

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

Injury No.: 02-142562

Employee: Dennis Schneider
Employer: American Airlines (Settled)
Insurer: American Home Assurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: September 20, 2002
Place and County of Accident: St. Louis City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 22, 2007. The award and decision of Administrative Law Judge Suzette Carlisle, issued October 22, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 21st day of May 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Dennis Schneider Injury No.: 02-142562
Dependents: N/A Before the
Employer: American Airlines (Settled) **Division of Workers'**
Compensation
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: American Home Assurance Company (Settled)
Hearing Date: July 24, 2007 Checked by: SC:tr

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: September 20, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis City, Mo.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant slipped and fell on a conveyor belt landing on both hands and knees.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Bilateral upper extremities
14. Nature and extent of any permanent disability: 25% PPD of the right shoulder, 25% PPD of the right elbow, 25% PPD of the right wrist, 25% PPD of the left elbow and 17.5% PPD of the left wrist, and 7.5% PPD of the body as a whole for thoracic/chest strain plus a 10% multiplicity factor.
15. Compensation paid to-date for temporary disability: \$59,366.40
16. Value necessary medical aid paid to date by employer/insurer? \$73,764.20

Employee: Dennis Schneider Injury No.: 02-142562

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Sufficient to reach maximum rates for workers' compensation benefits
19. Weekly compensation rate: \$649.32/\$340.12
20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$309.20) payable by SIF for 294 weeks beginning
June 3, 2005 and, thereafter, (beginning January 21, 2011) for Claimant's lifetime

Total: **TO BE DETERMINED**

22. 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:

Robert Keefe

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Dennis Schneider

Injury No.: 02-142562

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: American Airlines (Settled)

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

Additional Party: Second Injury Fund

PRELIMINARIES

A hearing was held for final award at the Missouri Division of Workers' Compensation (DWC), St. Louis office pursuant to a request from Dennis Schneider (Claimant). Claimant appeared represented by Attorney Robert Keefe. Assistant Attorney General Kristin Frasier represented the Second Injury Fund (SIF).

American Airlines (Employer) and American Home Assurance Company (Insurer) settled their respective claims with Claimant prior to the hearing for 17 ½% of the left wrist, 25% of the left elbow, 25% of the right wrist, 25% of the right elbow, 25% of the right shoulder, and 7 ½% of the body as a whole totaling \$100,000.00.

The record closed after presentation of evidence. Hearing venue is correct and jurisdiction properly lies with DWC.

STIPULATIONS

The parties stipulate that on or about September 20, 2002;

1. The alleged accident occurred in St. Louis City.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was fully insured by Insurer.
4. A Claim for Compensation was filed within the time prescribed by law.
5. Claimant's average weekly wage was sufficient to result in maximum rates for temporary total disability (TTD) and permanent partial disability (PPD) benefits. The rates for compensation are \$649.32 for TTD and \$340.12 for PPD.
6. Claimant received \$59,366.00 in TTD payments representing 91 and 3/7 weeks.
7. Claimant received \$73,764.20 in medical benefits.
8. Claimant reached maximum medical improvement (MMI) on June 3, 2005.

ISSUES

The issues to be resolved at hearing are:

1. Accident;

ISSUES (cont.)

2. Arising out of and in the course of employment;
3. Notice;
4. Medical causation;
5. Nature and extent of PPD from the primary injury; and
6. Nature and extent of SIF liability, if any, for either PPD or PTD.

EXHIBITS

Claimant's Exhibits A- O and Q-S were admitted. Exhibit P is excluded based on lack of relevance. SIF's exhibits I-IV were admitted without objection. Any notations contained in the Exhibits were present when admitted into evidence.

SUMMARY OF EVIDENCE

All of the evidence was reviewed, but only evidence supporting this award is summarized below.

Live Testimony

Claimant was 47 years old at the time he was injured in 2002. Claimant graduated high school and studied mechanics at Lewis & Clark College for one year. He can handle math but believes he is dyslexic because he has difficulty reading.

Claimant worked for Vandusen Aircraft from 1979 to 1987 packaging items. He worked part time as an Assistant Manager at Brentwood Skate from 1988 to 1990, distributing skates and making ice for the rink.

In March 1997 Employer hired Claimant as a Fleet Service Clerk. The job required lifting, walking, and crawling inside the plane. Claimant flagged, parked, and cleaned planes. He loaded luggage, mail, and freight into the belly of the plane, and moved human remains weighing up to 300 pounds with assistance from co-employees. The company later became American Airlines.

Injuries Before 2002

In 1978 Claimant's left ankle was fractured. The ankle was casted and he missed three months from work. After treatment ended, he experienced stiffness, pain, and wore a support brace and high top hiking boots to support his ankle. A bone chip occasionally became lodged in the joint causing pain.

Claimant injured his neck in a 1978 car accident. No surgery was performed. On-going complaints include stiffness, popping, and pain. In 1980, Claimant twisted his low back while lifting 70 pounds at work. Occasionally his back goes out and he has stiffness if he lifts the wrong way.

In 1987, Claimant sustained a work related injury to his right shoulder and Dr. Mannis performed arthroscopic surgery and later reconstructive surgery. He was off work nine to twelve months. Complaints include popping, limited range of motion, decreased strength, and difficulty throwing overhead, and pushing or pulling at work. He relied more on his left hand, although he is right handed. Claimant settled a workers' compensation case for 25% PPD of the right shoulder.

In 1991, he injured his left shoulder while working and Dr. Maylach provided injections, physical therapy, and arthroscopic surgery. He was off work almost a year. Complaints include left arm weakness, pain, numbness, and difficulty lifting from 1991 to 1995. He relied on his right arm again. Claimant settled a workers' compensation case for 30% PPD of the left shoulder and a settlement from the SIF for the prior right shoulder and left ankle injuries.

Claimant suffered from depression in 1992. He received therapy three times a week for nine months and took Lexapro.

In 1993, his left knee dislocated and popped; requiring treatment for two weeks. Now, the knee dislocates when walking; however, he has not received additional treatment.

In 1996, Claimant re-injured his left shoulder while working and Dr. Stetson provided conservative care and surgery. Claimant lost half the strength in his shoulder and experienced increased numbness, tingling, and pain from his neck to his arm. Claimant settled a workers' compensation case for 15% PPD of the left shoulder.

In the late 1990s, Claimant sustained a chest injury when he threw and stacked 30 boxes each weighing 50 pounds. While lifting a box, he felt chest pain. Dr. Morris provided treatment and Claimant missed one month from work. Claimant testified he has pain with every breath which affects his ability to sleep and perform strenuous work. After the chest injury, Claimant decreased the amount of time he spent playing golf.

Despite these injuries, Claimant was able to work 40 hours per week with help from co-employees. Robert Morris, Claimant's lead man, assigned easier jobs such as flagging, watering, and cleaning planes. Co-workers permitted Claimant to perform lighter duties. He frequently turned down overtime due to pain, weakness, and fatigue. Claimant worked full time with no physician imposed restrictions until 2002.

Prior to 2002, Dr. Bly and Dr. Gally prescribed Ambien and Terazone for sleep and pain. He also took Vicodin and Ultram. Co-employees allowed Claimant to perform lighter duties. Claimant worked the less popular jobs; cleaning bathrooms and watering the plane. Overhead activity was restricted, preventing him from placing the required 10-pound bag on the second shelf of a cart, and he had difficulty holding a folder due to pain.

The September 20, 2002 Injury

While working on September 20, 2002, Claimant tripped on a conveyor belt and landed on both hands and knees. Claimant had several scheduled off days after the accident. He returned to work cleaning planes; which was considered light duty. Not feeling better by September 28, 2002, Claimant filed a report of injury with a female supervisor whose name he cannot remember. He sought treatment on September 28, 2002, his last day at work.

Claimant testified he injured both wrists, elbows, and his right shoulder as a result of the September 2002 injury. On December 10, 2002, Dr. Charles Mannis performed right shoulder surgery. Right elbow surgery was performed by Dr. Mannis in March 2003. On July 14, 2003, Dr. Feinstein performed right carpal tunnel, cubital tunnel, and epicondyle procedures. On October 13, 2003, Dr. William Feinstein repaired torn cartilage in Claimant's right wrist. On February 21, 2005, Dr. Strecker performed left carpal tunnel and cubital tunnel procedures. Claimant settled with Employer and Insurer for bilateral wrists, elbows and the right shoulder.

He was released from medical care and furloughed from work on October 31, 2003. However, Claimant considered it a termination because all benefits stopped; including retirement. Claimant testified Employer had no light duty available. Claimant received unemployment benefits for 13 weeks because he was unable to find work within the 10 pound lifting restrictions.

Claimant received two additional surgeries to his left wrist and elbow. During this time Claimant received workers' compensation benefits. After the last surgery, Claimant testified he could not perform light duty. Claimant was also examined by Dr. Volarich and Ms. Gonzales at the request of his attorney.

Before 2002, Claimant earned \$1,000.00 a week or \$50,000.00 a year. After being released by the doctor, Claimant began receiving social security disability and disability insurance through the union. Now, he earns \$24,000.00 a year.

Currently he takes a number of prescription medications. Dr. Gally, his primary care physician, prescribes tranquilizers, pain and sinus medicine, including Tezadone, Vicodin, and Prevacid for a hiatal hernia. Side effects include drowsiness and inability to think clearly. He stopped taking medication for depression because he could not afford it.

After the 2002 injury, Claimant's activities became more restricted. Right hand complaints include pain, numbness and tingling, swelling, difficulty holding the phone, decreased grip strength, pain and numbness in the first two fingers, tenderness, and swelling. Left hand problems are a little worse than the right hand. Right elbow complaints include pain, tingling, numbness, decreased strength, tenderness, and limited range of motion. The left elbow is weak. Right shoulder complaints include pain, popping, lack of stability, decreased strength, and range of motion. The left shoulder is painful, weak, and numb with shooting pains from the neck, down the arm. Shoulder pain is 6 to 7 out of a possible 10. Claimant is unable to play baseball or perform overhead work. He has chest pain on a scale of 8 to 9 out of 10. He has been depressed since the 2002 injury.

He cannot flex his left ankle due to a bone chip becoming lodged. He testified to weight gain after the 2002 injury due to the loss of physical activity at work.

In the first Functional Capacity Evaluation (FCE), Claimant testified he walked at the therapist's pace and injured his left knee and chest. His blood pressure rose, requiring him to lie down. During the second FCE, Claimant was injured while lifting 50 pounds, causing his sides to hurt and his blood pressure to rise.

A day in Claimant's life includes taking pain medication at night, sleeping three hours and repositioning for comfort. At 9:00 a.m. he takes Vicodin and medication for stomach, and sinus problems. Claimant may drive to the store or to visit a friend nearby. He is unable to perform yard work. Bending over the washing machine or dryer produces pain in his shoulders, chest, and left knee.

Claimant testified he cannot work due to pain and work restrictions. The airline would not permit his return to work while taking Vicodin. Employees are required to lift 100 pounds onto a transfer cart, which Claimant cannot do with a 15 pound weight restriction. Claimant cannot sit for long periods, walk steps or long distances.

In 2006 Claimant testified he sought work with 50 companies. After telling potential employers about his restrictions, complaints, and the impact of medication, no employer was willing to hire him.

Deposition Testimony

David Volarich, M.D., a board certified Independent Medical Examiner, examined Claimant at his attorney's request.

He acknowledged Dr. Graham's examination demonstrated multiple inconsistencies which did not support Claimant's complaints, the cervical MRI was negative, and two orthopedic surgeons found no major problems with Claimant's shoulders. However, Dr. Volarich found Claimant's injuries from the 2002 injury were a substantial factor in causing cervical, thoracic, chest and lumbar strains, and the need for surgery to his right shoulder, elbow, and wrist, and left elbow and wrist.

Dr. Volarich found Claimant's preexisting disabilities constituted an obstacle or hindrance to his ability to work. Dr. Volarich found the following pre-existing disabilities: 12.5% of the body as a whole from cervical and lumbar strains,^[1] 5% of the left hip for a thigh contusion, 15% of the left knee for patella femoral syndrome,^[2] 15% of the left ankle for a fibular fracture, 50% of the right shoulder for two surgeries for derangement,^[3] 50% of the left shoulder for two surgeries for internal derangement,^[4] 20% of the left elbow for unoperated cubital tunnel, and 20% of the left wrist for unoperated carpal tunnel syndrome. Dr. Volarich found Claimant was depressed but deferred a rating to a psychiatric evaluator.

For the primary injuries, Dr. Volarich rated 35% PPD of the right shoulder, 45% PPD of the right elbow, 40% PPD of the right wrist, 30% PPD of the left elbow, 30% PPD of the left wrist, and 25% PPD of the body as a whole for a spinal strain and chest wall pain.

Dr. Volarich found Claimant's overall disability from the preexisting injuries and the September 2002 injury was greater than their simple sum, and a loading factor should be applied.

He concluded Claimant could work if a vocational assessment identified work within the limits he set. If no jobs were found, Dr. Volarich concluded Claimant to be permanently and totally disabled due to a combination of the 2002 injury and the preexisting medical conditions. However, Dr. Volarich deferred to a vocational opinion regarding Claimant's ability to work.

Delores Gonzalez, a vocational rehabilitation counselor, interviewed Claimant in person at his attorney's request. Ms. Gonzalez concluded Claimant was unable to compete in the open labor market due to a combination of his pre-existing medical conditions and the 2002 work injury. She also concluded Claimant's pre-existing medical conditions and the injuries sustained in 2002 were a hindrance or obstacle to his employment or reemployment.

Ms. Gonzalez found Claimant's pain a barrier to returning to his former employment. She found no transferable skills from his past employment that could assist in finding new employment. Claimant would be required to sit, stand or walk for prolonged periods to perform work at a sedentary, light, medium, heavy or very heavy level. His work restrictions permitted only 'less than sedentary work.' The sit/stand restrictions and limited hand use required employers to make accommodations which do not exist in the open labor market on a competitive basis.

Limited education also prevented Claimant from performing sedentary work on a consistent basis. She did not recommend vocational retraining due to Claimant's inability to repetitively use his upper extremities.

James England Jr., a rehabilitation counselor, performed a records review on behalf of the SIF. Mr. England concluded Claimant could not return to his former employment. He found Claimant was approaching advanced age with no transferable skills. However, Mr. England found Claimant could compete for entry-level service employment, provided jobs are available within the restrictions set by Drs. Strecker and Dr. Volarich.

He found Dr. Strecker's 15 pound lifting restriction permitted light and sedentary work, whereas Dr. Volarich's restrictions only permitted sedentary work. Mr. England acknowledged Dr. Strecker's restrictions only addressed bilateral upper extremities; whereas Dr. Volarich included multiple body parts. Mr. England conceded Dr. Volarich's report contained more specific information than Dr. Strecker's regarding range of motion, grip strength, etc.

Based on Dictionary of Occupational Titles (DOT), 10% of the 12,000 possible job titles are sedentary. Mr. England found Claimant qualified for a couple of percentages of sedentary jobs based on his age, lack of transferable skills, limited education, and restrictions. However, based on Dr. Strecker's restrictions, Claimant qualified for many more jobs.

He opined Claimant had more sedentary opportunities with a voice activated computer program. Mr. England found Claimant eligible for vocational rehabilitation evaluation, counseling, and placement at no charge.

DWC and Medical Evidence

A Claim for Compensation dated March 1, 1989, revealed injury to Claimant's neck, right shoulder and mid-back when luggage fell on his right shoulder while working. On November 17, 1989, Claimant settled the workers' compensation claim for 25% of the right shoulder.

On February 29, 1988, Charles Mannis, M.D. performed right arthroscopic shoulder surgery. Reconstructive surgery of the right shoulder was performed in June 1988. In May 1989 Claimant was released with 20% PPD of the right shoulder.

A Claim for Compensation was filed for a March 16, 1991 injury to Claimant's left shoulder, elbow, back and fingers. The left shoulder was repaired in July 1991. Claimant settled with the employer and insurer for 30% of the left shoulder; and with the SIF for 25% of the right shoulder and 15% of the left ankle.

On May 2, 1996, Claimant re-injured his left shoulder at work. William Stetson, M.D., repaired the left shoulder on July 29, 1996. Claimant received 15% PPD of the left shoulder from the SIF.

John Graham, M.D., examined Claimant in April 2001 for left-sided chest complaints. Dr. Graham noted Claimant's symptoms extended from the left side of his neck to his anterior thigh. However, the same area did not reproduce pain when Claimant was distracted. Dr. Graham found Claimant's symptoms inconsistent with physical examination. Dr. Graham believed other factors may be involved, including job dissatisfaction. Dr. Graham recommended medication and psychiatric evaluation.

In October 2002 Dr. Mannis diagnosed a right rotator cuff strain, medial and lateral epicondylitis of the left elbow, mild cubital tunnel, and provided injections and physical therapy.

In December 2002 Dr. Mannis performed an arthroscopic subacromial decompression of the right shoulder. Dr. Mannis performed a right lateral epicondylar release on March 7, 2003. The medial epicondyle was injected in April 2003. Claimant was to follow up in three weeks; however, no additional medical records are in evidence.

William Feinstein, M.D., performed a right carpal tunnel release, right ulnar nerve decompression, and right elbow surgery on July 14, 2003. Dr. Feinstein repaired a complex right wrist tear in October 2003. In February 2005, Dr. Strecker performed a left carpal tunnel release and ulnar nerve decompression with transposition.

A May 2005 FCE placed Claimant in the occasional heavy work level; but unable to meet Employer's needs. Claimant's subjective complaints were out of proportion with his displayed function. Claimant failed 7 or 11 validity criteria based on consistency and quality of effort. Claimant's symptoms were observed to be inconsistent with minimal distress, pain behavior, and sub-maximal effort. The material handling evaluation was terminated due to subjective complaints.

On November 16, 2006, Claimant settled with Employer and Insurer for 17.5% of the left wrist, 25% of the left elbow; 25% of the right wrist, 25% of the right elbow, 25% of the right shoulder, and 7.5% of the body as a whole.

FINDINGS OF FACT and RULINGS OF LAW

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant to be permanently and totally disabled due to the combination of his pre-existing and primary injuries for the reasons stated below.

Burden of Proof

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury fund Liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968).

Accident

Claimant asserts he was injured when he fell over a conveyor belt while working on September 20, 2002. SIF contends Claimant has not proven an accident occurred in the course of employment.

Section 287.020.2 RSMo (2000) defines accident as "an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor."

I find Claimant sustained an accident. The fall was unexpected, sudden, violent, and produced objective results. Claimant's testimony was consistent with the history provided to Dr. Mannis on October 9, 2002. Examination revealed tenderness in the cervical region, right shoulder pain, positive impingement, and right elbow tenderness with increased pain when gripping.

Arising out of and in the Course of Employment

Section 287.120.1 RSMo (2000) provides workers' compensation where an injured worker shows his injury was caused by an accident "arising out of and in the course of the employee's employment."

An accident arises out of the employment relationship "when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Abel By and Through Abel v. Mike Russell's Standard Service*, 924 S.W.2d 502,503 (Mo. 1996) (citations omitted). An injury occurs 'in the course of' employment' "if the injury occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment." *Shinn v. General Binding Corp.*, 789 S.W.2d 230, 232 (Mo. App.1990) "Arising out of" and "in the course of" are two separate tests. "[B]oth must be met before [an employee] is entitled to compensation." *Automobile Club Inter-Insurance Exchange v. Bevel*, 663 S.W.2d 242, 245 (Mo. Banc 1984).

I find Claimant's accident arose out of and in the course of his employment with Employer. The accident occurred on Employer's premises, during Claimant's scheduled shift, while he was working at his assigned location. Dr. Volarich

opined Claimant's fall was the substantial factor causing his need for medical treatment and the resulting disability.

Notice

Claimant asserts he notified Employer of the injury on September 28, 2002. SIF contends Claimant failed to show Employer received proper notice.

Section 287.420 RSMo (2000) requires written notice of the time, place and nature of the injury, and the name and address of the person injured, to be given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission finds that there was good cause for failure to give the notice, or that the employer was not prejudiced by failure to receive the notice. No defect or inaccuracy in the notice shall invalidate it unless the commission finds that the employer was in fact misled and prejudiced.

I find Claimant provided proper notice. I find Claimant's testimony credible that he reported the injury on September 28, 2002 and completed a written report. Claimant provided a consistent history of accident when treated, 19 days following the accident. All medical treatment was classified as "Workman's Comp," and no contrary evidence is contained in the record.

Medical Causation

For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 704 (Mo.App.1973). (*Citations omitted*). Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding nor in the absence of expert opinion is the finding of causation within the competency of the administrative tribunal. *Id.*

Dr. Volarich found Claimant's September 2002 fall to be a substantial factor in causing cervical, thoracic, chest, and lumbar strains, and the need for surgery to his right shoulder, elbow, and wrist, and left elbow and wrist. There is no contrary medical evidence contained in the record. Therefore, I find Claimant has proven a causal connection between the accident and the injuries sustained.

SIF Liability for PPD or PTD Benefits

Claimant seeks PTD compensation from the SIF. The SIF contends Claimant is not PTD, but may be entitled to receive PPD compensation.

In order to establish SIF liability for PPD or PTD, Section 287.220 RSMo (2000) requires the [fact finder] make three findings regarding disability:

- 1) There must be a determination that the employee has permanent disability resulting from the last injury alone, and
- 2) There was a pre-existing permanent disability that was serious enough to constitute a hindrance or obstacle to employment or re-employment which combines with the disability from the compensable work related injury to create a greater overall disability to the employee's body as a whole than the simple sum of the disability from the work injury and the pre-existing disability considered individually, and

To establish entitlement to PTD benefits, Claimant must also prove:

- 3) All of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

Section 287.020.7 defines “total disability”...as the inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident. Any employment means any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition. **Kowalski v. M-G Metals and Sales, Inc.** 631 S.W.2d 919, 922 (Mo.App. 1982) (*Citations omitted*).

The test for permanent total disability in Missouri is a claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. **Searcy v. McDonnell Douglas Aircraft Co.**, 894 S.W.2d 173, 178 (Mo.App. 1995) (*overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. 2003)). If a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and the employer is responsible for the entire amount. **Hughey v. Chrysler Corp.** 34 S.W.3d 845, 847 (Mo. App. 2000). Therefore, the inquiry begins with the Employer's liability.

The Last Injury Alone

I find Claimant sustained PPD from the last injury. Eight surgical procedures were performed on Claimant bilateral upper extremities related to the September 2002 accident. Complaints include right elbow pain, tingling, numbness, decreased strength and range of motion, right shoulder pain, popping, lack of stability, shooting pains down the left arm, and pain with breathing.

Dr. Volarich rated 35% PPD of the right shoulder, 45% PPD of the right elbow, 40% PPD of the right wrist, 30% PPD of the left elbow, 30% PPD of the left wrist, and 25% PPD of the body as a whole for spinal strain and chest wall pain. The [fact finder] is not strictly limited to the percentages of disability testified to by the medical experts. **Banner Iron Works v. Mordis**, 663 S.W.2d 770, 773(Mo.App. 1983).

The parties are not bound to the stipulated agreement between Claimant, Employer and Insurer. However, I find the agreement consistent with the medical records and Claimant's testimony during the hearing. Therefore, based on Dr. Volarich's ratings and Claimant's credible testimony, I find Claimant sustained 25% PPD of the right shoulder, 25% PPD of the right elbow, 25% PPD of the right wrist, 25% PPD of the left elbow, 17.5% PPD of the left wrist, and 7.5% PPD of the body as a whole for thoracic/chest strain. I find a 10% multiplicity factor applies. **Chambliss v. Lutheran Medical Center**, 822 S.W.2d 926, 932 (Mo.App.1991). (*Overruled on other grounds by Hampton*, 121 S.W.3d at 223).

Hindrance or Obstacle to Employment

I find Claimant's pre-existing disabilities constitute a hindrance or obstacle to employment or reemployment. Claimant had two surgeries to each shoulder before 2002, including reconstruction of the right shoulder. Due to injuries before 2002, co-employees permitted Claimant to limit his duties. Claimant took Vicodin and Ultram for pain and played less golf. Dr. Volarich found Claimant's preexisting disabilities constituted a hindrance or obstacle to his ability to work. He also found Claimant's overall disability from the preexisting injuries and the September 2002 injuries was greater than their simple sum.

I further find the overall disability from the pre-existing injuries and primary injuries is greater than the simple sum of the injuries individually.

Permanent Total Disability

Dr. Volarich deferred to a vocational expert regarding Claimant's ability to work. All experts in the case agree; and the 2005 FCE confirmed Claimant is unable to return to his former employment.

The question is whether any employer, in the usual course of business, could reasonably be expected to employ Claimant in his present physical condition. I find employers cannot reasonably be expected to employ Claimant in his present physical condition.

Claimant's testimony was credible that his activities were more restricted after the 2002 accident. Claimant talked to 50 employers about his injuries, medication and the effect it has, and no one offered him a job.

Ms. Gonzales' opinion is persuasive that the sit/stand limitations combined with no repetitive use of his hands, limits Claimant to less than sedentary work; which is not available in a competitive labor market. Ms. Gonzalez and Mr. England found Claimant had no transferable skills.

Claimant was approaching advanced age at 51, according to Mr. England. Mr. England acknowledged Dr. Strecker's restrictions did not take into account limitations from pre-existing injuries.[5] Conversely, Dr. Volarich's restrictions reflect pre-existing injuries to both shoulders, neck, back, thigh, left ankle, left wrist and elbow. Tardy ulnar nerve palsy, costochondritis, and depression were other conditions Ms. Gonzalez reviewed. [6]

However, Mr. England's opinion is not credible that Claimant is able to find entry level employment with no experience, despite his age, lack of transferable skills, limited education, and restrictions. Initially, he found Claimant could work as a retail clerk, security guard or cashier, within Dr. Strecker's restrictions, and in customer service, security or alarm monitoring with Dr. Volarich's restrictions.

However, during the deposition, Mr. England limited Claimant's employment options to 24 sedentary jobs in the service industry out of 1,200 potential sedentary jobs listed with the Dictionary of Titles (DOT).[7] Based on this scenario, Claimant would compete with many applicants for a very small number of jobs. Given the restrictions and medication; it is unlikely employers would hire Claimant to fill one of the 24 positions, given his physical condition.

Ms. Gonzalez found Claimant could not perform sedentary work; because it required the ability to sit 6 out of 8 hours at work and reach, handle, finger, and feel, which Claimant had difficulty doing. Additionally, medication causes drowsiness and inability to concentrate, which has proven a deterrent to Claimant's re-employment.

The 2005 FCE results are not persuasive. They place Claimant in the occasional heavy demand level; however neither Dr. Strecker nor Dr. Volarich permitted that level of work. Additionally, Ms. Gonzalez and Mr. England did not suggest Claimant was employable at the heavy demand level.

