

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

Injury No. 09-110444

Employee: Richard Schroeder
Employer: Applied Turf Products, LLC (Settled)
Insurer: Secura 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 award and decision of the administrative law judge dated November 21, 2014, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued November 21, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 15th day of July 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Richard Schroeder Injury No.: 09-110444
Dependents: N/A Before the
Employer: Applied Turf Products, LLC (Settled) **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Secura Insurance, A Mutual Company (Settled) Jefferson City, Missouri
Hearing Date: October 20, 2014 Checked by: EJK/kr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: November 5, 2009
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The employee, a truck driver, fell five feet off a ladder exacerbating his neck, left trapezius muscle, headaches, and vertigo conditions.
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: Neck, psychiatric condition
14. Nature and extent of any permanent disability: 5% Permanent partial disability of the neck and 5% permanent partial disability for psychiatric condition
15. Compensation paid to-date for temporary disability: Not Determined
16. Value necessary medical aid paid to date by employer/insurer: Not Determined

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$576.99
- 19. Weekly compensation rate: \$384.66
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Settled

22. Second Injury Fund liability: No

TOTAL:

23. Future requirements awarded: None

Said payments to begin immediately 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: James J. Sievers, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Richard Schroeder	Injury No.: 09-110444
Dependents:	N/A	Before the
Employer:	Applied Turf Products, LLC (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Secura Insurance, A Mutual Company (Settled)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/kr

This workers' compensation case requires a determination of Second Injury Fund liability arising out of a work-related injury in which the claimant, a truck driver, aggravated his prior disc osteophyte complexes and suffered head aches and vestibular dysfunction when he fell while a ladder kicked out from underneath him causing an increase neck pain, dizziness, and headaches. The sole issue for determination is Second Injury Fund liability. The evidence compels an award for the defense.

At the hearing, the claimant testified in person and depositions and reports from David T. Volarich, D.O., Wayne A. Stillings, M.D., and Delores Gonzalez, there claimant's Workers' Compensation settlements with his employer, and various medical records. The defense offered no evidence beyond cross-examination of the claimant.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On November 5, 2009, the claimant, a truck driver, aggravated his prior disc osteophyte complexes and suffered head aches and vestibular dysfunction when he fell from a ladder causing an increase neck pain, dizziness, and headaches. The claimant complained of right hip pain and an increase in headaches and dizziness. The claimant returned to work, following his fall. In a follow-up visit on March 8, 2010, the claimant indicated there was no change in his symptoms, was released to full duty without working at heights, and returned to work.

Dr. Volarich examined the claimant and diagnosed: (1) Cervical left arm radicular syndrome secondary to irreversible aggravation of disc osteophyte C4-5, C5-6, and C6-7 causing extremity and shoulder girdle radiculopathy – S/P anterior cervical discectomy with fusion and instrumentation C4-5, C5-6, and C6-7 and (2) Posttraumatic headaches and vestibular dysfunction causing dizziness. See Exhibit 3. He rated the claimant's permanent partial disabilities from the occurrence at 5% of the body as a whole rated at the cervical spine, due to aggravation of his cervical syndrome and left upper extremity radicular symptoms and

paresthesias, and (2) 5% of the body as a whole rated at the central nervous system, due to the aggravation of posttraumatic headaches and vestibular dysfunction. See Exhibit 3.

The claimant settled his workers' compensation claim with the employer on the basis of a 10% permanent partial disability to the body as a whole (40 weeks). One half of the disability was attributed to his neck and the other half of the disability was attributed to a psychological condition. See Exhibit C.

The claimant sustained a subsequent work related injury. On March 3, 2011, while installing a rotor weighing about 45 pounds on a shaft, claimant fell backwards, striking steel and the rotor crushed his left little finger. He filed a workers' compensation claim and received medical treatment for his left little finger injury. The claimant ultimately settled his workers' compensation claim with his employer on the basis of a 12 ½% permanent partial disability to his left hand and a 7 ½% permanent partial disability based on a psychiatric disability. See Exhibit 4. The claimant continues to have difficulty with his left hand including stiffness, disfigurement and pain related to weather changes.

Pre-existing Conditions

On July 17, 2009, claimant was in a motor vehicle accident and sustained injuries to his head and neck. He was diagnosed with posttraumatic headaches and posttraumatic vestibular dysfunction causing dizziness. As a result of this occurrence, Dr. Volarich diagnosed: (1) Cervical radiculopathy, left greater than right upper extremity due to irreversible aggravation of disc osteophyte complexes C4-5, C5-6, and C6-7– S/P anterior cervical discectomy with fusion and instrumentation C4-5, C5-6, and C6-7 with partial C5 corpectomy, and (2) Posttraumatic headaches and vestibular dysfunction. See Exhibit 3.

David T. Volarich, D.O.

Dr. Volarich evaluated the claimant on three occasions, July 28, 2010, November 4, 2011, and December 14, 2012. Dr. Volarich reviewed numerous records including diagnostic studies, operative reports, and treatment records and conducted a physical examination. He also performed numerous range of motion tests, both passive and active. See Dr. Volarich deposition pages 5-7. He also reviewed Dr. Stillings' report and the vocational report from Ms. Gonzalez. Dr. Volarich opined, "When you included psychiatric disabilities and his physical disabilities, he's permanently and totally disabled as a result of the combination of all his medical conditions." See Dr. Volarich deposition, page 10. He also testified:

Q. Dr. Volarich, when did Mr. Schroeder reach MMI in regards to his July 17th, '09, in jury? ...

A. It looks like on August 28, 2012. That's when he was released by Dr. Riew.

Q. Okay. And so those were after his ... 11/2/09 and His 3/3/11 injury?

A. Yes.

Q. So before those two injuries I just spoke of, he was not at MMI in regards to the 7/17/09 injury, correct?

A. Correct.

Q. And I understand you're saying combination with the physical and orthopedic; however, would you agree that the orthopedic standing alone regardless of any psychiatric disabilities, the orthopedic disability from the July 17, 2009 injury standing alone renders him permanently and totally disabled?

A. From just a physical standpoint, yes. See Dr. Volarich deposition, pages 10, 11.

Wayne T. Stillings, M.D.

On February 7, 2013, Dr. Stillings evaluated claimant for psychiatric disability after reviewing medical records, taking a medical history, and conducting a mental status examination. Dr. Stillings performed numerous tests on the claimant including the MMPI-2 test, MCMI-III, WTAR and WRAT3. Dr. Stillings diagnosed:

The three work injuries are the prevailing factors in causing Mr. Schroeder a mood disorder with an associated 10% psychiatric permanent partial disability of the body as a whole, residual symptoms from a head injury with an associated 10% psychiatric permanent partial disability of the body as a whole, and a pain disorder with an associated 5% psychiatric permanent partial disability of the body as a whole;

Mr. Schroeder has the following pre-existing psychiatric disorders and disabilities:

(A) Low IQ with poor education achievement with an associated 15% psychiatric permanent partial disability of the body as a whole. (B) Personality disorder with an associated 5% psychiatric permanent partial disability of the body as a whole.

The two work injuries of 07/17/2009 and 11/05/2009 were hindrances or obstacles to employment/re-employment and combine synergistically with each other and with the 03/2011 work injury, causing Mr. Schroeder to be permanently and totally disabled from the work force. See Dr. Stillings deposition, page 9.

Dr. Stillings testified that the MMPI-2 and the MCMI-III give information about a person's personality and that those tests confirm pre-existing personality disorder.

Delores Gonzalez

On February 15, 2013, Delores Gonzalez, CRC, performed a vocational rehabilitation evaluation. She reviewed all of the medical records, performed a social and vocational history, educational history, conducted a client interview, vocational history and obtained the activities of daily living. She testified that the claimant's "impairments have severely compromised his ability to either return to his past relevant jobs or to perform any job on a sustained basis. It is my opinion that Richard Ollie Schroeder is not a candidate for vocational rehabilitation as he is not

currently capable of competitive work for which there is a reasonably stable job market.” See Ms. Gonzalez deposition, page 7.

After reviewing the reports of Dr. Volarich and Dr. Stillings, on February 28, 2014, Ms. Gonzalez opined, “After a review of the additional evidence, it is still my opinion that Mr. Schroeder’s impairments have significantly compromised his ability to either return to past relevant jobs or to perform even sedentary work on the open labor market. It is still my opinion that Mr. Schroeder is not a candidate for vocational rehabilitation. He is not capable of any competitive work for which there is a reasonably stable job market. Mr. Schroeder has a combination of adverse vocational factors as a result of his disabilities that preclude competitive employment currently and in the future.”

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability pre-existing the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 2000; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).
2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Treasurer of the State of Missouri v. Witte, 414 S.W.3d 455 466, 467 (Mo. Banc 2010).
6. In cases arising after August 27, 1993, the extent of at least one of the pre-existing permanent partial disability injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 2000; Treasurer of the State of Missouri v. Witte, 414 S.W.3d 455 466, 467 (Mo. Banc 2010).

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work-related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1, RSMo 1994, contains four distinct steps in calculating the compensation due an employee, and from what source:

1. The employer's liability is considered in isolation- "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability."
2. Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered;
3. The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and
4. The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

Based on the entire record, the claimant suffered a compensable work-related injury in November 2009 resulting in a 10% permanent partial disability to the body as a whole (40 weeks). One half of the disability was attributed to his neck and the other half of the disability was attributed to a psychological condition. At the time the last injury was sustained, the claimant had a no pre-existing permanent partial disabilities. Although the claimant suffered a serious accident in July 2009 eventually resulting in a 35% permanent partial disability to the

neck (140 weeks) and a 7 ½% permanent partial disability to his central nervous system (30 weeks), the claimant did not attain permanent partial disability from those conditions until August 28, 2012, when he attained maximum medical improvement from the July 2011 occurrence. See Dr. Volarich deposition, page 10. Because the preexisting permanent disability was not at maximum medical improvement, Second Injury Fund liability must be denied. Hoven v. Treasurer, 414 S.W.3d 676 (Mo. App. ED 2013); Miller v. Treasurer, 425 S.W.3d 218 (Mo. App. ED 2014). Therefore, the evidence supports a defense award.

Made by: _____

EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation

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

Injury No. 11-015548

Employee: Richard Schroeder
Employer: Applied Turf Products, LLC (Settled)
Insurer: Secura Insurance (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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

Discussion

Second Injury Fund liability

On December 14, 2012, employee's evaluating expert, Dr. David Volarich, opined that employee is permanently and totally disabled based on a July 17, 2009, work injury considered alone and in isolation. Yet, on August 27, 2013, employee settled his claim against the employer/insurer arising from the July 17, 2009, injury based upon an approximate 35% permanent partial disability of the body as a whole, and instead pursued a claim against the Second Injury Fund for permanent total disability benefits in this matter. On February 21, 2014, Dr. Volarich did provide a subsequent opinion suggesting that employee is permanently and totally disabled as a result of a combination of all of his physical and psychiatric problems, but at his deposition of April 18, 2014, he confirmed his belief that employee is permanently and totally disabled based on the physical effects of his July 17, 2009, injury considered alone.

Likewise, employee's own testimony suggests that the symptoms traceable to his July 17, 2009, injury (including dizziness and constant headaches prompting an unpredictable need to lie down daily) render him permanently and totally disabled in isolation. We acknowledge that employee made a commendable effort to continue working despite the residuals from the July 17, 2009, injury, but this employer's willingness to continue to employ him until 2011 doesn't necessarily demonstrate that employee was then capable of competing for work in the open labor market.

Employee also provides an opinion from Dr. Wayne Stillings that he is permanently and totally disabled on a psychiatric basis from a combination of all his work injuries, but Dr. Stillings doesn't purport to challenge Dr. Volarich's opinion that employee was rendered permanently and totally disabled on a physical basis owing to the effects of the

Employee: Richard Schroeder

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July 17, 2009, injury alone. As a result, we deem Dr. Volarich's opinion regarding the cause of employee's permanent total disability to be essentially unopposed on this record. After careful consideration, we discern no compelling reason to disturb the administrative law judge's (implied) finding that Dr. Volarich persuasively identified the July 17, 2009, injury as the source of employee's inability to compete in the open labor market.

We do note that the administrative law judge appears to suggest, by citing the decision in *Hoven v. Treasurer*, 414 S.W.3d 676 (Mo. App. 2013), that an employee must demonstrate preexisting permanent partial disabilities that have reached maximum medical improvement as of the date of the primary injury in order to pursue a claim for permanent total disability benefits from the Second Injury Fund. We wish to make clear that under the plain language of the statute, as well as the relevant and controlling case law on the topic, this is not the case. *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144, 160 (Mo. App. 2014). Having provided this clarification, however, we must affirm the administrative law judge's award denying benefits from the Second Injury Fund, because the overwhelming weight of the medical evidence compels a finding that employee is permanently and totally disabled based on the effects of the July 17, 2009, injury considered alone and in isolation.

