

FINAL AWARD ALLOWING COMPENSATION

(Affirming Amended Award and Decision of Administrative Law Judge)

Injury No.: 07-086266

Employee: Ralph Shelton
Dependent: Connie Shelton
Employer: Missouri Department of Corrections
Insurer: Self-Insured
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 amended 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 amended award and decision of the administrative law judge dated April 19, 2013. The amended award and decision of Administrative Law Judge Carl Strange, issued April 19, 2013, 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 20th day of November 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AMENDED AWARD

Employee: Ralph Shelton

Injury No. 07-086266

Dependents: Connie Shelton

Employer: Missouri Department of Corrections

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: December 21, 2012

Checked by: CS/rm

SUMMARY OF FINDINGS

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 13, 2007.
5. State location where accident occurred or occupational disease contracted: Washington 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 happened or occupational disease contracted: Employee fell from a guard tower 25 feet and reinjured his back and neck.
12. Did accident or occupational disease cause death? N/A

13. Parts of body injured by accident or occupational disease: Low back and neck.
14. Nature and extent of any permanent disability: 20% of the body as a whole referable to his low back and 35% of the body as a whole referable to his neck (See Findings).
15. Compensation paid to date for temporary total disability: \$8,573.44.
16. Value necessary medical aid paid to date by employer-insurer: \$102,459.03.
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: Not calculated.
19. Weekly compensation rate: \$361.53 for temporary total disability, permanent total disability; and permanent partial disability.
20. Method wages computation: By Agreement.
21. Amount of compensation payable:
 - a. Employee awarded permanent partial disability from Employer in the amount of \$80,982.72 (See Findings).
 - b. Employee awarded permanent total disability benefits from Second Injury Fund at a rate of \$361.53 per week beginning June 13, 2012 (See Findings).
22. Second Injury Fund liability: Yes (See Findings).
23. Future requirements awarded: Yes (See Findings).

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The compensation awarded to the employee shall be subject to a lien in the amount of costs plus 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Kenneth Seufert

FINDINGS OF FACT AND RULINGS OF LAW

On December 21, 2012, the employee, Ralph Shelton, appeared in person and by her attorney, Kenneth Seufert, for a hearing for a final award. The employer-insurer was represented at the hearing by Assistant Attorney General Gregg Johnson. The Second Injury Fund was represented by Assistant Attorney General Kevin Nelson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about September 13, 2007, Missouri Department of Corrections was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer.
2. On or about September 13, 2007, the employee was an employee of Missouri Department of Corrections and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about September 13, 2007, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's rate for temporary total disability, permanent total disability, and permanent partial disability is \$361.53.
7. The employee's injury is medically causally related to the work injury occurring on or about September 13, 2007.
8. The employer has furnished \$102,459.03 in medical aid to the employee.
9. The employer has paid temporary total disability benefits for 23 5/7 weeks at a rate of \$361.53 per week for a total of \$8,573.44.
10. Employee reached maximum medical improvement on February 26, 2008.
11. Employer shall furnish additional medical to cure and relieve the effects of the September 13, 2007 work-related injury in accordance with 287.140 RSMo.

ISSUES:

1. Nature and Extent of Disability.
2. Liability of the Fund.
3. Dependency under Schomehl

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

A-1 Report of Dr. David T. Volarich, D.O. dated April 19, 2010;

