is unemployable and is probably retired from the competitive labor market as he did not think that the employee could put in a days work.

On cross examination, Dr. Magrowski agreed that the employee was working full time until his accident and that he was not treating for any of his pre-existing disabilities. He also agreed that he did not review any records other than Dr. Cohen's where the employee's pre-existing conditions were rated. He also agreed that he could not diagnose a learning disability.

The employee settled his primary case with his employer-insurer on October 13, 2009. The settlement was for 17% of the BAW referable to the head, eyes and hearing. In addition, the employer agreed to provide future medical care as provided by Dr. Pernoud. Mr. Reese testified that he is in the process of trying to get Dr. Pernoud to schedule him for more surgery.

Mr. Reese testified that he would like to return to work but he does not know what he could do. He testified that he would still be working if he had not had the 2004 accident; he stated he could work if he could disregard all pre-existing conditions. He testified about his prior disabilities. He indicated that he received social security disability in 1993 that was based on several conditions but mainly on the condition of his knees. He also testified that he had back problems during that period and his back would flare up depending on what he was doing. He said he has back and knee pain all the time and he occasionally falls but believes that is mostly due to his knees. He injured his right shoulder in 1993 and he stated that this also affected his ability to work. He reported that he had problems with his hip but attributed that to his back problems and sciatica. He is not seeing anyone presently for any of these conditions. He said that he worked heavy or medium labor prior to 2004.

The employee further described his present physical conditions stating that he cannot squat due to his back and knees. In addition, he indicated he cannot climb ladders due to his back and knee condition. He testified essentially that he went into painting as he could not do heavy physical labor and the painting was an easier job. He indicated he is dizzy about 90% of the time. In addition, he stated he has migraine headaches associated with his dizziness. He further testified that he has tried to paint since the accident but he cannot do it due to the fumes and burning of his eyes. He reported that he cannot do chores around the house and can only stand for about 15-20 minutes and has to move around. In addition, if he sits too long he has to lie down due to back pain and lies down for about 30 minutes two to three times a day. He testified that he does not sleep very well as he is up and down all the time.

Ms. Reese testified that she was involved in the painting business with her husband. She indicated that the business was started shortly after they were married in 1995 and continued up until the last accident. She testified that her husband made lots of errors in the contracts he tried

to do, therefore, her responsibility was to do the books, keep the checkbook and straighten out all of the paperwork. She stated that the checks were written wrong about every time her husband wrote one. As an example of his problems, she indicated that she had a birthday a few days prior to the trial and her husband gave her a birthday card and spelled things wrong. She indicated that he gets all of the letters but he mixes them up.

Ms. Reese testified that she is home with her husband almost every day. She stated that he gets up and down, but the most work he is able to do is wash a dish. She testified that he does not work in the garden. She indicated that she helps with the medications that he takes for dizziness, ointment for his eyes and the ibuprofen and Tylenol that he takes in 800mg. doses every 4-6 hours.

She indicated that she was married to Mr. Reese after the last injury to his right knee and she went to treatment with him. She testified that there was nothing left in the knee to repair and her husband was told that he should not do hard labor.

The Court observed the employee during the trial. He was constantly moving and shifting in his chair and stood up very stiffly. In the Court's opinion, he gave the impression that he was in a lot of discomfort and pain. In addition, he used eye drops multiple times during the trial.

Other than cross examination, the SIF offered no evidence. No exhibits were offered, no witnesses were called and no professional opinions concerning PTD were presented to offset the opinions and testimony of Dr. Cohen and Dr. Magrowski.

RULINGS OF LAW-

The evidence in this case is really pretty straightforward. The employee has presented evidence which, if credible, established that he was permanently and totally disabled due to a combination of his pre-existing disabilities and the disabilities that resulted from his September 8, 2004 accident. On the other hand the SIF presented absolutely no evidence. Most importantly the SIF offered no expert opinion, not even a records review, to contradict, offset or diminish the testimony, credibility and opinions of Dr. Cohen or Dr. Magrowski.

The disabilities that the employee claims from his September 8, 2004 accident are subjective in nature. Those disabilities can be referred to generally as vertigo and migraine headaches. It is clear that the credibility of the employee has to be considered in making a determination as to the existence and extent of his subjective complaints.

The testimony and medical opinions of Dr. Cohen and Dr. Magrowski address these subjective complaints. The doctors' testimony remains unchallenged and uncontradicted. To deny the case against the employee, the Court would have to rule that the testimony of the employee and the testimony and opinions of Dr. Cohen and Dr. Magrowski are not credible in any way. The Court is not prepared to do that, more importantly there is no evidence that would justify the Court taking such a position.

The employee is claiming that he is permanently and totally disabled. 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 SIF 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 September 8, 2004. 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.

There is both medical and vocational evidence that addresses whether the employee is permanently and totally disabled. The opinions of Dr. Cohen and Dr. Magrowski were that the employee was permanently and totally disabled, and this evidence was not disputed by any other professional or credible evidence. The employer-insurer settled with the employee on the primary issue concerning the disabilities that resulted from the September 8, 2004 accident. The SIF did not challenge the employee’s expert’s opinions with other expert opinion.

Based on a review of all of the evidence, the Court finds the opinions of Dr. Cohen and Dr. Magrowski are credible regarding whether the employee is permanently and totally disabled.

In addition to both the medical and vocational evidence, the Court found that the employee was a very credible and persuasive witness on the issue of his disabilities and permanent total disability. His wife also offered testimony that supported the employee’s disability. The Court assessed the employee as being a person who has worked hard his entire life and is not happy with his current situation where he cannot work. The employee offered detailed information to the examining doctors and the Court concerning the impact that his physical conditions have had on his daily ability to function at home or in the work place, both before and after September 8,

2004. His testimony supports a conclusion that he is not able to compete in the open labor market. The employee was observed during the hearing. In the Court's opinion, his actions exhibited characteristics of someone who was in pain. In addition, the employee put eye drops in his eyes on several occasions during the trial. The Court's opinion is that the employee worked hard physically all of his life and has incurred accidents and resultant disabilities that affect his ability to work and/or perform physical labor or even work at all.

Based on the credible testimony of the employee, his wife, 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 condition and reasonably expect the employee to perform the work for which he was hired. The Court further finds that the employee is unable to compete in the open labor market and is permanently and totally disabled.

There is no credible evidence that the last injury alone caused the employee to be permanently and totally disabled. Dr. Cohen offered his opinions as to the employee's disabilities from the September 8, 2004 injury: He opined that

1. The employee has a 40% PPD of the whole person.
2. The accident of September 8, 2004 was the substantial and prevailing factor in causing the medical treatment that the employee received.
3. The accident of September 8, 2004 was the substantial and prevailing factor in causing his diagnosis.
4. The accident of September 8, 2004 was the substantial and prevailing factor in causing the disability he assessed.

In addition he rated disabilities from the employee's pre-existing accidents. He also opined:

1. The pre-existing conditions have a synergistic effect with the primary injury.
2. The employee is permanently and totally disabled and not capable of gainful employment in today's open labor market. This is a result of a combination of the primary work related injury of September 8, 2004 with his pre-existing conditions and disabilities. They create a synergistic effect or a greater effect than their simple sum.

These opinions were not challenged by any other expert opinion.

A Stipulation for Compromise Settlement was entered into by the employee and the employer-insurer and approved by the Division. The settlement was based upon a disability of 17% of the body as a whole referable to the head, eyes and hearing. The Court finds that as a result of the September 8, 2004 accident, the employee sustained permanent partial disability. The compromise settlement with the employer-insurer lends additional support to such a finding. Based upon a consideration of all of the evidence, the Court finds that as a direct result of the last injury the employee sustained a permanent partial disability of 17% of the body as a whole. The Court further finds that the employee's last injury alone did not cause the employee to be permanently and totally disabled.