Conclusion

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

The award and decision of Administrative Law Judge Edwin J. Kohner, issued November 21, 2014, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 15th day of July 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Richard Schroeder Injury No.: 11-015548
Dependents: N/A Before the
Employer: Applied Turf Products, LLC (Settled) **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Secura Insurance, A Mutual Company (Settled) Jefferson City, Missouri
Hearing Date: October 20, 2014 Checked by: EJK/kr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: March 3, 2011
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The employee, a truck driver, was installing a rotor weighing about 45 pounds on a shaft, fell backwards, striking steel, and the rotor crushed his left little finger.
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: left hand and body as a whole -- psychiatric
14. Nature and extent of any permanent disability: 12.5% Permanent partial disability of the left hand and 7.5% permanent partial disability for psychiatric condition
15. Compensation paid to-date for temporary disability: \$3,479.28
16. Value necessary medical aid paid to date by employer/insurer: \$12,047.53

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$614.66
- 19. Weekly compensation rate: \$409.77
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Settled

22. Second Injury Fund liability: No

TOTAL:

23. Future requirements awarded: None

Said payments to begin immediately 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: James J. Sievers, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Richard Schroeder	Injury No.: 09-110444
Dependents:	N/A	Before the
Employer:	Applied Turf Products, LLC (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Secura Insurance, A Mutual Company (Settled)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/kr

This workers' compensation case requires a determination of Second Injury Fund liability arising out of a work-related injury in which the claimant, a driver and maintenance worker, while installing a rotor weighing about 45 pounds on a shaft, the claimant fell backwards, and the rotor crushed his left little finger. The sole issue for determination is Second Injury Fund liability. The evidence compels an award for the defense.

At the hearing, the claimant testified in person and depositions and reports from David T. Volarich, D.O., Wayne A. Stillings, M.D., and Delores Gonzalez, there claimant's Workers' Compensation settlements with his employer, and various medical records. The defense offered no evidence beyond cross-examination of the claimant.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On March 3, 2011, while installing a rotor weighing about 45 pounds on a shaft, the claimant fell backwards, and the rotor crushed his left little finger. He filed a workers' compensation claim and received medical treatment for his left little finger injury. The claimant ultimately settled his workers' compensation claim with his employer on the basis of a 12 ½% permanent partial disability to his left hand and a 7 ½% permanent partial disability based on a psychiatric disability. See Exhibit 4. The claimant continues to have difficulty with his left hand including stiffness, disfigurement and pain related to weather changes.

Pre-existing Conditions

On July 17, 2009, claimant was in a motor vehicle accident and sustained injuries to his head and neck. He was diagnosed with posttraumatic headaches and posttraumatic vestibular dysfunction causing dizziness. As a result of this occurrence, Dr. Volarich diagnosed: (1) Cervical radiculopathy, left greater than right upper extremity due to irreversible aggravation of disc osteophyte complexes C4-5, C5-6, and C6-7– S/P anterior cervical discectomy with fusion

and instrumentation C4-5, C5-6, and C6-7 with partial C5 corpectomy, and (2) Posttraumatic headaches and vestibular dysfunction. See Exhibit 3.

On November 5, 2009, the claimant, a truck driver, aggravated his prior disc osteophyte complexes and suffered head aches and vestibular dysfunction when he fell from a ladder causing an increase neck pain, dizziness, and headaches. The claimant complained of right hip pain and an increase in headaches and dizziness. The claimant returned to work, following his fall. In a follow-up visit on March 8, 2010, the claimant indicated there was no change in his symptoms, was released to full duty without working at heights, and returned to work.

Dr. Volarich examined the claimant and diagnosed: (1) Cervical left arm radicular syndrome secondary to irreversible aggravation of disc osteophyte C4-5, C5-6, and C6-7 causing extremity and shoulder girdle radiculopathy – S/P anterior cervical discectomy with fusion and instrumentation C4-5, C5-6, and C6-7 and (2) Posttraumatic headaches and vestibular dysfunction causing dizziness. See Exhibit 3. He rated the claimant's permanent partial disabilities from the occurrence at 5% of the body as a whole rated at the cervical spine, due to aggravation of his cervical syndrome and left upper extremity radicular symptoms and paresthesias, and (2) 5% of the body as a whole rated at the central nervous system, due to the aggravation of posttraumatic headaches and vestibular dysfunction. See Exhibit 3.

The claimant settled his workers' compensation claim with the employer on the basis of a 10% permanent partial disability to the body as a whole (40 weeks). One half of the disability was attributed to his neck and the other half of the disability was attributed to a psychological condition. See Exhibit C.

David T. Volarich, D.O.

Dr. Volarich evaluated the claimant on three occasions, July 28, 2010, November 4, 2011, and December 14, 2012. Dr. Volarich reviewed numerous records including diagnostic studies, operative reports, and treatment records and conducted a physical examination. He also performed numerous range of motion tests, both passive and active. See Dr. Volarich deposition pages 5-7. He also reviewed Dr. Stillings' report and the vocational report from Ms. Gonzalez. Dr. Volarich opined, "When you included psychiatric disabilities and his physical disabilities, he's permanently and totally disabled as a result of the combination of all his medical conditions." See Dr. Volarich deposition, page 10. He also testified:

Q. Dr. Volarich, when did Mr. Schroeder reach MMI in regards to his July 17th, '09, in jury? ...

A. It looks like on August 28, 2012. That's when he was released by Dr. Riew.

Q. Okay. And so those were after his ... 11/2/09 and His 3/3/11 injury?

A. Yes.

Q. So before those two injuries I just spoke of, he was not at MMI in regards to the 7/17/09 injury, correct?

A. Correct.

Q. And I understand you're saying combination with the physical and orthopedic; however, would you agree that the orthopedic standing alone regardless of any psychiatric disabilities, the orthopedic disability from the July 17, 2009 injury standing alone renders him permanently and totally disabled?

A. From just a physical standpoint, yes. See Dr. Volarich deposition, pages 10, 11.

Wayne A. Stillings, M.D.

On February 7, 2013, Dr. Stillings evaluated claimant for psychiatric disability after reviewing medical records, taking a medical history, and conducting a mental status examination. Dr. Stillings performed numerous tests on the claimant including the MMPI-2 test, MCMI-III, WTAR and WRAT3. Dr. Stillings diagnosed:

The three work injuries are the prevailing factors in causing Mr. Schroeder a mood disorder with an associated 10% psychiatric permanent partial disability of the body as a whole, residual symptoms from a head injury with an associated 10% psychiatric permanent partial disability of the body as a whole, and a pain disorder with an associated 5% psychiatric permanent partial disability of the body as a whole;

Mr. Schroeder has the following pre-existing psychiatric disorders and disabilities:
(A) Low IQ with poor education achievement with an associated 15% psychiatric permanent partial disability of the body as a whole. (B) Personality disorder with an associated 5% psychiatric permanent partial disability of the body as a whole.

The two work injuries of 07/17/2009 and 11/05/2009 were hindrances or obstacles to employment/re-employment and combine synergistically with each other and with the 03/2011 work injury, causing Mr. Schroeder to be permanently and totally disabled from the work force. See Dr. Stillings deposition, page 9.

Dr. Stillings testified that the MMPI-2 and the MCMI-III give information about a person's personality and that those tests confirm pre-existing personality disorder.

Delores Gonzalez

On February 15, 2013, Delores Gonzalez, CRC, performed a vocational rehabilitation evaluation. She reviewed all of the medical records, performed a social and vocational history, educational history, conducted a client interview, vocational history and obtained the activities of daily living. She testified that the claimant's "impairments have severely compromised his ability to either return to his past relevant jobs or to perform any job on a sustained basis. It is my opinion that Richard Ollie Schroeder is not a candidate for vocational rehabilitation as he is not

currently capable of competitive work for which there is a reasonably stable job market.” See Ms. Gonzalez deposition, page 7.

After reviewing the reports of Dr. Volarich and Dr. Stillings, on February 28, 2014, Ms. Gonzalez opined, “After a review of the additional evidence, it is still my opinion that Mr. Schroeder’s impairments have significantly compromised his ability to either return to past relevant jobs or to perform even sedentary work on the open labor market. It is still my opinion that Mr. Schroeder is not a candidate for vocational rehabilitation. He is not capable of any competitive work for which there is a reasonably stable job market. Mr. Schroeder has a combination of adverse vocational factors as a result of his disabilities that preclude competitive employment currently and in the future.”

SECOND INJURY FUND

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in [a]ll cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined..."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

The test for permanent, total disability is the worker's ability to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. Id. at 48. Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is “permanent” if “shown to be of indefinite duration in recovery or substantial improvement is not expected.” Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) The employer's liability is considered in isolation - "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability;" (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or

percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

This is so, because our law is, "If the employee's last injury in and of itself rendered the employee permanently and totally disabled, the Fund has no liability; the employer is responsible for the entire amount of compensation." Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 248 (Mo. banc 2003). For this reason, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. Id. If the employee's last injury in and of itself rendered the employee permanently and totally disabled, the Fund has no liability; the employer is responsible for the entire amount of compensation. Id. Birdsong v. Waste Mgmt., 147 S.W.3d 132, 138 (Mo. App. S.D. 2004)

Based on the entire record, the claimant suffered a compensable work-related injury in 2011 resulting in a 12 ½% permanent partial disability to the left hand (21.875 weeks) and a 7 ½% permanent partial disability to the body as a whole (30 weeks). See Exhibit 4. At the time of the 2011 injury, the claimant suffered from a 10% pre-existing permanent partial disability to the body as a whole from a November 2009 accident with one half of the disability was attributed to his neck and the other half of the disability was attributed to a psychological condition. See Exhibit 5. In addition, he suffered from a 35% pre-existing permanent partial disability to the neck and a 7 ½% -existing permanent partial disability to the central nervous system. See Exhibit 6.

Dr. Volarich opined that the work injury of July 17, 2009, alone is sufficient to render claimant permanently and totally disabled. He wrote:

Based on my medical assessment alone, it is my opinion that Mr. Schroeder is permanently and totally disabled as a direct result of the work related injuries of 7/17/09 standing alone. I note that he has a small amount of disability with reference to his left small finger, but this would not contribute significantly to his overall permanent disability. The severity of the 7/17/09 injury far outweighs the mild additional disability he sustained from the 11/5/09 aggravations. See Dr. Volarich deposition, December 14, 2012, report page 12.

Even after reviewing records from Dr. Stillings, Dr. Volarich's opinion did not change, it was the 7/17/09 injury alone that rendered claimant permanently and totally disabled. "I stand by my opinions as voiced in my prior IMEs that Mr. Schroeder is permanently and totally disabled as a direct result of the work related injury of July 17, 2009, standing alone from an orthopedic standpoint." See Dr. Volarich deposition, February 21, 2014, IME addendum. In his deposition, Dr. Volarich steadfastly maintained his opinion that the July 17, 2009, injury alone was sufficient to render claimant PTD, regardless of any psychiatric disability claimant might have. See Dr. Volarich deposition, pages 9, 11.

The vocational expert evidence supports Dr. Volarich's conclusion that the claimant's physical disabilities alone are sufficient to render him unemployable. In her report of February 15, 2013, vocational expert Delores Gonzalez opined that the restrictions that Dr. Volarich gave

in his December 14, 2012 report render claimant capable of less than sedentary work, “which does not exist in the open labor market.” See Exhibit 3, Report page 22. “Furthermore, it is not reasonable to expect an employer to hire an individual who would need to change positions frequently to maximize comfort and rest when needed as recommended by Dr. Volarich.” See Exhibit 3, Report page 22. Ms. Gonzalez’ deposition and report do not reflect any reliance upon the report or testimony of Dr. Wayne Stillings. See Exhibit 3.

The claimant’s continued work and accidents during his treatment and recovery from the July 17, 2009, injury do not serve to create a Second Injury Fund combination case. The level of permanent disability from an accident cannot be determined until the claimant reaches maximum medical improvement. Hoven v. Treasurer, 414 S.W.3d 676 (Mo. App. E.D. 2013). Although the claimant continued to work during his initial treatment for the July 17, 2009, injury, he did not reach maximum medical improvement (MMI) for that injury until August 28, 2012, after both of the subsequent injuries. In addition, the claimant did not have surgery for the primary injury until August 15, 2011, nearly six months after the last alleged work injury. He testified that he stopped working in March 2011. Once the claimant reached maximum medical improvement, his permanency for the preexisting injury could be assessed. It is clear that the preexisting disability for the July 17, 2009, work-related motor vehicle accident was total, not partial, and therefore no Second Injury Fund benefits are due for any subsequent injuries. Therefore, the claim against the Second Injury Fund must be denied.

Made by: _____
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation