

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

Injury No.: 04-008702

Employee: Herbert Schnell  
Employer: Eilermann Transfer Company (Settled)  
Insurer: Missouri Employers Mutual Insurance (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the corrected award and decision of the administrative law judge dated October 17, 2011. The corrected award and decision of Administrative Law Judge Suzette Carlisle, issued October 17, 2011, 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 2<sup>nd</sup> day of October 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## CORRECTED AWARD

Employee: Herbert Schnell Injury No.: 04-008702  
Dependents: N/A Before the  
Employer: Eilermann Transfer Company (Settled) **Division of Workers'**  
**Compensation**  
Additional Party: Second Injury Fund Department of Labor and Industrial  
Relations of Missouri  
Insurer: Missouri Employers Mutual Insurance (Settled) Jefferson City, Missouri  
Hearing Date: June 27, 2011 Checked by: SC

### 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: February 4, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis City, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Claimant fell on ice onto his outstretched left arm at work and injured both shoulders, and his cervical spine.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Bilateral shoulders, cervical spine
14. Nature and extent of any permanent disability: Permanent Total Disability – Second Injury Fund
15. Compensation paid to-date for temporary disability: \$9,117.28
16. Value necessary medical aid paid to date by employer/insurer? \$9,305.24

Employee: Herbert Schnell

- 17. Value necessary medical aid not furnished by employer/insurer? NA/
- 18. Employee's average weekly wages: \$670.00
- 19. Weekly compensation rate: \$446.30/\$347.05
- 20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Employer previously settled

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:  
weekly differential (\$99.25 per week) payable by SIF for 74 5/7 weeks beginning  
February 3, 2006 and, thereafter, on July 12, 2007, \$446.30 per week for Claimant's lifetime

TOTAL:

**TO BE DETERMINED**

23. Future requirements awarded: None

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

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

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Herbert Schnell	Injury No.: 04-008702
Dependents:	N/A	Before the
Employer:	Eilermann Transfer Company (Settled)	<b>Division of Workers' Compensation</b>
Additional Party:	Second Injury	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Missouri Employers' Mutual Insurance (Settled)	Checked by: SC

**PRELIMINARIES**

The parties appeared before the undersigned administrative law judge on June 27, 2011 for a final hearing at the request of Herbert Schnell (Claimant) to determine the liability of the Second Injury Fund (SIF) for either permanent partial disability (PPD) or permanent total disability (PTD) benefits. Attorney Ellen Morgan represented Claimant.<sup>1</sup> Attorney Daniel Walkenhorst is also Claimant's attorney of record, and he appeared at the hearing. Assistant Attorney General Kristin Frazier represented the SIF. The record closed after presentation of the evidence.

Claimant submitted three separate claims for disposition, 00-131749, 04-008702, and 04-048993.<sup>2</sup> Although separate awards were issued for each injury number, the body of each award contains similar evidence as the issues raised in each claim are closely related.

Prior to the hearing, Employer, Eilermann Transfer Company, and Insurer, Reliance Insurance Company, settled the primary injury with Claimant for 8.25% PPD of the cervical spine and 15% PPD of the right shoulder. The Employer did not participate in the hearing.<sup>3</sup>

The parties stipulated that on or about February 4, 2004:

1. Claimant was employed by Employer and sustained an accident, which arose out of and in the course of employment in St. Louis City, Missouri;
2. Employer and Claimant operated under the Missouri Workers' Compensation Law;
3. Employer's liability was fully insured.
4. The Employer had notice of the injury;
5. A Claim for Compensation was timely filed;

<sup>1</sup> At the beginning of the hearing, Ms. Morgan entered as co-counsel for Claimant.

<sup>2</sup> All references in this award are to the 2000 Revised Statutes of Missouri unless otherwise stated

<sup>3</sup> Any reference in this award to the Employer also refers to the Insurer.

6. Claimant's average weekly was \$670.00 which resulted in a rate for temporary total disability (TTD) and permanent total disability (PTD) of \$446.30, and a rate for permanent partial disability (PPD) of \$347.05;
7. The Employer paid TTD benefits totaling \$9,117.28 which represents 20 3/7 weeks; and
8. Employer paid medical benefits totaling \$9,305.24

The issues for disposition are:

1. What is the nature and extent of Claimant's disability from the primary injury, if any?
2. What is the nature and extent of the Second Injury Fund liability for permanent partial disability, if any?
3. What is the nature and extent of Second Injury Fund liability for permanent total disability, if any?

### *Exhibits*

Claimant's Exhibits A through T were received into evidence without objection. The SIF offered no additional exhibits.

### **FINDINGS OF FACT**

All evidence was reviewed but only evidence needed to support this award will be summarized below. Any objections contained in the depositions and made during the hearing but not expressly ruled on in this award are now overruled. To the extent that marks and highlights are contained in the exhibits, those were made prior to becoming part of this record and were not placed there by the undersigned administrative law judge.

1. At the time of the hearing, Claimant was 69 years old. In 1960, Claimant joined the U.S. Navy and built diesel motors on ships. He earned a GED in 1961 while in the military. He has not received any formal training since the GED.
2. On July 25, 1963, Claimant fell overboard a navy ship and into the water and sustained an injury to his sacroiliac and left buttocks when the boat's propeller hit him. Claimant worked light duty for a year. After he returned to the ship he was unable to perform his duties. In 1964 Claimant received a medical discharge and 30% disability from the military.
3. Since Claimant's discharge in 1964, he has received pain medication for his back from the Veteran's Administration (VA). Prescription medication includes; Darvon, Dorvacet, Oxycodone, and methocarbinal. Three weeks before the hearing, Claimant switched to morphine for his back, shoulders, knee, and hands. The VA records are not in evidence.
4. Claimant began his civilian career as a dock hand but later became a truck driver. He worked as a truck driver 95% of the time. As a result of the Navy injury, he was unable to lift and carry as much as the other drivers because of his back. Claimant had problems standing,

bending, and lifting. Pain slowed his production. He sought assistance from others when handling drums and heavy items.

5. On May 20, 1996 Claimant fell and injured his left elbow, and on October 27, 1997 the ulnar nerve was surgically transposed. After surgery, it became difficult to lift items. Claimant settled the case with his employer for 17.5% PPD of the left elbow, and he settled with the SIF for 30% PPD of the body as a whole for the sacroiliac and left gluteus.
6. In April 1997 Claimant had bilateral carpal tunnel releases. Symptoms improved for a short time, then returned and have continued since the 1990's. Fine motor skills decreased. Claimant settled the claim for 15% PPD of each wrist. Claimant returned to regular duty after treatment for the left elbow and both wrists.
7. Employer hired Claimant around 1999. Claimant worked eight to twelve hour days, and ten hours of overtime per week. Claimant's duties included standing, walking, and sitting, bending, kneeling, squatting, and climbing.
8. Claimant transported empty bottles from two warehouses to the Dial plant in St. Louis. Claimant "dropped and hooked" a three pound air line to the trailer twenty times a day, and transported goods to a facility in Illinois. He bent and lifted air lines, pulled pins, opened and closed doors, and "cranked up" the dolly. Claimant lifted heavy items when a load spilled or returned goods were transported. Claimant lifted up to 20 pounds at chest level.
9. On October 10, 2000, Claimant slipped and fell while climbing steps on his truck and fractured a bone spur of the right calcaneus. After conservative treatment failed, **Gary Schmidt, M.D.**, surgically removed the bone spur and reinserted the Achilles tendon on December 15, 2000. When complaints continued, Dr. Schmidt prescribed therapy and orthotics. On April 19, 2001, Dr. Schmidt determined Claimant had achieved maximum medical improvement (MMI). However, Claimant continued to take Vioxx for pain.
10. On May 22, 2001, Dr. Schmidt rated 6%PPD of the ankle. For the first time, Claimant reported left knee locking and weakness, which Dr. Schmidt opined may be related to prolonged crutch walking. Ongoing foot complaints include pain with walking and cold weather.
11. During rehabilitation for the heel, Claimant fell, and injured his left knee. In December 2002 **Stephen M. Benz, M.D.**, provided an Independent Medical Examination and opined that multiple falls during treatment for the heel aggravated the preexisting degenerative joint disease, which resulted in a tear of the left meniscus.
12. On March 6, 2003, Dr. Benz performed a meniscectomy, prescribed physical therapy, and rated Claimant in June 2003. After surgery, Claimant had ongoing complaints. Dr. Benz injected the knee, prescribed a brace, and rerated Claimant in September 2003.
13. On February 14, 2005 Dr. Benz performed a total knee replacement, which he opined was due to the combination of preexisting degenerative arthritis, a series of falls, and increased

stress on the left knee from using crutches. On June 17, 2005, Dr. Benz returned Claimant to work full duty.

14. Dr. Benz released Claimant to full activities on December 15, 2005; however, Claimant was not working due to back problems. On February 3, 2006 Dr. Benz rated 35% PPD of the left knee.<sup>4</sup>
15. Claimant's residual complaints include pain when walking and weather changes, which lowered his production. Claimant had knee pain for the remainder of his career. He had difficulty climbing onto the trailer. He used a rope to climb into the trailer. He lifted his left leg to get it into the trailer. The knee replacement did not significantly improve Claimant's mobility.
16. Leading up to February 2004, Claimant continued to receive medical treatment for the left knee, take medication, attempt to work regular and light duty, and had knee surgery.
17. On **February 4, 2004** Claimant fell on ice onto his outstretched left arm and injured his back, both shoulders, cervical spine, and he was unconscious for a period of time. Claimant treated for his cervical spine and left shoulder at **BarnesCare** from February 2004 through April 1, 2004. Medical treatment included physical therapy, a left shoulder injection, and medication.
18. **James Doll, M.D.** initially examined Claimant on April 8, 2004 with complaints of left arm tingling, numbness, and pain, left worse than right. Dr. Doll prescribed physical therapy for the left shoulder on April 21, 2004.
19. On May 12, 2004, Claimant reported "persistent right shoulder pain still unresolved from the date of injury and more noticeable now given his improvements in his left shoulder and neck regions." Right shoulder examination revealed tenderness and a positive crossed-arm adduction test bilaterally. On May 24, 2004 Dr. Doll prescribed right shoulder therapy for AC joint degenerative joint disease.
20. A June 25, 2004 work conditioning evaluation revealed Claimant could work at the medium exertion level which met Employer's requirements. During the test, Claimant displayed less than maximal effort. On July 1, 2004, Dr. Doll returned Claimant to work with no restrictions.
21. Dr. Doll released Claimant in July 2004 and he worked regular duty for Employer until the business closed on May 9, 2005.
22. Claimant settled the February 2004 claim with Employer for 15% PPD of the left shoulder and 8.25% PPD of the cervical spine.
23. Residual left shoulder complaints at work included pain and difficulty lifting and closing doors, which slowed his production. Right shoulder complaints were greater than left due to

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<sup>4</sup> Dr. Benz did not specify how much of the disability resulted from degenerative joint disease.

shifting gears and pulling pins and doors. The cervical spine occasionally locked when he turned his head, which caused pain. Cranking the dolly caused shoulder pain.

24. After Employer's business closed, a company hired Claimant to drive a tractor trailer and unload dirt for construction of a levy. No lifting was required. However, he did not work because he had a left total knee replacement.
25. After Claimant was released from knee treatment, he worked two months for Yellow Freight for 40 to 45 hours per week. Claimant delivered freight, unloaded items, and made pickups in the city. Claimant climbed into and out of trailers and used a rope to pull himself into trailers.
26. Claimant could not pick up freight due to left knee, shoulder, and neck pain. Also the work was harder on his back than the work he performed for Employer. Claimant's back problems increased after he began working for Yellow Freight as a spotter. He received more pain management treatment. Also Claimant did not climb when he worked for Employer.
27. To reduce pain at Yellow Freight, Claimant requested a transfer and was moved to the "yard" as a spotting horse. However, this was worse because it required a fast pace to pull trailers, drop, close doors, and frequently jump in and out of the tractor, which he could not physically do.
28. Since Claimant left Yellow Freight, he uses a stick as a cane to remove leg pressure when he walks. He stopped hunting and fishing when he developed back problems. He can no longer shoot a gun after he developed knee and shoulder problems. Now, he spends most of his time watching television.
29. Claimant wanted to work to increase his pension, but stopped when his physical condition worsened.

#### *Expert Medical Opinion*

30. **David Volarich, M.D.**, provided an Independent Medical Examination (IME) on January 20, 2006 at the request of Claimant's attorney. Dr. Volarich opined Claimant achieved MMI for all three work injuries.
31. Dr. Volarich diagnosed cervical syndrome secondary to aggravation of mild degenerative joint disease, left shoulder impingement, and rotator cuff tendonitis, not surgically repaired. He rated the following disabilities from the **February 4, 2004** work injury:
  - a. Cervical spine – 20% PPD of the cervical spine
  - b. Left shoulder – 25% PPD of the shoulder
29. Dr. Volarich identified the following preexisting medical conditions and disabilities prior to February 4, 2004:
  - a. Left SI joint subluxation with degeneration – 30% PPD of the lumbar spine,
  - b. Left elbow cubital tunnel surgically repaired – 30% PPD of the left elbow,

- c. Right carpal tunnel syndrome – 25% PPD of the right wrist;
  - d. Left carpal syndrome – 25% PPD of the left wrist
  - e. Right ankle – 30% PPD of the right ankle; and
  - f. left knee - 85% PPD of the left knee
30. Dr. Volarich found the combination of Claimant's disabilities created a synergistic effect.
32. Based on Claimant's three work related injuries, advanced age, preexisting medical conditions, limited education and work experience, and an award for social security disability, Dr. Volarich opined to be permanently and totally disabled as a result of these combined factors.<sup>5</sup>
33. Dr. Volarich imposed the following restrictions for the spine, shoulders, elbows, forearms, and wrists:
1. Lower extremities:
    - a. Avoid all stooping, squatting, crawling, kneeling, pivoting, climbing, and impact maneuvers
    - b. Caution on uneven terrain, slopes, steps, and ladders with weight
    - c. Limit prolonged weight bearing including standing or walking to 30 minutes or tolerance and pad knee surfaces
    - d. Use Glucosamine
    - e. Strength training
  2. Spine and pelvis:
    - a. Avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing, etc.
    - b. Limit weight to 25 pounds occasionally
    - c. No overhead weight
    - d. Avoid fixed positions for more than 45 minutes
    - e. Rest in a recumbent position as needed
    - f. Stretch training
  3. Elbow, forearms, wrists, and hands
    - a. Proper ergonomics
    - b. Avoid repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotating motions
    - c. Avoid impact and vibratory trauma
    - d. No weights over five pounds or extended away from body
    - e. Handle weights to tolerance close to body
  4. Shoulders
    - a. Avoid overhead use of arms
    - b. Minimize pushing pulling and traction moves
    - c. Limit weight to five pounds away from the body
    - d. Handle weight to tolerance, maximum 15 pounds

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<sup>5</sup> Dr. Volarich's PTD opinion also included the alleged May 19, 2004 injury, which is discussed in the award issued for injury number 04-048993.

## e. Stretch and strength training

34. **Mr. James England Jr.**, a rehabilitation counselor, interviewed Claimant at the request of his attorney on November 28, 2006. Mr. England administered the Wide Range Achievement Test, which Claimant scored seventh grade in reading and sixth grade in arithmetic.

35. Mr. England provided the following opinion about Claimant's ability to work:

“This guy was a truck driver essentially all his career, drove a truck locally, spotted trailers. That's it... Some of it involved loading and unloading; some of it didn't, but everything required pretty much a medium level of exertion in order to perform his past work. He can't do that. I think that was obvious from looking at the medical. He did attempt to go back one more time after he had a series of three different injuries in the last few years. He did attempt to go back, and I think he indicated to me he lasted about two month at Yellow Freight trying one more time to do what he did before and just couldn't do it, but **I think if you look at the combination of restrictions that were described as well as his description of his day-to-day functioning, I don't see how he would be able to get through a regular work day.** ...” (Emphasis added)

36. Based on permanent restrictions imposed by Dr. Volarich, and Claimant's reported medical problems and symptoms, Mr. England concluded Claimant could not sustain employment. He noted Claimant is in his 60's, had difficulty walking, could not sit without squirming, and got up every 20 minutes. Also, Claimant has no transferable skills that could be used in a sedentary to light position. Mr. England concluded Claimant was unable to perform sedentary work due to his inability to use his upper extremities repetitively and the need to lie down during the day, based on Dr. Volarich recommendation.