The next issue to be addressed is whether the employee's pre-existing conditions were a hindrance or obstacle to his employment or re-employment. The employee testified as to the effects of his pre-existing conditions/injuries on his ability to work prior to September 8, 2004. Just as importantly he discussed these pre-existing disabilities with the various experts who testified in his behalf. These experts based their opinions in part on what the employee told them. There is no question that the statements and credibility of the employee are critical in assessing the concept of hindrance or obstacle and all other issues in the case. There is no credible evidence disputing whether the employee's prior injuries were debilitating in some sense and created some hindrance/obstacle, some difficulty in completing his job assignments. No evidence was introduced disputing the testimony of the employee that he changed from heavy physical labor to painting due to problems that he was experiencing from his prior accidents. The employee provided multiple examples of how his prior injuries affected him physically. Again, the Court found the employee's testimony to be reliable and credible in this area. The experts found that the employee's prior injuries were debilitating. Dr. Cohen provided a rating for permanent partial disability as to the pre-existing injuries.

Based on a review of all of the evidence, the Court finds that the employee's pre-existing disabilities and conditions constituted a hindrance or obstacle to his employment or reemployment.

It was Dr. Cohen's opinion that the pre-existing disabilities and the disability associated with the injury of September 8, 2004 combined to create a greater overall disability. He specifically testified that the employee's permanent total disability is due to a combination of the primary and pre-existing injuries from the synergistic interaction. Dr. Cohen testified that the employee was permanently and totally disabled in combination from a physical standpoint. He also testified about his mental deficiencies. Dr. Magrowski testified that the employee is unemployable in the open labor market and was permanently and totally disabled from the vocational standpoint. He also testified that the employee's education/special education classes and his learning disability are a hindrance or obstacle to employment. All of these opinions are unchallenged.

The Court therefore finds that the prior injuries combined synergistically with the primary injury to cause the employee's overall condition and symptoms. Based on the credible and undisputed testimony of the employee and his wife, supported by the credible and uncontradicted testimony of Dr. Cohen and Dr. Magrowski, the Court finds that the employee is permanently and totally disabled as a result of the combination of his pre-existing injuries and conditions and the September 8, 2004 injury and conditions said injury caused. Thus, the liability for permanent total disability lies with the SIF and not the employer-insurer.

The employee was injured on September 8, 2004. According to the compromise settlement the employee was paid temporary disability benefits for a period of 84 weeks. By calendar the employee's temporary disability benefits ended on April 19, 2006. This is the date of maximum medical improvement.

Notwithstanding the fact that the employee settled his claim against the employer-insurer for a lump sum, the Court finds that for the purpose of determining liability of the SIF, the 17%

permanent partial disability to the body as a whole would have been payable in 68 weekly installments. Since the employer-insurer paid temporary total disability benefits for a period of 84 weeks commencing on September 8, 2004 and ending on April 19, 2006 the employee has been paid all benefits due him up until that date.

SIF liability begins on April 19, 2006 however they are entitled to 68 weeks credit for the permanent partial disability benefits that the employer-insurer paid. By calendar, 68 weeks after April 19, 2006 is August 8, 2007. Therefore, the SIF liability for permanent total disability begins on August 9, 2007. The SIF shall pay to the employee permanent total disability benefits beginning on August 9, 2007 at the rate of \$675.90 per week. The employee's rate for PTD is \$675.90 per week. His rate for PPD is \$354.05. The SIF is also liable for the difference for the two rates for a total of 68 weeks.

These payments for permanent total disability shall continue for the remainder of the employee's lifetime or until suspended if the employee is restored to his regular work or its equivalent as provided in Section 287.200 RSMO.

ATTORNEY'S FEE

Chris N. Weiss, 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

Date: _____

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation