

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

Injury No. 10-102401

Employee: John W. Robertson  
Employer: Transport Corporation of American, Inc.  
Insurer: Zurich American Insurance Co.  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record. We find that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Introduction**

The parties asked the administrative law judge (ALJ) to resolve the following issues: (1) whether employee is permanently totally disabled or permanently partially disabled; (2) the nature and extent of Second Injury Fund liability; (3) whether employee is entitled to future medical care; and (4) whether employee is entitled to reimbursement for dental treatment in the amount of \$650.00.

The administrative law judge rendered the following findings and conclusions: (1) the employee is permanently totally disabled from the last injury alone; (2) the Second Injury Fund is not liable; (3) awarded future medical treatment for employees' headaches alone; and (4) employee was entitled to reimbursement for dental treatment in the amount of \$650.00.

Employer filed a timely Application for Review with the Commission alleging the ALJ erred: (1) in finding employee is permanently and totally disabled; (2) if employee is permanently and totally disabled, then in finding it is due to the last injury alone; and (3) in holding employer was obligated to provide employee with future medical care for employee's headaches.

**Discussion**

The administrative law judge's award dated August 7, 2014, sets forth the stipulations of the parties and the administrative law judge's findings of fact on the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award.

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<sup>1</sup> All statutory references are to the Revised Statutes of Missouri (2014), unless otherwise indicated.

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Corrections

In the final paragraph on page 10 of her award, the administrative law judge states that employee had no headaches before the December 8, 2010, primary injury. This statement is incorrect. At the hearing, the employee testified he had complained of headaches to Dr. Koprivica in 2000, after a right shoulder injury. Accordingly, we must disclaim this finding by the administrative law judge.

In all other respects, we affirm the award of the ALJ dated August 7, 2014.

We further approve and affirm the ALJ's allowance of attorney's fees herein as being fair and reasonable.

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

The award and decision of Administrative Law Judge Emily S. Fowler, issued August 7, 2014, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 11<sup>th</sup> day of May 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED

James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: John W. Robertson

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge assessing liability for employee's permanent total disability against the employer is in error, and that the decision should be modified to award permanent total disability benefits from the Second Injury Fund.

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." The Fund is liable for permanent total disability benefits where the work injury combines with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

This 63-year-old employee worked for employer for approximately six months when he was involved in a workplace accident on December 8, 2010. Prior to the December 2010 work injury, employee had an extensive history of significant injuries which included injuries to his abdomen, back, right shoulder, knee, and ankle.

Employee fractured his ankle in high school playing football, which was treated with a cast for six to seven months. Employee then received multiple severe injuries while serving in the military in the 1970s. Employee was shot in the knee and abdomen, and required surgery. Employee was then run over by a tank, causing an injury to his back. Employee required a back fusion as a result of this back injury, and continued to have back pain and limitations since the injury. Employee was assaulted in 1989, and was kicked in the face and abdomen multiple times.

In 1991, employee suffered a work-related injury to his low back and left knee when he fell off a stool. Employee received a workers' compensation settlement of 5% permanent partial disability to his lumbar spine and 5% permanent partial disability to his left knees as a result of this work accident.

In 2000, employee suffered a work-related injury to his right shoulder when an insulation bundle struck him. Employee underwent surgery for decompression and debridement of a rotator cuff tear. Dr. Koprivica examined employee in November of 2000 and issued permanent restrictions including a 20 pound lifting limitation and directions to avoid repetitive activities above the shoulder level. At that time, Dr. Koprivica assessed a 31% permanent partial impairment to the right upper extremity. Dr. Koprivica noted pain, weakness, and loss of motion in the right shoulder and reported that employee had to leave his truck driving employment because of the right upper extremity condition. Employee also reported he was suffering headaches at this time. Employee received a worker's compensation settlement for this condition.

The only vocational expert to testify was Michael Dreiling, who testified on employee's behalf. Mr. Dreiling opined that employee was unemployable in the open labor market due

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to the combination of his primary and pre-existing injuries. In his deposition, Mr. Dreiling made it clear that it was not his opinion that employee was unemployable based solely on the December 8, 2010, accident. Rather, it was due to “a combination of all the issues including preexisting medical problems....” Mr. Dreiling agreed that his opinion on employee’s unemployability was based on Dr. Koprivica’s current restrictions, the restrictions Dr. Koprivica recommended in 2000, and the restrictions recommended after the 1991 workplace injury.

I credit the testimony of the only vocational expert to testify, and find that employee is permanently and totally disabled due to a combination of the December 2010 work injury and his extensive preexisting conditions. I would modify the decision of the administrative law judge and award permanent total disability benefits from the Second Injury Fund.

Because the majority has determined otherwise, I respectfully dissent.

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James G. Avery, Jr., Member

## FINAL AWARD

Employee: John W. Robertson Injury No.: 10-102401  
Dependents: N/A  
Employer: Transport Corporation of America, Inc.  
Insurer: Zurich American Insurance  
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund  
Hearing Date: June 18, 2014 Checked by: ESF/pd

### 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 occupation under the Law? Yes
4. Date of alleged accident or onset of occupation disease: December 8, 2010
5. State location where alleged accident occurred or occupational disease was contracted:  
Kansas City, Clay County, Missouri
6. Was above employee in employ of above employer at time of allege accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant had retrieved supplies from his employer and was walking to his truck when he tripped over a stake in the ground and fell.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupation disease: Left shoulder and left wrist.

14. Nature and extent of any permanent disability: Permanent Total disability attributed to the accident date December 8, 2010
15. Compensation paid to-date for temporary disability: \$8,447.98
16. Value necessary medical aid paid to date by employer/insurer? \$20,676.76
17. Value necessary medical aid not furnished by employer/insurer? \$650.00
18. Employee's average weekly wage: \$941.82
19. Weekly compensation rate: \$627.58/\$418.58
21. Amount of compensation payable: Employer to pay to Employee permanent total disability payments of \$627.58 per week beginning April 28, 2011 for as long as Employee remains permanently and totally disabled. Employer shall also pay to Employee the sum of \$650.00 as and for unpaid medical treatment required to cure and relieve Employee from the injuries he sustained in his December 8, 2010 accident.
22. Second Injury Fund liability: None
23. Future requirements awarded: Future medical care which will cure and relieve the symptoms related to Claimant's headaches as suggested by Dr. Kelly.

A fee of 25% for all benefits herein shall be awarded to Michael W. Downing, Employee's attorney, for services rendered.

**FINDINGS OF FACT AND RULINGS OF LAW**

Employee: John W. Robertson Injury No.: 10-102401  
Dependents: N/A  
Employer: Transport Corporation of America, Inc.  
Insurer: Zurich American Insurance  
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund  
Hearing Date: June 18, 2014 Checked by: ESF/pd

On June 18, 2014, the Employee, Employer and the Second Injury Fund appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Claimant, John W. Robertson, appeared personally and through counsel, Michael W. Downing. The employer, Transport Corporation of American, and its insurer, Zurich American Insurance, appeared through counsel Samantha Benjamin-House. The Second Injury Fund appeared through counsel Maureen Shine.

**STIPULATIONS**

The parties entered into the following stipulations at trial:

1. Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act and liability was fully insured by Zurich American Insurance.
2. An employer/employee relationship existed between Employee and Employer on December 8, 2010.
3. Employee sustained an accident on December 8, 2010 arising out of and in the course of his employment with Transport Corporation of America.
4. Employer received timely notice of Employee's accident.
5. Employee's claim was filed within the time allowed by law.
6. Employee's average weekly wage was \$941.82, which leads to a \$627.58 temporary disability compensation rate and \$418.58 permanent partial disability compensation rate.

**ISSUES**

The issues to be resolved in these proceedings are:

1. Whether Claimant is permanently totally disabled or permanently partially disabled.
2. What is the nature and extent of Claimant's disability against the Employer and Second Injury Fund?
3. Whether Claimant is entitled to future medical care resulting for injuries sustained on December 8, 2010.

4. Whether Claimant is entitled to reimbursement for the dental treatment in the amount of \$650.00.

### **EXHIBITS**

Claimant testified on his own behalf and offered the following exhibits which were entered into evidence without objection:

*Claimant's Exhibit A – Deposition of Michael Dreiling taken on August 31, 2012*

*Claimant's Exhibit B – Deposition of Dr. Koprivica taken on October 5, 2012*

The Claimant offered the following exhibit which was entered into evidence over Employer's objection:

*Claimant's Exhibit C -- Dental Medical bill totaling \$650.00*

The employer offered no live testimony but offered the following exhibits which were entered into evidence without objection:

*Employer/Insurer's Exhibit No. 1 – Deposition of Dr. Jones taken on January 15, 2013*

*Employer/Insurer's Exhibit No. 2 – 60-day letter of Dr. Kelley dated January 30, 2013*

*Employer/Insurer's Exhibit No. 3 – Eye Exam report dated January 28, 2011*

Second Injury Fund offered no live testimony but offered the following exhibit which was entered into evidence without objection:

*Second Injury Fund Exhibit No. 1 – Deposition of John W. Robertson taken on 4/6/2012*

### **FINDINGS OF FACT**

Claimant is a sixty-three-year-old man who worked for employer as a truck driver for approximately six months when he was involved in a workplace accident on December 8, 2010. On December 8, 2010, Claimant had picked up some supplies from the employer's terminal and was walking back to his truck when he tripped over a rod in the ground and fell. Claimant alleges he injured his left shoulder, left wrist, both knees, head, teeth, and eyes in the accident. Employer accepted the claim as compensable and provided treatment for his injuries. Claimant is alleging he sustained permanent disability to his left shoulder, left wrist and head as a result of his workplace accident. Furthermore, Claimant alleges he is now permanently and totally disabled.

On the day of the accident, Claimant was seen at Concentra and was assessed as having a face/scalp contusion, a face laceration, a broken tooth, dizziness, blurry vision and a wrist injury. Claimant was sent to the hospital for further evaluation of his injuries. Although Claimant indicates he was in and out of consciousness while being treated at Concentra, the Concentra medical records do not show that Claimant lost consciousness. Claimant was then seen at North

Kansas City Hospital where an X-ray was taken of his left wrist which revealed an ossified density, which was thought to be a chronic fracture from the radial styloid. Additionally, a CT scan of Claimant's cervical spine was taken which was negative. Claimant returned to Concentra the following day and was again sent to North Kansas City Hospital where a CT scan of his head was taken which revealed no evidence of any acute traumatic intracranial injury. Additionally, a CT scan of the maxillofacial region was taken which was negative for any acute bony injuries.

Due to ongoing complaints of headaches, Claimant was evaluated by Dr. Kelly, a neurologist, on December 30, 2010. Dr. Kelly performed a neurological examination of Claimant and opined that he did not believe Claimant's headaches were debilitating and required only conservative treatment such as Tylenol. However Claimant after being seen again in February for his headaches was prescribed a low dose of Amitriptyline. On May 13, 2011, Claimant returned to Dr. Kelly indicating the Amitriptyline was successful in relieving his headaches. Dr. Kelley discontinued Claimant's medication at that point and found him to be at maximum medical improvement with regard to his minor closed head injury. Dr. Kelley released Claimant to return to work full duty without any neurological restrictions. Additionally, Dr. Kelley opined, "I would not expect him to have any long-term needs for medical treatment for his posttraumatic headaches." However, he did state that if Claimant's headaches should return, additional treatment with Amitriptyline would be appropriate for a few additional weeks or months. On January 18, 2013, Dr. Kelly issued a report stating, "I do not consider [Claimant] disabled because of his headaches." In his testimony, Claimant stated that his headaches did return and continue on a daily basis. They interfere with sleep and cause him to be tired throughout the day. He is often required to lie down for up to 4 hours a day due to his lack of sleep. He also stated he has requested additional treatment form the V.A. Hospital but has yet to receive it.

With regard to Claimant's left upper extremity injuries, Claimant was initially seen by Dr. Jones on January 3, 2011. On that date, an MRI was taken of Claimant's left shoulder which revealed severe glenohumeral arthritis and arthritis of the acromioclavicular joint. There was no finding of a rotator cuff tear, labral tear, or any new soft tissue injuries. Dr. Jones explained that Claimant's arthritic conditions in his shoulder could not have been caused by his December 8, 2010 accident. Rather, Dr. Jones assessed that the December 8, 2010 accident caused only a contusion with a suspected sprain of the rotator cuff. Treatment required for his shoulder injury was physical therapy, medications and injections. Dr. Jones testified that the fall on December 8, 2010 aggravated a pre-existing condition of severe arthritis in Claimant's left shoulder. He felt that Claimant's symptoms of pain would have eventually started sooner or later due to his underlying condition, but he did agree that the fall started these symptoms based on Claimant's history.

On March 17, 2011, Claimant returned to Dr. Jones with continued complaints of left shoulder, left wrist and bilateral knee pain. Additionally, Dr. Jones stated that Claimant's bilateral knee pain was resolving and he did not feel it warranted treatment. Finally, Dr. Jones referred Claimant to Dr. Divelbiss for treatment of his left wrist injury. Claimant was seen by Dr. Divelbiss on March 24, 2011. Dr. Divelbiss reviewed an MRI taken of Claimant's left wrist and noted it showed no signs of a TFC tear, but it did show a possible old fracture in the region of the tip of the radial styloid. Dr. Divelbiss treated Claimant with an injection and a brace.

On April 28, 2011, Claimant followed up with Dr. Divelbiss for his wrist injury and it was noted that the swelling and pain in his left wrist had significantly improved. Dr. Divelbiss released Claimant to return to work full duty. On June 13, 2011, Dr. Jones issued a rating report with regard to Claimant's left upper extremity which included both his left wrist and left shoulder injuries. Dr. Jones opined that Claimant sustained a 10% permanent partial impairment of function to his left upper extremity as a result of his December 8, 2010 workplace accident. Further, Dr. Jones stated that he did not believe future medical treatment is directly necessary due to his December 8, 2010 injury. Although he indicated that a total shoulder replacement would be recommended if he continues to have pain, this would not be related to his December 8, 2010 injury but rather to his underlying arthritic condition.

With regard to Claimant's alleged eye injury, Claimant was treated by Dr. Ketcherside. On January 19, 2011, Claimant underwent visual field testing in both eyes. Dr. Ketcherside explained that the field test revealed that his left eye appeared perfectly normal, and his right eye superonasally had a very faint area where he did not see quite as well, which is most likely normal. On January 28, 2011, Dr. Ketcherside issued a report finding Claimant was certainly okay to drive a commercial truck from an ocular standpoint. Although Claimant testified that he continues to have problems with his eyes, he admitted that he was diagnosed with glaucoma in his eyes in 2012 for which he is currently taking prescribed eye drops.

Ultimately, Claimant was released from treatment approximately five months after the accident by May 2011 without surgical intervention for any of his injuries stemming from the December 8, 2010 accident.

Prior to Claimant's workplace accident on December 8, 2010, Claimant had injuries to his back, right shoulder and ankle. First, Claimant fractured his ankle in high school playing football. Claimant was treated with a cast which he was required to wear for six to seven months. In the 1970's, Claimant was serving in the military when he sustained multiple severe injuries. First, Claimant was shot in the abdomen and knee which required surgery. Second, Claimant was run over by a tank causing injury to his back. Claimant testified that immediately following the incident involving the tank he was airlifted to a nearby hospital. He was treated with medication and returned to full active military duty. In the late 1970's, Claimant ultimately underwent a back fusion as a result of being run over by the tank. Claimant received Social Security disability benefits for approximately six to eight months while he was recovering from this injury. Following the back injury and subsequent fusion, Claimant did have problems with his back. He testified that he continued to have back pain through the years and although he stated it did limit him at times, he was able to lift as much as 100 pounds as required by his job duties throughout the years and was always able to do all the requirements of his jobs duties up until his accident of December 8, 2010

Although Claimant does not recall the incident, there are records which indicate that Claimant was assaulted in 1989 which included being kicked in the face and abdomen multiple times. In 1991 Claimant sustained a work-related injury to his low back and left knee when he fell off of a stool. Claimant treated with Dr. Yost for this injury and Dr. Yost's medical records note Grade II spondylolisthesis with questionable spondylosis in his back. An EMG and nerve conduction study was taken which showed mild left-sided L4-5 nerve root irritation along with a minimal right L5 nerve root irritation. Claimant received a compromised settlement for 5%

permanent impairment to his lumbar spine and 5% permanent impairment to his left knee as a result of his 1991 accident.

Next, in 2000 Claimant sustained a work-related injury to his right shoulder when a large insulation bundle struck his shoulder. Claimant was treated by Dr. Jones and underwent an arthroscopic subacromial decompression and debridement of a partial rotator cuff tear. He completed post-operative rehabilitation at HealthSouth and ultimately received a compromise settlement for this injury. On November, 3, 2000, Dr. Koprivica performed an independent medical evaluation on Claimant's right shoulder and concluded Claimant sustained a 31% permanent partial impairment to the shoulder as a result of his workplace accident. Dr. Koprivica testified that Claimant's right shoulder injury was significant and that he continued to have problems with the shoulder following surgery which resulted in Dr. Koprivica imposing permanent work restrictions as a result of this injury. These work restrictions included: avoiding repetitive or sustained activities above shoulder girdle level on the right, avoid weighted activities above shoulder level on the right, any one-time lift should be limited to 20 pounds or less, avoid awkward postures of the cervical spine, and avoid forceful pushing/pulling activities at the right shoulder girdle level, especially repetitive activities. Additionally, Claimant told Dr. Koprivica that he was unemployed for a short period of time in November 2000 because of his physical inability to sustain employment due to his right shoulder injury.

While the Claimant did advise Dr. Koprivica that he did not have ongoing problems with his right shoulder, he testified at that he did have problems with the shoulder but that they were mainly weather related. These problems mostly caused him to not be able to move his shoulder as he wanted and limited his lifting at times. From Employee's description of these problems it appears that his shoulder injury caused minor residual problems which mainly surfaced due to weather related effects. These problems apparently did not keep him from performing his job duties.

With regard to Claimant's most recent workers' compensation claim with a date of accident of December 8, 2010, several doctors have provided opinions regarding Claimant's permanent disability. First, as stated above, Dr. Kelly, Claimant's treating doctor for his head injury, found Claimant had no permanent disability due to his head injury. However, he did state that should these headaches return a continued treatment of Amitriptyline for a few weeks or months would be advisable. Second, as stated above, Dr. Ketcherside found Claimant was not permanently disabled due to his eye injury. Third, Dr. Jones, Claimant's treating doctor for his left arm injuries, found that Claimant sustained a 10% permanent partial disability to the left upper extremity as a result of his December 8, 2010 accident. Dr. Jones's rating included impairment to both his left wrist and left shoulder. Dr. Jones stated that the injury on December 8, 2010 aggravated Claimant's pre-existing asymptomatic arthritis.

Dr. Koprivica performed an independent medical evaluation at the request of Claimant's attorney and issued a report dated September 26, 2011 finding Claimant sustained a 15% permanent partial disability to the body as a whole due to residual headache complaints, a 35% permanent partial disability of the left upper extremity at the level of the shoulder, and a 10% permanent partial disability of the left upper extremity at the level of the forearm due to his wrist complaints. Dr. Koprivica did not assign any permanent disability rating based on visual injury. In total, Dr. Koprivica found Claimant sustained a 50% permanent partial disability to his body as a whole based on the combination of his injuries from December 8, 2010. Dr. Koprivica also

suggested that future medical treatment would be necessary for his injuries including ongoing treatment from Dr. Kelley for his chronic headaches, a second opinion with regard to his ocular complaints, and consideration of a left shoulder arthroplasty. However, Dr. Koprivica did state that he would defer to Dr. Jones with regard to ongoing treatment to the left shoulder.

Additionally, Dr. Koprivica concluded that work restrictions would be necessary which included: restriction from repetitive hand use on the left, avoid repetitive grasping or gripping types of activities using the left upper extremity, avoid repetitive reaching activities with the left upper extremity at the shoulder, avoid repetitive pushing or pulling activities using the left upper extremity, avoid overhead activities on the left, limit the lifting and carrying activities to an occasional activity in terms of frequency and to less than 20 lbs, and avoid sustained or awkward postures of the cervical spine. Dr. Koprivica further stated, "Although I would not consider the nature of these injuries to typically be totally disabling, if Claimant was found to be permanently totally disabled by a vocational expert with his history of lack of industrial disability prior to December 8, 2010, I would consider the permanent total disability to arise based on the restrictions necessitated by the primary injury of December 8, 2010 in and of itself." Furthermore, Dr. Koprivica found no Second Injury Fund liability based on the history that Claimant provided.

On April 23, 2012, Mr. Michael Dreiling performed a vocational evaluation on Claimant and concluded that Claimant was permanently and totally disabled. Mr. Dreiling admitted that his opinion that Claimant is permanently and totally disabled is not limited to Claimant's December 8, 2010 injuries alone, but encompasses his prior injuries, vocational factors, and medical restrictions. Specifically Mr. Dreiling testified that "Mr. Robertson is unemployable in the open labor market based on the totality of the factors including his prior work restrictions and then those recommended by Dr. Koprivica currently."

Finally, it should be noted that Mr. Dreiling's report indicated that Claimant was physically able to drive a personal car and is even able to mow his lawn. Indeed, Mr. Dreiling testified that Claimant could physically perform a job driving a taxi-cab or delivery vehicle which does not require a DOT certification. Furthermore, Claimant's education history revealed he has completed high school, two years of college, and even owned his own small loan business. However in his deposition, Mr. Dreiling appeared to waiver on what the cause of Claimant's permanent total disability was. He testified that if there were no restrictions from the previous injuries Claimant's unemployability was due to his last accident given Dr. Koprivica's current restrictions.

The first issue to be determined is whether Claimant is permanently totally disabled or permanently partially disabled. Further if he is permanently and totally disabled, whether the liability is against the Employer or The Second Injury Fund?

In Missouri workers' compensation cases, the law clearly provides that the employee has the burden of proving all material elements of the claim. *Fischer v. Archdiocese of St. Louis-Cardinal Richter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990). It is the claimant's burden to prove "not only causation between the accident and the injury, but also that a disability resulted and the extent of such disability." *Griggs v. A.B. Chance Company*, 503 S.W.2d 697 (Mo. App. W.D. 1973). Further, "proof of permanency of injury requires reasonable certainty." *Id.* This

proof must be based on competent and substantial evidence and not merely on speculation. *Moriarty v. Treasurer of the State of Missouri*, 141 S.W.3d 69 (Mo. App. E.D. 2004).

The claimant alleges that he is permanently and totally disabled. However, to show that the disability constitutes a permanent and total disability under the Missouri workers' compensation law, the claimant must show that, given the employee's situation and condition, he or she is not competent to compete in the open labor market. Under the Missouri Workers Compensation Act, total disability is defined as the inability to return to any employment. *Messex v. Sachs Elec. Co.*, 989 S.W. 2d 206, 210 (Mo. App. E.D. 1999). The words inability to return to any employment mean that the employee is unable 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. *Kowalski v. M-G Metals and Sale*, 631 S.W.2d 919, 922 (Mo.App. S.D. 1982). The primary determination for permanent total disability is whether the employee is able to compete in the open labor market. *Messex*, 989 S.W.2d at 210. A determination of permanent total disability focuses on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment *Gordon v. Tri-State Motor Transit*, 980 SW 2d 849, (Mo. App. 1995). There are many factors that may be considered in this assessment including a claimant's physical and mental condition, age, education, job experience and skills in order to determine whether a claimant is permanently and totally disabled. See *Tiller v. 166 Auto Auction*, 941, SW 2d 863 (Mo. App. 1997).

If a claimant is found to be permanently and totally disabled, it becomes a determination for the finder of fact to determine whether the claimant is permanently and totally disabled due to the last accident alone or as a result of a combination of the claimant's pre-existing injuries, triggering Second Injury Fund liability. The statutory basis for determining Second Injury Fund liability is found at Section 287.220.1 R.S.Mo. By unambiguous language, the legislature has imposed potential liability on the Second Injury Fund for claimants who, "at the time of the last injury, had some partial disability" Section 287.220.1 R.S.Mo. The administrative law judge is to consider the degree of the employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained. This statutory formula for determining Second Injury Fund liability incorporates a medical causation component. The employer's liability must be determined first, and the statute provides that the employer shall be liable only for the disability resulting from the last injury considered alone, in and of itself. The statute then provides if the compensation for which the employer at the time of the last injury is less than the compensation provided in the chapter for permanent and total disability, then, in addition to the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent and total disability from the Second Injury Fund. Applying this language, if it is clear that the last injury considered alone and of itself results in permanent and total disability, the employer is responsible for the full permanent and total disability benefits and the Second Injury Fund has no liability. *Gasson v. Treasurer of the State of Missouri*, 134 S.W.3d 75 (Mo. App. W.D. 2004).

When these cases and the relevant statutes are applied to the facts of this case, based upon all of the evidence, the medical records, Claimant's testimony at hearing, and the medical and vocational testimony, it is clear that the permanent and total disability results from the last accident considered in isolation as explained below.

Dr. P. Brent Koprivica testified on behalf of the Claimant. Dr. Koprivica concluded by opining that if Claimant was found to be permanently totally disabled by a vocational expert, with his history of lack of industrial disability prior to December 8, 2010, "I would consider the permanent total disability to arise based on the restrictions necessitated by the primary injury of December 8, 2010, when considered in isolation, in and of itself."

Vocational expert, Michael J. Dreiling, testified on behalf of the Claimant. He opined that when taking account the totality of Claimant's vocational profile and the medical restrictions, along with his presentation to prospective employers, no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ this individual in his existing physical condition. He ultimately agreed with Dr. Koprivica's assessment that it is the restrictions resulting from the 12/8/10 injury which render Claimant unemployable and permanently and totally disabled without consideration of any preexisting conditions

All of Claimant's current pain and complaints of physical and functional limitations result from the last accident. He has pain, cracking, and a feeling that the bone in his left shoulder "grabs" when he raises his arm. He cannot sleep on his left shoulder. He cannot raise his left arm above shoulder level. He cannot reach around to his back with his left arm, and he has lost strength in the left shoulder. It bothers him in cold and wet weather. His left shoulder severely limits his ability to do lifting activities. He still uses the prescription pain cream given to him by Dr. Jones following the 12/8/10 injury. It appears from Employee's testimony as well as the medical records that Employee was asymptomatic regarding his left shoulder prior to his last accident. Dr. Jones found that Employee suffered from an underlying arthritic condition which he found to be pre-existing and not related to his December 8, 2010 accident. However he did state that the accident did "aggravate" the underlying arthritis thus rendering it painful. This aggravation is a permanent change to Employee's shoulder as opposed to an irritation which usually implies a temporary change. Therefore it appears that Employee's current shoulder problems do in fact stem from his December 8, 2010 accident.

Due to the primary injury, he has ongoing left wrist pain and stiffness. There is loss of movement of the left wrist and loss of left hand strength. He has no normal movement/range of motion in his left wrist, side to side or up and down. He must keep it straight. He is having to limit himself to the 10-20 pound recommendation by Dr. Jones on lifting and carrying because of loss of left wrist strength and these residuals. He wore a wrist brace to the hearing. Claimant testified that he is left-hand dominant.

Claimant testified that he still has some neck pain related to the 12/8/10 fall. He still has severe headaches which he described as sharp pains in his head all times of the day. His sleep is interrupted by his headaches. He described being up and down all night with the headaches that last all night, every single night. Due to these post-injury headaches, the most sleep he gets at one time during the night is 3-4 hours. Then he has to get up, take some aspirin; and when that Aspirin wears off, he is up again from the headaches. As a result of the headaches resulting from the 12/8/10 injury, he has to lie down during the day for extended periods, usually 2-3 times per day. His headaches are so bad that he sought further treatment from Dr. Kelley after his MMI release; whereas, he had no headaches before the 12/8/10 primary injury and certainly was not lying down during the day prior to the primary injury. Dr. Koprivica opined that Claimant's need to lie down during the day due to his complaints resulting from the primary injury is totally

disabling in and of itself. Mike Dreiling concurred, opining that Claimant's need to lie down during the day for complaints resulting from the 12/8/10 injury renders him unemployable in the open labor market and, therefore, permanently and totally disabled. He acknowledged that Claimant did not need to lie down during the day before 12/8/10 and there were no accommodations made for him on the job by the Employer for any condition prior to the primary injury.

Claimant also complained of having ongoing visual complaints with seeing shadows out of the left eye (superior temporal field area) resulting from the injury. He also complained of memory problems since the primary injury. Further, he has low back pain since the primary injury. Dr. Koprivica confirmed these low back pain complaints resulted from the primary injury and acknowledged that claimant injured his low back in the 12/8/10 injury. Granted, the Claimant had undergone some type of lumbar surgery back in the 1970's. Despite this surgery some 35 years ago, Claimant stated that he had a good recovery and never had problems. He was always able to perform his required job duties without accommodation from any employers.

In any case, Claimant told Dr. Koprivica that the prior lumbar injury and surgery did not limit or hinder him in his work prior to the primary injury. Claimant testified that once he was found to be at MMI from the prior low back surgery, no restrictions were placed on his work, he was able to return to his full time, full duty job at the Sheriff's Department and the Leawood Police Department, that he thereafter missed no time from work, nor did his employer ever give him any help or accommodations with his work due to any low back problems prior to the primary injury. Dr. Koprivica confirmed these claims and acknowledged that the prior lumbar condition did not constitute a hindrance or obstacle to Claimant's work prior to the primary. Dr. Koprivica commented that Claimant made a good recovery from the lumbar surgery, was able to return to heavy demand work, and that he had no hindrance or obstacle to his work due to the lumbar condition prior to the primary injury. "On an ongoing basis, he told me he could do any kind of work without limitation." Mike Dreiling made the same acknowledgements, noting that Claimant was able to return to heavy, full time work without restriction or limitation due to the lumbar condition. Claimant did admit to some lingering back pain when the weather got cold or wet. Nevertheless, that did not hinder him in his work prior to the primary injury.

Claimant also had a prior right shoulder injury requiring surgery by Lowry Jones, M.D., in 2000 from which he made a full recovery with no lingering problems. He testified that once he was released at MMI, no restrictions were placed on his work, he was able to return to his heavy full time, full duty work, he missed no time from work, nor did the employer ever give him any help or accommodation with his work due to right shoulder problems prior to the primary injury and he had no ongoing treatment for the right shoulder, nor did he need or take any prescribed pain medication for the right shoulder prior to the primary injury. Dr. Koprivica confirmed that Claimant made these same assertions to him and opined that the prior right shoulder condition was not a hindrance or obstacle to Claimant's work prior to the primary. "Yeah. I understood from him that he was not accommodating for any condition when he was working from this time frame between the time I saw him in November of 2000 and up until December 8<sup>th</sup> of 2010. I understood from him that he wasn't seeking treatment and that he was – that he was successful in maintaining his employment, that there was no reason he was being terminated for his lack of performance at work. He really denied being – he thought he was doing well is what he told me." The Employer was not accommodating Claimant for any preexisting condition prior to the

primary injury either, according to Dr. Koprivica. Dr. Koprivica acknowledged that Claimant was able to perform medium to heavy work prior to the primary injury. "I actually put restrictions on him for his shoulder that would have limited him to light physical demand, and what I understood from him is that he did better than what I had projected he was going to do, he had recovered, and that he was functioning at medium to heavy physical demand without limitation" before 12/8/10. Dr. Koprivica testified that Claimant was not having any problems sleeping through the night prior to 12/8/10: "He – basically —basically told me he was fine before, so I – there's no evidence that – in terms of history he provided me, that he was interrupted on sleep before December 2010."

Due to the pain and limitations he experiences from the primary injury, Claimant is currently not able to perform any household repairs, gutter cleaning, or climbing or lifting a ladder. Since the injury, he has problems with prolonged sitting and prolonged standing. He did not have these problems with these activities before the primary injury. He did testify that he could mow his lawn with a self-propelled mower and that he does shoulder strengthening exercises daily. He also stated that he lays down due to the lack of sleep from his headaches almost daily. He reported to Mr. Dreiling that prior to the primary he was in good physical health and had no problems performing his work. He was able to maintain his job as a truck driver, and when hired by Transport America, he was able to pass the DOT physical exam. In addition, he was able to perform all the heavy physical requirements of his job and was able to unload the truck and lift up to 100 pounds of freight before 12/8/10. Since the primary injury, however, he was not able to return to his job because, due to the problems with the left upper extremity as well as the other injuries resulting from the primary, he was unable to pass the DOT lifting requirements for a truck driver position.

Claimant testified that, prior to the 12/8/10 injury he had no problems sleeping through the night, he did not need to lie down during the day due to headaches, he was taking no chronic prescription pain medication, he was able to perform his job duties satisfactorily, he always received good evaluations and regular raises, and he was never written up, demoted or fired for failure to perform his job properly. Further, he admitted that if he had not had the 12/8/10 injury he would still be working for Transport America as a truck driver hauling freight, and that it is the primary injury that has rendered him unable to work. After having reviewed all the medical records as well as the testimony this Court finds Claimant's testimony to be credible. He was consistent in his reporting of his problems to the medical and vocational experts. Further his testimony was consistent with the medical records.

When pertinent case law and the relevant statutory authority are applied to the facts in this case, it is clear that Claimant is permanently and totally disabled and unable to compete in the open labor market strictly due to the restrictions and residuals resulting from the primary injury. All of the substantial and competent evidence demonstrates that his inability to access the open labor market results from the effects of the primary injury. Therefore, Claimant is found to be permanently and totally disabled and such permanent and total disability is the responsibility of the Employer, and all liability for Claimant's permanent total disability should be assessed against the Employer. Under the terms of the Statute, there is no need to even consider Second Injury Fund liability because the Claimant has been rendered unemployable and, therefore, permanently and totally disabled solely as a result of the primary injury. Thus, no liability can be assessed against the Second Injury Fund.

The next issue to be determined is whether Claimant is entitled to future medical care resulting for injuries sustained on December 8, 2010. RSMo §287.140.1 states in relevant part,

“In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury...”

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. *Rana*, 46 S.W.3d at 622. The claimant satisfies this burden by establishing a reasonable probability that he will need future medical treatment. *Smith v. Tiger Coaches, Inc.*, 73 S.W.3d 756, 764 (Mo.App.2002). To be awarded future medical benefits, the claimant must show that the medical care “‘flow [s] from the accident.’” *Crowell v. Hawkins*, 68 S.W.3d 432, 437 (Mo.App.2001)(quoting *Landers v. Chrysler Corp.* 963 S.W.2d 275, 283 (Mo.App.1997)).

In the present case, the evidence suggests it is reasonably probable that Claimant will need future medical treatment for his December 8, 2010 injuries in Dr. Koprivica’s opinion. First, Dr. Koprivica recommended that Claimant go back to Dr. Kelley for management of his chronic headaches. Dr. Kelley’s January 18, 2012 report stated, “I would not expect him to have any long term needs for medical treatment for his posttraumatic headaches.” However, he also suggested that if such headaches returned an additional course of Amitriptyline for a few weeks or months would be appropriate. Employee testified that his headaches have indeed returned. He has asked for medical care related to these headaches from the V.A. Hospital but has yet to receive such care. Therefore, the evidence indicates it is reasonably probable that Claimant will need future treatment with regard to his December 8, 2010 head injury.

Dr. Koprivica suggested a second opinion regarding Claimant’s eye complaints to insure that there has not been any significant structural eye injury based on the trauma. Besides Claimant’s subjective complaints of blurriness in his eyes, there is no objective evidence that Claimant suffered from an injury to his eyes at all due to the December 8, 2010 accident. Indeed, Dr. Ketcherside reported, “His left eye appeared perfectly normal, and his right eye had a very faint area where he did not see quite as well, but it is most likely normal.” Furthermore, Claimant admitted that he was diagnosed with glaucoma in his eyes in 2012. A diagnosis of glaucoma in 2012 would not be related to his accident in 2010 and most likely is the cause for his current symptoms in his eyes. Therefore, Claimant has failed to establish a reasonable probability that he will need future medical treatment for his eyes that flows from the December 8, 2010 accident.

Finally, Dr. Koprivica’s opinion states, “With end-stage degenerative disease of the left shoulder, there is the consideration of a left shoulder-arthroplasty. I would defer these issues of ongoing treatment need to Lowrey Jones or another appropriate orthopedist.” In a report dated January 17, 2012, Dr. Jones stated that he did not believe future medical treatment is necessary as a result of his December 8, 2010 injury to his left shoulder or left wrist. Dr. Jones stated that although Claimant might eventually need a total shoulder replacement this is due to his underlying arthritic condition and not his injury sustained on December 8, 2010. As a result, the

total shoulder replacement does not “flow from the December 8, 2010 accident.” Therefore, Claimant has failed to meet his burden of proving he is entitled to future medical benefits relating to any injury to his left shoulder arising from the December 8, 2010 accident.

The next issue to be determined is whether Claimant is entitled to reimbursement for the dental treatment in the amount of \$650.00. Claimant submitted to the Court a bill for an amount totaling \$650.00. Per the Claimant’s testimony, this bill was for treatment to a tooth to repair damage caused by the work-related fall on December 8, 2010. Claimant testified that he had the tooth fixed but had problems with the crown coming off. He stated he contacted the employer’s insurance carrier but they never responded to him concerning the need to repair the crown which was necessitated by the accident of December 8, 2010. Employee explained what the bill was for and that the work his dentist did fixed the problem he was having. The bill clearly stated that it was for a crown. Employee requested the work be done through employer’s insurance carrier, but there was no response from the carrier. Wherefore, this Court finds that the bill is reasonable for the work done and finds that Employee was free to have the work done after he requested it from the insurance company and they failed to respond. Therefore, the Employer owes to Claimant the \$650.00 for payment of the bill for dental work required due to his accident of December 8, 2010.

Wherefore, this Court orders Employer to pay to Claimant permanent total disability payments of \$627.58 per week beginning April 28, 2011 for as long as Employee remains permanently and totally disabled. Employer shall also pay to Employee the sum of \$650.00 as and for unpaid medical treatment required to cure and relieve Employee from the injuries he sustained in his December 8, 2010 accident. And, finally, Employer shall provide Claimant with medical care as may be reasonably required to cure and relieve the effects of the symptoms associated with the headaches he suffers as advised by Dr. Kelly.

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Emily S. Fowler  
*Administrative Law Judge*  
*Division of Workers' Compensation*