### RULINGS OF LAW

Claimant asserts he is PTD due to a combination of his primary injury and pre-existing disabilities. The SIF acknowledges possible liability for PPD benefits, but contends no PTD benefits are owed because Claimant returned to work and performed his duties.

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 SIF Liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968).

After careful consideration of the entire record, based upon the above testimony, Claimant's demeanor during the hearing, competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant met his burden to prove he is PTD due to a combination of his medical conditions and disabilities for the reasons stated below.

#### *Claimant sustained disability from the last injury alone*

In computing permanent and total disability in the situation where claimant suffers from a previous disability, the [fact finder] first determines the degree of disability as a result of the last injury. “Until that disability is determined, it is not known whether the [SIF] has any liability.” *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. Ct. App. 2000). If a claimant's last injury

rendered him permanently and totally disabled, then the [SIF] has no liability and employer is responsible for the entire amount. ***Id at 847.***

I find Claimant to be generally credible in regard to this injury. I find Claimant sustained 8.25% PPD of the cervical spine and 15% PPD of the left shoulder from the February 4, 2004 injury.

I further find Claimant sustained 3% PPD of the right shoulder from the February 2004 injury. I find credible Dr. Volarich's opinion that Claimant sustained disability to the right shoulder; however I do not find credible his opinion that it resulted from a May 19, 2004 injury. Medical records in evidence contain no evidence of a May 19, 2004 injury, although Claimant was under active treatment with Dr. Doll for other injuries at the time of the alleged accident in May 2004.

The only medical evidence of right shoulder complaints and treatment occurred after the February 2004 accident and before May 2004. The first right shoulder complaint was recorded in April 2004. Also, on May 12, 2004, before the alleged May accident, Claimant reported:

“[P]ersistent right shoulder pain complaints still unresolved from the date of injury and more noticeable now given his improvements in his left shoulder and neck regions.”

In response to Claimant's right shoulder complaints, Dr. Doll prescribed physical therapy. Dr. Volarich assigned right shoulder disability and related it to a May 19, 2004 injury; however, medical causation is not an issue in this case and will not be discussed.<sup>6</sup>

Based upon credible testimony by Dr. Volarich regarding disability, medical records, and Claimant's history to Dr. Doll, I find Claimant sustained injury from the last injury alone but it did not take Claimant out of the workforce.

***Claimant's pre-existing disabilities were a hindrance or obstacle to employment***

After determining Claimant's disability from the last injury alone, the [fact finder] then determines “the degree or percentage of employee's disability that is attributable to *all injuries or conditions existing at the time the last injury was sustained.*” Section 287.220.1, RSMo (emphasis added). Thus, the Second Injury Fund is not liable for any progression of claimant's preexisting disabilities not caused by claimant's last injury. ***Garcia v. St. Louis County***, 916 S.W.2d 263, 266 (Mo. Ct. App. 1995) (overruled on other grounds by ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d 220, 230 (Mo. banc 2003).<sup>7</sup>

I find Dr. Volarich's opinion credible that Claimant sustained preexisting injury to his left SI joint and back, left elbow, bilateral wrists; right ankle, and left knee. I find Dr. Volarich's opinion is credible that Claimant's preexisting conditions are a hindrance or obstacle to employment or reemployment. I find Claimant's testimony is credible that he had ongoing back

<sup>6</sup> See injury number 04-048993 for more details.

<sup>7</sup> Several cases herein were overruled by ***Hampton*** on grounds other than those for which the cases are cited. No further reference will be made to ***Hampton***.

pain, difficulty with fine motor skills, pulling pins, and hopping on and off trailers before February 2004.

***Claimant is permanently and totally disabled due to a combination of disabilities***

Total disability is defined as the “inability to return to any employment and [does] not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.” Section 287.020.7 RSMo. The words "inability to return to any employment" mean that "the employee is unable to perform the usual duties of the employment in the manner that such duties are customarily performed by the average person engaged in such employment." ***Kowalski v. M-G Metals and Sales, Inc.***, 631 S.W.2d 919, 922 (Mo.App. 1982).

The test for permanent total disability is whether, given the claimant's situation and condition, he is competent to compete in the open labor market. ***Laturno v. Carnahan***, 640 S.W.2d 470, 472 (Mo.App.1982). In determining if claimant is totally disabled, the [fact finder] must decide whether, in the ordinary course of business, any employer would reasonably be expected to hire him in his present physical condition and reasonably expect him to perform the work. ***Garcia***, 916 S.W.2d at 266.

I find Claimant to be PTD based on his primary injury and preexisting medical conditions and disability. Based on Claimant’s injuries, symptoms, and physical examination, Dr. Volarich imposed restrictions for Claimant’s lower extremities, spine, elbow, wrists, and shoulders, including the ability to “rest in a recumbent position as needed.” I find Dr. Volarich’s restrictions are credible.

Mr. England’s credibly testified that Claimant cannot compete in the open labor market based on Dr. Volarich’s restrictions and Claimant’s daily limitations. Mr. England noted Claimant could not return to work as a truck driver, which comprised ninety percent of his work experience. Also, Mr. England did not believe Claimant could sustain “any type of work activity.” Mr. England credited Claimant for attempting to return to work “one more time and lasted about two months with Yellow Transit until the pain level became unbearable.”

He further concluded Claimant cannot perform sedentary work if he has to lie down and is unable to perform repetitive work with his upper extremities. If Claimant applied for unskilled, entry-level positions, prospective employers would not be impressed with his slow movements and lack of transferable skills. Mr. England did not recommend vocational rehabilitation.

After Dr. Benz released Claimant from the knee injury, Employer’s business closed and he attempted to work for Yellow Freight. Claimant’s testimony is credible that he could not perform the lifting requirements because of knee, shoulder, neck, and back pain. He transferred to a lighter job, at his request, but quit because he could not keep up with the fast pace and frequent climbing into trailers.

Claimant uses a stick as a cane to remove leg pressure when he walks. He stopped hunting and fishing when he developed back problems. He could no longer shoot a gun after he

developed knee and shoulder problems. Now, he spends most of his time watching television. During the hearing, I observed Claimant walk slowly with a cane.

Based upon credible testimony by Dr. Volarich, Mr. England, Claimant’s testimony related to disability from the last injury and preexisting disabilities, medical records, and reports, I find no employer in the ordinary course of business would hire Claimant in his present physical condition and expect him to perform the work. I find Claimant is permanent and totally disabled and unable to compete in the open labor market.

***Commencement date of permanent total disability payments***

In cases of permanent total ...disabilit[y], payment is due at the start of the disability. Thus, payment should have begun when the disability began. ***Kramer v. Labor & Indus. Relations Commission***, 799 S.W.2d 142, 145 (Mo.Ct. 1990).

The parties did not stipulate to the MMI date. Maximum medical improvement is reached when the medical condition has reached the point where further progress is not expected. ***Cardwell v. Treasurer of State of Missouri***, (Mo. App. 2008).

On February 3, 2006, Dr. Benz released Claimant to full activities and rated Claimant 35% PPD of the left knee. Claimant continues to take medication for his knee and other disabilities but is not under active medical care. I find Claimant reached MMI on February 3, 2006, and compensation should have begun on this date.

I previously found Claimant sustained 8.25% PPD of cervical spine, 15% PPD of the left shoulder, and 3% PPD of the right shoulder as a result of the February 4, 2004 injury. Therefore, I find the SIF liable for \$99.25 per week (\$446.30 PTD rate less \$347.05 PPD rate) for 74 5/7 weeks, commencing retroactively on February 3, 2006, and thereafter (beginning July 12, 2007) the sum of \$446.30 per week for the remainder of Claimant’s life. ***Laturno***, 640 S.W.2d at 471-72 (Mo.App.1982).

**CONCLUSION**

Claimant is permanently and totally disabled as a result of the primary injury and preexisting disabilities and conditions. The SIF is liable for a differential payment commencing retroactively on February 3, 2006, and full permanent total disability benefits beginning retroactively on July 4, 2008 for the remainder of Claimant’s lifetime. The issue of permanent partial disability benefits from the SIF is moot. Claimant’s attorney is entitled to a 25% lien for legal services rendered.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

**Suzette Carlisle**  
*Administrative Law Judge*  
*Division of Workers' Compensation*