- A-2 Supplemental report of Dr. David T. Volarich, D.O. dated June 24, 2010;
- A-3 Curriculum Vitae of Dr. David T. Volarich, D.O.;
- A-4 Records Provided to David T. Volarich D.O. for IME;
- A-5 Deposition of David T. Volarich D.O. taken 10-22-10;
- B-1 Report of James England, V.R.C. dated 11-17-10;
- B-2 Supplemental Report of James England, V.R.C. dated 12-6-10;
- B-3 James England, V.R.C. Curriculum Vitae;
- B-4 Engagement letter of Ken Seufert to James England dated 8-27-10;
- B-5 Letter of Ken Seufert to James England dated 11-29-10;
- B-6 Records Provided to James England for Vocational Evaluation;
- B-7 Deposition of James England taken 04-25-11;
- C-1 Claim for Compensation, DOI: 08-23-00;
- C-2 Report of Injury, DOI: 08-23-00;
- D-1 Amended Claim for Compensation, DOI: 08-23-01;
- D-2 Report of Injury, DOI: 08-23-01;
- E-1 Claim for compensation, DOI: 12-24-02;
- E-2 Department Accident/Incident Cause Evaluation (ACE), DOI: 12-24-02;
- F-1 Claim for Compensation, DOI: 06-18-03;
- F-2 Department Accident/Incident Cause Evaluation (ACE), DOI: 06-18-03;
- G-1 Claim for Compensation, DOI: 09-13-07;
- G-2 Report of Injury, DOI: 09-13-07;
- H Medical History of Ralph Shelton along with medical records from the care providers for treatment for Injury No. 00-095465 (DOI: 08-23-2000), Injury No. 01-106528 (DOI: 08-23-2001), Injury No. 02-138453 (12-24-2002) and Injury No. 03-057911(DOI: 6-18-2003):
 - 1. Mineral Area Regional Medical Center;
 - 2. Quality Healthcare;
 - 3. Paul Young, M.D.;
 - 4. Washington County Memorial Hospital;
 - 5. Dr. Dennis E. Sumski, D.O.;
 - 6. Robart Chiropractic Care Center;
 - 7. Dr. Matthew T. Gornet, M.D.; and
 - 8. Barnes-Jewish West County Hospital.
- I Medical History of Ralph Shelton concerning injuries he sustained on 09-13-07 (Inj# 07-086266) along with medical records from the following care providers attached:
 - 1. Arch Air;
 - 2. St. John's Mercy Medical Center;
 - 3. Dr. Lukasz J. Curylo, M.D.;
 - 4. Dr. Bryan R. Troop, M.D.;
 - 5. Missouri Baptist Medical Center;
 - 6. Dr. James J. Coyle, M.D.;
 - 7. ProRehab;
 - 8. Dr. Matthew F. Gornet, M.D.; and
 - 9. Dr. Anthony Guarino, M.D.
- J-1 Printout from Wal-Mart Pharmacy for the period of 01-01-06 to 07-27-09;

- J-2 Printout from Wal-Mart Pharmacy for the period of 01-01-08 to 11-20-09;
- J-3 Printout from USA Clinic at Mineral Area for the period of 06-01-10 through 06-18-11;
- J-4 Printout from USA Clinic at Mineral Area for the period of 05-01-11 through 07-05-12;
- J-5 Printout from USA Clinic at Mineral Area for the period of 07-01-12 through 12-17-12;
- L-1 Medical Records from Jefferson Regional Medical Center;
- L-2 Medical Records from Jefferson Regional Medical Center-Stress Unit;
- M Medical Records from Southeast Missouri Behavioral Health;
- N Social Security Administration Retirement, Survivors and Disability Insurance, Notice of Award dated 08-03-08;
- P-1 Medical Records of Dr. Jordan Balter, D.O. covering the period of 11-20-10 to 10-18-11;
- P-2 Medical Records of Dr. Jordan Balter, D.O. covering the period of 12-27-11 to 07-04-12;
- Q Medical Records of Dr. Anthony H. Guarino, M.D. covering the period of 02-23-09 through 08-28-12;
- R Stipulation for Compromise Settlement Injury No. 01-106528;
- S Stipulation for Compromise Settlement Injury No. 02-138453; and
- T. Stipulation for Compromise Settlement Injury No. 03-057911.