In post-hearing briefs, SIF contends Claimant failed to prove he is PTD due to a lack of foundation for his expert's opinion. However, a claimant is not required to offer into evidence all medical records relied on by his expert in reaching a causation opinion.

Based on the credible testimony of Claimant, Ms. Gonzalez, Dr. Volarich, medical records, Claimant's age, lack of transferable skills, limited education, impact of medication, and work restrictions, I find Claimant unable to compete in the open labor market due to a combination of the pre-existing conditions and the work injury on September 20, 2002.

Commencement Date for Permanent Total Disability

The obligation to pay permanent disability compensation commences under Section 287.160.1 RSMo (2000) on the date claimant's permanent disability begins. ***Kramer v. Labor & Indus. Rel. Com'n***, 799 S.W.2d 142, 145 (Mo. App. 1990) (*overruled on other grounds by Hampton*, 121 S.W.3d at 223). On April 25, 2006, Dr. Taylor found Claimant reached MMI regarding the 2004 work injury. However, the parties stipulate Claimant achieved MMI on June 3, 2005.

Therefore, I find Claimant reached MMI on June 3, 2005. I previously found the following primary disability; 25% PPD of the right shoulder, 25% PPD of the right elbow, 25% PPD of the right wrist, 25% PPD of the left elbow and 17.5% PPD of the left wrist, and 7.5% PPD of the body as a whole for thoracic/chest strain, with a 10% multiplicity factor applied. I find Employer liable for 294 weeks of compensation at the stipulated rate of \$340.12 per

week, beginning retroactively on June 3, 2005.

Where, as in the instant case, the rates of compensation for PPD and PTD are different, the SIF is liable for the difference between what should be paid by the Employer/Insurer for PPD under Section 287.190, and what Claimant should receive for PTD under Section 287.200. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 923 (Mo. App. 1982).

I find Employer's liability for PPD should have commenced June 3, 2005 and will conclude on January 21, 2011. SIF is liable to pay Claimant the sum of \$309.20 (\$649.32 PTD rate less \$340.12 PPD rate) per week for 294 weeks, and thereafter (beginning January 22, 2011), the sum of \$649.32 per week for the remainder of Claimant's lifetime. *Laterno v. Carnahan*, 640 S.W.2d 470, 471 (Mo. App. 1982).

CONCLUSION

Claimant is found to be permanently and totally disabled as of June 3, 2005. Employer shall provide 294 weeks of permanent partial disability. Second Injury Fund shall provide a weekly differential of \$309.20 from June 3, 2005 to January 21, 2011. Thereafter, the Second Injury Fund shall provide permanent total disability payments of \$649.32 per week for the remainder of Claimant's lifetime. The award is subject to a 25% lien in favor of Claimant's attorney for legal services rendered. The issue of permanent partial disability benefits owed by the Second Injury Fund is moot.

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Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Division Director
Division of Workers' Compensation

[1] Dr. Volarich testified the spinal rating was based on myofascial problems throughout the entire spine. However, Claimant denied specific injury to his neck. The only reported back injury occurred in the 1980's from a work injury. Claimant reportedly received several weeks of conservative treatment. These medical records are in evidence.

[2] Dr. Volarich reviewed no medical records for left knee injury prior to 2002. The first mention of left knee problems was in 2004.

[3] Dr. Volarich was unaware of a 25% settlement of the right shoulder prior to 2002 and no medical records were reviewed.

[4] Claimant settled a workers' compensation case for 30% of the left shoulder prior to 2002. However, Dr. Volarich was unaware of a 15% settlement to the left shoulder prior to 2002.

[5] Only Dr. Strecker's operative note is in evidence.

[6] Medical records are not in evidence for these conditions.

[7] Mr. England testified there are 12,000 possible jobs listed with DOT, which 10% fit within sedentary requirements (1,200). The number of potential jobs decreased based on Claimant being over 50 years old with a high school education. When sedentary restrictions were added, the number of potential jobs decreased to several percentages (about 2% of 1,200 or 24).