

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

Injury No.: 04-048443

Employee: David Robben
Employer: Kuna Food Service (Settled)
Insurer: Commerce & Industry Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

The administrative law judge awarded permanent total disability benefits from the Second Injury Fund. The Second Injury Fund appeals, arguing that employee's permanent total disability results from the primary injury considered in isolation. In support of its arguments, the Second Injury Fund points to testimony from employee's medical expert, Dr. Volarich, that employee needs to rest in a recumbent fashion "because of" the primary injury. *Transcript*, page 1636.

We have carefully reviewed Dr. Volarich's testimony. We note that Dr. Volarich did not opine that employee has a need to rest in a recumbent fashion solely because of the primary injury, and that throughout his deposition and report, Dr. Volarich emphasized that employee's current low back condition represents a combination of his preexisting 2002 low back injury and surgery and the primary 2004 low back injury and surgeries, and that employee's 2004 low back injury would not have been nearly as severe if it had not been for employee's preexisting low back problems. We note also Dr. Volarich's ultimate opinion that employee's permanent total disability results from a combination of the effects of the primary injury and his preexisting conditions of ill-being.

Viewed in the context of Dr. Volarich's testimony as a whole, we are not persuaded that his opinion that employee should be permitted to rest in a recumbent fashion "because of" the primary injury means that employee's need to lie down during the day is solely due to the effects of the primary injury considered in isolation. Likewise, we are not convinced by the Second Injury Fund's argument that employee's need to lie down during the day must be solely due to the primary injury because it did not arise until after the primary injury; this argument confuses chronology with causation and we do not find it persuasive.

Employee: David Robben

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Rather, we find credible employee's testimony (and so find) that he has a need to lie down during the day to relieve his low back pain. We find persuasive Dr. Volarich's testimony (and so find) that employee's low back pain results from a combination of the primary injury and employee's preexisting low back injury. We also find persuasive the unanimous opinion from both employee's vocational expert, Ms. Gonzalez, and the Second Injury Fund's vocational expert, Mr. England, that a need to lie down during the day renders employee unable to compete for work in the open labor market.

For the foregoing reasons, and because we otherwise agree with the administrative law judge's findings, analysis, and conclusions, we hereby affirm the award.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued July 3, 2013, is attached and incorporated by this reference.

We approve and affirm 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 23rd day of January 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: David Robben

Injury No.: 04-048443

Dependents: N/A

Employer: Kuna Food Service (Settled)

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

Additional Party: Second Injury Fund

Insurer: Commerce & Industry Insurance Co. (Settled)

Hearing Date: March 27, 2013 and April 4, 2013

Checked by: MDL

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: April 6, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri venue
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was lifting a bag of beans when he injured his back.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back.
14. Nature and extent of any permanent disability: 60% PPD of the body as a whole referable to the low back and 40% PPD of the body as a whole – psychological previously settled with Employer, and PTD against Second Injury Fund.
15. Compensation paid to-date for temporary disability: \$117,755.00
16. Value necessary medical aid paid to date by employer/insurer? \$357,157.00

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unkn0own
- 19. Weekly compensation rate: \$658.96/\$347.05
- 20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: SETTLED

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$311.91) payable by SIF for 400 weeks beginning January 7, 2010
and, thereafter \$347.05, for Claimant's lifetime TO BE DETERMINED

TOTAL: TO BE DETERMINED

23. Future requirements awarded: None

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Evan J. Beatty

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Robben

Injury No.: 04-048443

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Kuna Food Services (Settled)

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

Additional Party: Second Injury Fund

Insurer: Commerce & Industry Insurance Co. (Settled)

Checked by: MDL

PRELIMINARIES

A hearing was held on March 27, 2013 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Pursuant to the agreement of the parties, the record remained open until April 3, 2013 for the introduction of the deposition transcript of Mr. James England. Upon receipt of the deposition of Mr. England on April 3, 2013, the record was closed. David Robben ("Claimant") was represented by Mr. Evan J. Beatty. Kuna Food Services ("Employer") and its insurer previously settled their liability with Claimant, and this matter proceeded to a hearing against the Second Injury Fund ("SIF") which was represented by Assistant Attorney General Joye Hudson. Mr. Beatty requested a fee of 25% of Claimant's award.

The parties stipulated that on or about April 6, 2004, Claimant sustained an accident arising out of and in the course of his employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri. Employer received proper notice of the injury; the claim was timely filed; the rates of compensation are \$658.96 for Permanent Total Disability ("PTD") benefits and \$347.05 for Permanent Partial Disability ("PPD") benefits; Employer paid \$117,755.00 in Temporary Total Disability ("TTD") benefits and \$357,157.00 in medical benefits; and if Claimant is found to be permanently and totally disabled, benefits should commence on January 7, 2010,

The only issue to be determined is whether the SIF is liable for PPD or PTD benefits.

SUMMARY OF EVIDENCE

Claimant is a 51 year old male with a high school education and some college. He is married and has two dependent children, ages 20 and 18. He lives in a one-story house with a basement. He seldom goes into the basement. He has a small yard which is less than a quarter of an acre and his wife mows the grass. He does some very light maintenance of his flower garden. His wife is a certified Optometrist Assistant and a scrub nurse at St. Clare Hospital. Claimant's wife and daughter do most of the chores around the house but Claimant does some cooking and light housekeeping. His wife does all of the grocery shopping.

Claimant was awarded Social Security Disability and began receiving benefits in 2005. He also works one and a half to 2 hours a day in a grade school cafeteria serving food to the children. He works about ten hours a week at this job. He is also a crossing guard for the St. Louis School District for two shifts each day. Each shift is about 45 minutes.

Claimant was very active in athletics while in high school and played football, track and baseball. He played one year of baseball at Meramec Community College. Claimant served in the Air Force from 1983 until his honorable discharge in 1987 when he reached the rank of Sergeant. While in the military Claimant worked as a registered mail clerk. After being discharged from the Air Force, he went to work for Safeco Insurance Company from 1988 through 1992 as a mail clerk. From there he went to work for Group Health Plan from 1992 through 1998, again, as a mail clerk.

In 1998 Claimant went to work for Employer where he worked from 1998 until his injury on April 6, 2004. Employer is a food distribution company, and Claimant was a night warehouse supervisor working 5:00 p.m. until 3:00 a.m. He was a salaried employee making \$850.00 a week plus bonuses based on performance and earned approximately \$52,000.00 a year. He supervised 6 to 11 employees and worked 50 hours a week. His job duties included supervision of night shift employees but also included operation of a forklift and a pallet jack. His job involved repetitive lifting, bending and stooping. He entered inventory into a computer through the use of codes, but this was the extent of his computer knowledge. Claimant was able to hire, fire, and discipline employees.

Claimant's first significant injury was in 1989 when he tore his left Achilles tendon which required surgery. Following surgery and leading up to April, 2004 he continued to have problems with pain in the back of his calf which was aggravated whenever he went up and down steps or ran.

In 1990, Claimant injured his right shoulder. This was diagnosed as a probable subluxation of the bicep tendon and a right shoulder arthrogram was ordered. Claimant underwent physical therapy and in 1991 he was diagnosed with impingement syndrome. Leading up to April, 2004 he continued to complain of tightness and soreness and had a sharp pain whenever he attempted to reach overhead. The injury slowed him down.

In 1991, Claimant suffered the first of two knee injuries requiring surgery for a torn medial meniscus. Claimant continued to complain of loss of motion and pain which was aggravated by activity including running. He suffered a second injury to the right knee in 1996 which required surgery, and was diagnosed with a torn ACL as well as tears of the medial and lateral meniscus. Following this surgery and leading up to April 2004 he complained of pain, tightness, and swelling, and he indicated the symptoms were a lot worse than they were following the first knee injury. He attempted to use a knee brace but did not notice any real improvement. His symptoms were aggravated by weather, as well as activity. He continued to ice his knee, apply heat, and take Ibuprofen on a regular basis.

In 1997 Claimant was diagnosed with depression and alcoholism. He was drinking 12 to 18 beers a day and was drinking before and after work. His drinking came to a head when he threatened suicide and the police were called. He was admitted into Edgewood Rehabilitation

Center for four days and continued outpatient care for another three months. Following this treatment, he attended Alcoholics Anonymous meetings which included both group and individual counseling. Claimant indicated this was very difficult to overcome but he has not had a drink since 1997.

Claimant's first significant back injury was in 2002 and his pain came on gradually. An MRI on August 8, 2002 demonstrated a disc bulge with focal central disc herniation at L4-5 and a central disc protrusion at L5-S1. Claimant came under the care of Dr. Faisal Albanna, a neurosurgeon who performed surgery on September 9, 2002 involving a lumbar discectomy at L4-5 and L5-S1. After the symptoms in his low back increased following surgery, Claimant was referred to Dr. Rahini who administered steroid injections on three different occasions. An MRI on February 18, 2003 demonstrated a perineural fibrosis about the thecal sac at the L5 nerve root at L4-5 and on the left nerve root at L5-S1. Dr. Rahini diagnosed Claimant with post lumbar laminectomy syndrome and left sided epidural fibrosis at L4-5 and L5-S1. Claimant had problems with bending and lifting at work and this slowed him down. Claimant was in constant pain while performing his job at Kuna Food Services and his low back pain worsened with bending, lifting and being on his feet. Claimant eliminated all physical activities outside of work except for occasional golf. Claimant was miserable at the end of a work day and had to lie down. Every night he used heat pads and a vibrating massager. He took Tylenol and Ibuprofen before and after work. At that point he could tolerate sitting and standing for up to an hour, but when he was not working he would lie down for relief after work and on the weekends.

PRIMARY INJURY

On April 6, 2004, Claimant was in a cherry picker and was bent at the waist lifting a 50 to 60 pound bag of beans from a pallet. While lifting the bag, Claimant felt immediate pain in his low back. The pain was more severe than he previously had in his low back, and was radiating down his left leg two inches above his knee. He was also suffering from numbness and feelings of pins and needles down his left leg. Claimant was referred for medical care and eventually was referred to an orthopedic surgeon, Dr. Raskas. Initially, Claimant was treated conservatively with physical therapy, medications and restricted duty. Claimant was sent for a second opinion to Dr. Sampson on June 16, 2004 and was diagnosed with left sciatica and treatment included a selective nerve root injection. He only received temporary relief from the injection and a CT scan was ordered on August 16, 2004 that showed post-operative changes at L4-5, bulging disc at L5-S1 and lateralization of probable scar tissue to the left and anterior epidural space at L4-5, as well as degenerative changes at L5-S1. Claimant's symptoms continued to worsen, and after another failed nerve root injection on November 30, 2004, Dr. Raskas recommended surgery.

Dr. Raskas and Dr. Arions performed surgery on February 15, 2005 involving an anterior L4-5 and L5-S1 discectomy with decompression, anterior lumbar fusion including instrumentation with a calcaneous allograft. Initially, Claimant noted some improvement in his condition but by April, 2005 he was having increased low back pain. In May, 2005 he was terminated from Kuna Food Services for running out of Family Medical Leave time. Claimant continued under the care of Dr. Raskas who prescribed additional physical therapy, as well as the use of bone stimulator. Claimant continued to suffer from low back and radiating pain in his left leg. Dr. Raskas attempted another L5 nerve block which provided only temporary relief and

therefore recommended another surgery for possible pseudoarthrosis or non-union of the fusion along with radiculopathy on the left at L5.

On February 7, 2006, Dr. Raskas took Claimant for another surgery which involved an L5-S1 hemi-laminectomy and micro discectomy, microscopic L5 nerve root decompression, L5-S1 posterior lateral fusion with pedicle screw fixation and iliac crest bone graft. Following surgery, he developed numbness in his right thigh. Claimant underwent a post-surgical course of physical therapy. Claimant did not notice any improvement and eventually sought a second opinion with Dr. Albanna. Dr. Albanna ordered a series of epidural steroid injections which provided only temporary relief. Dr. Albanna ordered a CT discogram which reproduced pain at L3-4 and surgery was discussed in an April 3, 2007 visit.

As a result of ongoing symptoms, Claimant underwent another surgery performed by Dr. Raskas on February 7, 2008 which involved an L3-4 anterior and posterior intrabody fusion with instrumentation, screw fixation and facet fusion. This was a level above the previous levels. Claimant did not notice any improvement with the fourth surgery. On September 5, 2008 Dr. Raskas diagnosed Claimant with reactionary depression with chronic pain, and the injury was a substantial and prevailing factor causing the development of depression. Claimant began seeking psychotherapy with Dr. Skye in October, 2008. Claimant continued under the care of Dr. Raskas, and on March 4, 2009 complained of a new onset of right thigh pain. Dr. Raskas felt this was related to the original injury, and recommended a lateral femoral cutaneous nerve block. In February, 2010, Claimant saw Dr. Hurford who recommended a TENS unit, but this was never approved by the workers' compensation insurance carrier.

Claimant continues to complain of radiating pain down his left leg, and numbness in his thigh. Claimant is able to sit for up to an hour, but after just 15 minutes he is constantly shifting position which was observed several times during his testimony at hearing. If he sits for longer than an hour his symptoms increase. His ability to stand is similar, and after an hour his symptoms worsen. He can walk for approximately 25 minutes before he has to sit down. Claimant's pain levels are anywhere from a 5 to 7 and worse with activity. In order to relieve his pain he takes 800 to 1000 milligrams of Ibuprofen four times every day. He also alternates ice and heat. In an attempt to alleviate the pain he lies down two to three times a day for period of between 15 minutes to a half hour. He does very little driving and has problems with any type of long drives. Claimant has developed an increased problem with depression which he attributes to dealing with his pain, as well as, his inability to function. He has feelings of hopelessness, sadness, lack of energy and tends to isolate himself. The only reason he keeps going from day to day is because of his children.

Prior to his back injury in 2002, Claimant was very active playing softball, golf, and weight training. It was after his first back surgery that he stopped most of these activities.

Claimant entered into a settlement with Employer for \$300,000.00. He received medical treatment in the amount of \$357,157.00 and TTD benefits of \$117,755.00 covering a period of 178 6/7 weeks.

OPINION EVIDENCE

Dr. Volarich examined Claimant on May 24, 2010. On physical examination, Dr. Volarich noted Claimant was depressed and his affect was flat. He indicated Claimant was very frustrated over the poor outcome from the surgical repairs and his inability to get back to work. Dr. Volarich noted diminished pin prick sensation in the left anterolateral thigh along the L4 nerve root. When Dr. Volarich asked Claimant to toe walk and heel walk it increased his right knee pain. Claimant was only able to squat 2/3 of normal, stopping because of low back and right knee pain. On range of motion testing of his back, Claimant had loss of range of motion in all areas including flexion, extension, right lateral flexion and left lateral flexion. Dr. Volarich noted the worse pain occurred with extension and when palpating the area it elicited pain at both the sacroiliac joints and over the sacrum and the midline. Dr. Volarich found trigger points in each of the SI joints. Claimant had a positive straight leg raise test at 80 degrees on the right and left side as well as left thigh pain and increased parathesia along the anterior lateral distribution at L4. Dr. Volarich's examination of the right shoulder showed a 15 – 20% loss of motion in all six planes and the impingement testing was moderately positive. With regard to the right knee, Dr. Volarich noted 3-4/4 crepitus at the patellofemoral joint and medial compartment. There was also 1/4 patellar mistraking and 1-2/4 swelling found in the right knee. Dr. Volarich also noted moderate to advanced posttraumatic arthritis in the knee joint. In examining the left ankle, Dr. Volarich found a lump approximately 6 centimeters proximal to the insertion of the Achilles at the ankle which was the site of the tear and repair. There was also a loss of range of motion on dorsiflexion. Dr. Volarich stretched the Achilles which caused minor discomfort in the calf muscles on the left.

Dr. Volarich provided restrictions to Claimant's activities in his May 24, 2010 report. For the spine prior to April 6, 2004 he indicated Claimant should limit repetitive bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks. He should also not use weights greater than 50 pounds and should avoid remaining in a fixed position for any more than 1 to 2 hours at a time including both sitting and standing. He also stated Claimant should change positions frequently to maximize comfort and rest when needed. Following the April 6, 2004 injury and three surgeries, Dr. Volarich further restricted Claimant to no lifting greater than 15 to 20 pounds and he should avoid all bending, twisting, lifting, pushing, pulling, carrying, and climbing. He further restricted him to avoid remaining in a fixed position for any more than about 20 to 30 minutes at a time including both sitting and standing, and advised him to change positions frequently to maximize comfort and rest when needed, including resting in a recumbent fashion. Dr. Volarich provided restrictions which predated the April 6, 2004 injury related to his lower extremities. Among other things, he indicated Claimant should limit prolonged weight bearing including standing or walking 1 to 2 hours or to tolerance. With regard to his prior right shoulder injury, Dr. Volarich indicated Claimant should avoid overhead use of the right arm and prolonged use of the right arm away from his body above chest level and should limit pushing and pulling with the right upper extremity. With regard to his lower extremities, Dr. Volarich indicated Claimant should limit repetitive stooping, squatting, crawling, kneeling, pivoting, climbing and all impact maneuvers.

Dr. Volarich testified about the differences between the pathology found in the initial back surgery in 2002 and the findings after the April 6, 2004 primary injury and how those

injuries and pathologies combined. In comparing the diagnostic films from both injuries, in 2002 Claimant had an L3-4 annular tear and was diagnosed with post laminectomy syndrome and epidural fibrosis at the operative sites at L4 and L5. (Ex. P, Pg. 19). Following the April 6, 2004 injury there really wasn't much change as far as the pathology but Claimant's symptoms changed and he began to have radiating pain in his left leg which was a new clinical finding. (Ex. P, Pg. 19). Dr. Volarich testified the epidural fibrosis worsened with each surgical procedure. Dr. Volarich also testified each time you fuse a different level there is concern with the level above the highest fused level for the development of stenosis or herniation or breakdown at that next level. (Ex. P, Pg. 20). Dr. Volarich's ultimate diagnosis was postsurgical failed back syndrome because Claimant still has significant symptomology, radiating pain, radicular symptoms to the lower extremities, loss of motion in the spine and Claimant has healed poorly with extensive epidural fibrosis of the spine. (Ex. P., Pg. 29).

Dr. Volarich rated Claimant's disability at 65% PPD of the body as a whole rated at the lumbosacral spine as a result of the April 6, 2004 accident. (Ex. P, Pg. 32). He also opined Claimant had 20% PPD of the body as a whole as it relates to the lumbosacral spine due to the 2002 L4-5 and L5-S1 laminectomy and discectomies which resulted in pre-existing back discomfort, loss of motion and difficulty with strenuous activities prior to April 6, 2004. He rated the left ankle at 20% PPD due to the Achilles tendon rupture which accounted for stiffness, tightness, as well as, difficulties with impact activities prior to April 6, 2004. He rated the right shoulder at 15% PPD due to the impingement and the AC joint arthritis that required conservative treatment and resulted in shoulder discomfort, loss of motion and crepitus prior to April 6, 2004. Finally, he rated the right lower extremity at 45% PPD of the right knee due to the torn medial meniscus that required surgery, as well as, the torn ACL that required reconstruction and accounted for ongoing discomfort, loss of motion, crepitus, deformity and weakness in the leg prior to April 6, 2004. Dr. Volarich also thought Claimant suffered from depression but deferred to psychiatric evaluation for that assessment.

Dr. Volarich opined the combination of Claimant's disabilities created a substantially greater disability than the simple sum or total of each separate injury or illness and a loading factor should be added. (Ex. P, Pg. 35). He testified it is his opinion Claimant is permanently and totally disabled as a direct result of the work-related injury of April 6, 2004 in combination with his pre-existing medical conditions. (Ex. P, Pg. 35). He explained that the April 6, 2004 work accident would not have been nearly as severe had it not been for the pre-existing discectomies and epidural fibrosis which had developed in his back and created a weakened condition prior to April 6, 2004 and thus made the current work injury much more severe. (Ex. P, Pg. 35). Dr. Volarich felt Claimant will need ongoing medical care to treat his back condition. (Ex. P, Pg. 36).

Dr. Volarich had an opportunity to review a psychiatric evaluation done by Dr. Anderson. (Ex. P, Pg. 38). Dr. Volarich testified the findings of Dr. Anderson did not change his opinion with regard to whether Claimant was permanently and totally disabled. (Ex. P, Pg. 38). Dr. Anderson confirmed Dr. Volarich's opinion that Claimant is suffering from depression. (Ex. P, Pg. 39).

Dr. Volarich testified the lateralization of the scar tissue to the left and the anterior epidural space at L4-5 was from the 2002 injury and surgery and the osteophytes and bone spurs

found which produced proximal encroachment on the left at L5-S1 pre-existed the 2004 accident. (Ex. P, Pg. 43). Dr. Volarich also noted Claimant continued to have ongoing problems following the 2002 surgery and the notes from Dr. Albanna reflect Claimant had decreased range of motion in his lumbosacral spine and a positive straight leg raise test on the left lower extremity which showed some irritation. (Ex. P, Pg. 46, 47). Dr. Volarich further testified that epidural fibrosis developed after the first surgery which indicates a component of failed back syndrome requiring post-operative epidural injections so there is no question he had problems before the April 6, 2004 accident. (Ex. P, Pg. 49). Dr. Volarich testified he placed restrictions which would have been present prior to the April 6, 2004 injury as a result of his prior back problems and then increased those restrictions following the April 6, 2004 injury. (Ex. P, Pg. 50, 51). Dr. Volarich opined that without the prior back surgery, the restrictions he placed on Claimant after April 6, 2004 would not have been as severe. (Ex. P, Pg. 51). Dr. Volarich indicated the injuries build on each other. (Ex. P, Pg. 51). Dr. Volarich testified it is his opinion Claimant is permanently and totally disabled and it is due to a combination of his pre-existing problems, as well as the injury suffered in 2004 and the surgeries he has had. (Ex. P, Pg. 50).

Dr. Richard Anderson is a board certified psychiatrist. (Ex. Q, Pg. 5). Dr. Anderson testified Claimant had a prior diagnosis of alcoholism and was also suffering from symptoms of anxiety and depression prior to April, 2004. (Ex. Q, Pg. 9, 10). Following the April 6, 2004 injury he again developed symptoms of anxiety and depression. (Ex. Q, Pg. 10). When Dr. Anderson evaluated Claimant he was on the antidepressant, Cymbalta. (Ex. Q, Pg. 11). Dr. Anderson noted Claimant was suffering from low mood, frequent crying spells, trouble with sleep, ruminating thoughts that his life would never improve and that he would be unable to provide for his wife and family, significant anxiety, feelings of hopelessness and worthlessness, as well as, passive thoughts of death. (Ex. Q, Pg. 12, 13). Based on the Beck Depression Inventory, Claimant had a moderate to high level of depression. (Ex. Q, Pg. 14). Dr. Anderson testified findings on Claimant's mental status examination were consistent with a diagnosis of depression and anxiety. (Ex. Q, Pg. 15). Dr. Anderson's diagnosis was recurrent major depression. Dr. Anderson testified if a person has one episode of major depression the chance of having succeeding episodes of depression is much higher than the standard population. (Ex. Q, Pg. 16). Dr. Anderson testified Claimant's first episode of depression was prior to April, 2004. (Ex. Q, Pg. 16). Dr. Anderson also testified because of Claimant's prior episode of alcoholism he has a much higher risk of substance abuse in the future. (Ex. Q, Pg. 17). Dr. Anderson opined Claimant will require ongoing medical care to treat his depression and anxiety. (Ex. Q, Pg. 18, 19). Dr. Anderson opined Claimant has a 50% psychiatric disability and 10% of that 50% is a result of his prior depression and substance abuse which substantially increases the risk of further episodes. (Ex. Q, Pg. 19).

Delores Gonzalez has been a vocational rehabilitation counselor for 39 years. (Ex. R, Pg. 5). Ms. Gonzalez personally met with Claimant on May 6, 2011. (Ex. R, Pg. 8). Ms. Gonzalez was asked about the work Claimant does at the school cafeteria and as a crossing guard which she indicated was only 2 hours a day and would not be considered competitive employment. (Ex. R, Pg. 10). Ms. Gonzalez also testified Claimant's age would be an adverse vocational factor as it is, according to the Department of Labor, approaching advanced age. (Ex. R, Pg. 11). She also cited a study done by Boston University which indicated that only 23% of people over 50 would be able to find employment if they lost their employment. (Ex. R, Pg. 11). She further indicated the reason an older individual has problems with new employment is they have difficulty

learning new tasks and also because technology has changed and they do not have the requisite knowledge of computers or other technology. (Ex. R, Pg. 12). Ms. Gonzalez also conducted vocational testing in the areas of math, reading and spelling and found Claimant would have difficulty in an academically based secondary program and he would need to take remedial classes in reading comprehension. (Ex. R, Pg. 13). Ms. Gonzalez testified because of Claimant's residual functional capacity he does not have any transferrable skills from his prior employment. (Ex. R, Pg. 15). Ms. Gonzalez was asked whether an employer would reasonably be expected to hire Claimant and she stated his impairments have severely compromised his ability to either return to his past relevant jobs or perform any job on a sustained basis, that he is not a candidate for vocational rehabilitation, and is not currently capable of any competitive work for which there is a reasonably stable job market as a result of his primary injury in combination with his pre-existing disabilities and conditions. (Ex. R, Pg. 17, 18). In using the word combination, Ms. Gonzalez was referring to the disabilities he had prior to April 6, 2004 including the physical injuries as well as his past psychiatric disability in combination with any disabilities he had as a result of the April 6, 2004 injury. (Ex. R, Pg. 18).

James England is a vocational rehabilitation counselor who testified on behalf of the SIF. (Ex. I, Pg. 4, 9). Mr. England indicated based on the vocational testing done by Delores Gonzalez Claimant would be able to learn additional skills that would be adequate for a number of vocational options. (Ex. I, Pg. 15). Mr. England also noted the difference in opinions with regard to Claimant's functional ability and that he had been released to function in the sedentary to light ranges of work. (Ex. I, Pg. 15). He also opined that Dr. Volarich's restrictions would prevent Claimant from returning to work because of Claimant's need to lie down or assume a recumbent position. (Ex. I, Pg. 16). Mr. England stated that the opinion of Dr. Raskas with regard to restrictions would place Claimant in the light range category of exertion and Dr. Bernardi's restrictions also would be in the light range and Dr. Graham had placed claimant in the sedentary to light category. (Ex. I, Pg. 17). Mr. England testified there are no jobs on the open labor market which can be done while resting in a recumbent fashion or lying down. (Ex. I, Pg. 19). If Claimant has to lie down on a regular basis as he testified to, Claimant would not be employable on the open labor market. (Ex. I, Pg. 20). Mr. England testified Claimant would be able to return as a mail clerk based on Dr. Bernardi or Dr. Graham's restrictions. (Ex. I, Pg. 23).

Mr. England testified that normally when he is providing vocational services he will typically evaluate the subject in person. (Ex. I, Pg. 25). In this case he did not interview Claimant. (Ex. I, Pg. 25). The value of conducting a personal interview is it allows him to see how the person comes across, how he presents and you can also ask him whatever questions you feel are appropriate and have the opportunity to test the individual. (Ex. I, Pg. 25). Doing a personal interview a person also can help in assessing the level in which Claimant is functioning. (Ex. I, Pg. 25). Mr. England admitted there can be a difference between restrictions given by a physician and an individual's real life experiences as far as what they can and can't do. (Ex. I, Pg. 26). If Mr. England had interviewed Claimant in person he would have been able to ask whether Claimant is able to perform at the functional level the doctor indicated, and specifically whether he can do those activities. (Ex. I, Pg. 26). Mr. England testified he did not know how long Claimant could perform light level work in the school cafeteria and crossing guard jobs. (Ex. I, Pg. 27). Mr. England testified Claimant stated in his deposition that he is physically only to do an hour or two at the school and doubted he could go over two hours because of the pain. (Ex. I Pg. 28). Mr. England testified on the open labor market, people work longer than two

hours at a time. (Ex. I, Pg. 28, 29). Mr. England testified Dr. Volarich was the only physician that evaluated all the different parts of Claimant's body including his pre-existing disabilities to his left ankle, right knee and right shoulder. (Ex. I, Pg. 31).

FINDINGS OF FACT & RULINGS OF LAW

Based on the competent and substantial evidence presented, including my observation of Claimant, and the application of Missouri law, I find:

Claimant suffered a work-related injury on April 6, 2004 to his low back which resulted in further aggravation, increase in severity and frequency of pain, and further functional limitation. Claimant's work injury necessitated additional back surgeries and substantial medical treatment. Based on the testimony of Claimant, the medical evidence and other evidence, I find claimant suffered 60% PPD of the body as a whole referable to the low back, and 40% PPD of the body as a whole referable to psychological impairment as a result of the injury on April 6, 2004. This injury is not totally disabling in and of itself.

I find Claimant is permanently and totally disabled and unable to compete in the open labor market. Claimant has several adverse vocational factors in terms of potential employment. He is 51 years of age with only a high school education. From a functional standpoint there is little doubt that an employer would not reasonably be expected to hire Claimant given his functional limitations. The only physician in this matter to examine all of Claimant's disabilities was Dr. Volarich. Dr. Volarich had the opportunity to not only review medical records pertaining all of Claimant's pre-existing disabilities and the last injury to his low back, but also was able to conduct a physical examination of all of the various body parts including his left ankle, right knee, right shoulder, and low back in order to assess each of the disabilities, and provide an opinion regarding the disability as well as what physical restrictions would be placed on Claimant.

I find the testimony of Ms. Gonzales to be more persuasive than that of Mr. England. Ms. Gonzalez testified Claimant's impairments have severely compromised his ability to either return to his past relevant job or perform any job on a sustained basis, and that he is not a candidate for vocational rehabilitation and is not currently capable of any competitive work for which there is a reasonably stable job market and therefore, he is permanently and totally disabled. Dr. Volarich also testified Claimant was permanently and totally disabled. Mr. England admitted he did not interview Claimant, and did not have the opportunity to see how Claimant would come across in an interview and did not ask him appropriate questions regarding his level of functioning.

Based on all the available medical and vocational opinions, as well as, the credible testimony of Claimant, Claimant is permanently and totally disabled. Given his current pain levels, limitation of functional ability, age and limited education, it is not reasonable to expect an employer to hire Claimant.

I further find Claimant is permanently and totally disabled as a result of the primary injury in combination with his pre-existing injuries which constituted hindrances or obstacles to employment or re-employment. The expert testimony supports the conclusion that Claimant's

permanent and total disability is a result of the combination of the primary injury and the pre-existing injuries.

Claimant settled his claim for \$300,000.00 against Employer. The court is not bound by that agreement or settlement stipulation, and is required to determine based on the evidence presented what amount should be awarded in determining liability of Employer and the SIF. When parties enter into a settlement it is a business decision based upon many factors.

Claimant reached maximum medical improvement on January 7, 2010 as stipulated to by the parties. Claimant has met his burden of proof, and I find he is permanently and totally disabled as a result of the combination of his pre-existing injuries and conditions, and the primary injury of April 6, 2004. The SIF is therefore liable for PTD benefits commencing on January 7, 2010. The SIF is responsible for payment to Claimant for the weekly differential of \$311.91 for 400 weeks beginning on January 7, 2010, and \$658.96 a week thereafter for life.

This award is subject to an attorney's lien of 25% in favor of Claimant's attorney Mr. Evan J. Beatty

Date: _____

Made by: _____

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