Employer's Exhibits:

1. Deposition of Dr. Wayne Stillings; and
2. Deposition of Susan Shea.

FINDINGS OF FACT:

Based on the testimony of Ralph Shelton ("Employee") and the medical records and reports admitted, I find as follows:

At the time of the hearing, Employee was 58 years old. After obtaining his GED, Employee enlisted in the US Army for two years. His past employment history includes loading carpet, pumping gas, light mechanic work, and drywall work. Employee began working for Missouri Department of Corrections ("Employer") in 1998. On September 13, 2007, Employee was married and living with his wife, Connie Shelton. At that time, they were dependent upon each other's income for support.

On September 13, 2007, Employee was in the Guard Tower and stepped into the open trap door hole and fell 25 feet to the ground landing on his neck and back. Although Employee had prior back and neck problems, Employee suffered additional injury to his back and neck. Employee was taken by Arch Ambulance to St. John's Mercy Medical Center. While the MRI of the lumbar spine revealed the disc prosthesis L5-S1 with mild foraminal narrowing, a CT of the cervical spine revealed acute injuries from C3-4 through C6-7. Dr. Curylo diagnosed Employee with low back pain superimposed on previous disc replacement and spinal cord injury due to herniation C3-4 and superimposed over old injury. On November 20, 2007, Dr. Lukasz Curylo performed an anterior cervical decompression and discectomy at C3-4 with decompression of spinal cord anterior cervical interbody fusion, C3-4 with structural allograft and spacer and local bone graft with instrumentation. Dr. Curylo discharged Employee from his care for the neck on February 26, 2008 (Employee's Exhibit I).

After his release from care, Employee was evaluated by Dr. James Coyle and Dr. Matthew Gornett. On February 23, 2009, Employee was examined by Dr. Anthony Guarino for pain management and was diagnosed with sciatica and lumbar spondylosis and facet disease. Dr. Guarino later added cervical spondylosis, status post discectomy and fusion, and facet disease to the diagnosis. On October 12, 2009, Employee underwent L3-L4, L4-5, and L5-S1 radiofrequency neuroablation of the lumbar facets. Since that time, Employee has continued to receive pain management from Dr. Guarino (Employee's Exhibit I).

On April 19, 2010, Dr. David Volarich evaluated Employee and opined that as a result of the September 13, 2007 work-related injury Employee suffered an 1) Postlaminectomy syndrome due to aggravation of disc replacement with mild subsidence with persistent bilateral lower extremity paresthesias, 2) herniated nucleus pulposus C3-4 treated with anterior cervical discectomy with fusion and instrumentation C3-4, 3) aggravation cervical myelopathy C5 and disc osteophyte complex C6-7 treated conservatively, and 4) moderately severe cervical and lumbar pain syndromes under active pain management. Further, Dr. Volarich opined that as a result of the September 13, 2007 work-related injury Employee suffered a 20% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine and a total of 35% permanent partial disability of the body as a whole at the 400 week level referable to his cervical spine (Employee's Exhibit A-1).

Prior to his work injury of September 13, 2007, Employee had several pre-existing conditions which included multiple injuries to his back and neck along with an injury to his left shoulder. On April 19, 2010, Dr. David Volarich evaluated Employee and opined that prior to September 13, 2007 Employee suffered 1) lumbar and bilateral thigh discomfort and aggravation of underlying degenerative disc disease at L4-5 and L5-S1 and degenerative joint disease and Schmorl's nodes at L1 and L3 due to an August 2000 injury, 2) lumbar strain with MRI evidence of disc protrusions at L4-5 and L5-S1 with associated degenerative disc disease due to a March 2001 injury, 3) aggravation lumbar syndrome with left leg paresthesias due to August 2001 injury, 4) aggravation lumbar syndrome due to July 2002 injury, 5) minor aggravation lumbar syndrome due to September 2002 injury, 6) minor exacerbation lumbar syndrome due to November 2002 injury, 7) aggravation lumbar syndrome due to December 2002 injury, 8) progression lumbar syndrome with lower extremity radiculopathy and new annular tear L5-S1 causing discogenic pain treated with partial corpectomy L5 with anterior decompression and disc replacement L5-S1 due to June 2003 injury, 9) minor aggravation lumbar syndrome resolved with return of symptoms to baseline due to February 2006 injury, 10) C5 fracture treated with immobilization with residual cord atrophy and posttraumatic arthritic changes cervical spine that pre-existed August 2000, and 11) left shoulder bursitis that pre-existed August 2000. Further, Dr. Volarich opined that Employee had a pre-existing 15% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine injured in August 2000, a 25% permanent partial disability of his body as a whole at the 400 week level referable to his cervical spine pre-existing August 2000, a 1-2% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine pre-existing August 2000, a 20% permanent partial disability of his left upper extremity at the 232 week level pre-existing August 2000, a 5% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine injured in March 2001, a 5% permanent partial disability of his body as a whole

at the 400 week level referable to his lumbar spine injured in August 2001, no permanent partial disability from the July 2002 injury, a 1% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine injured in September 2002, no permanent partial disability from the November 2002 injury, a 5% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine injured in December 2002, a 30% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine injured in June 2003, and no permanent partial disability from the February 2006 injury (Employee's Exhibit A-1).

As part of his evaluation, Dr. Volarich also diagnosed depression but noted that he would defer to psychiatric evaluation for assessment. Additionally, Dr. Volarich opined that the combination of Employee's disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness, and a loading factor should be added. Based on his medical assessment alone, Dr. Volarich opined that Employee is permanently and totally disabled as a direct result of his current work-related injuries in combination with each other as well as in combination with his pre-existing medical conditions prior to his current work injuries. At the time of his deposition, Dr. Volarich testified that he does not think that Employee could work from a medical standpoint or physical standpoint, but noted that "if a vocational counselor can find something that he thinks he might be able to do, I don't have any problems with him trying to do it" (Employee's Exhibits A-1 & A-5).

On November 11, 2010, Mr. James England, a vocational rehabilitation expert, evaluated Employee and opined that he did not believe that Employee would be able to sustain any level of work on a consistent, day-to-day basis. Further, Mr. England opined that Employee is likely to remain totally disabled from a vocational standpoint. At the time of his deposition, Mr. England testified that he would not quarrel with Dr. Volarich's assessment that Employee's permanent and total disability was due to a combination of pre-existing problems and the primary injury in 2007 (Employee's Exhibits B-1, B-2, & B-7).

On October 20, 2011, Dr. Wayne Stillings evaluated Employee and opined that the September 13, 2007 work-related injury was the prevailing factor in causing Employee to suffer an adjustment disorder in remission with an associated 1% psychiatric permanent partial disability of the body as a whole. After noting that Employee had a pre-existing 2% psychiatric permanent partial disability of the body as a whole due to a panic disorder and a pre-existing 15% psychiatric permanent partial disability of the body as a whole due to a personality disorder, Dr. Stillings opined that Employee was at psychiatric maximum medical improvement due to the 2007 work-related injury and Employee is able to work without psychiatric restrictions (Employer-Insurer's Exhibit 1).

On July 6, 2012, Ms. Susan Shea, a vocational rehabilitation expert, evaluated Employee and opined that she believed that Employee was unemployable due to a combination of the September 13, 2007 work-related injury and his prior conditions. At her deposition, Ms. Shea noted that Employee attributed his need to lie down to his 2007 injuries combined with pain from the prior injuries. Further, Ms. Shea testified that Employee's need to lie down by itself does keep Employee from being employable (Employer-Insurer's Exhibit 2).

At the time of the hearing, Employee continued to have problems that included neck pain, low back pain, difficulty sleeping, pain down arms and legs, numbness, tingling, fatigue, difficulty getting dressed, problems walking, problems standing, problems sitting, difficulty driving, difficulty shopping, nightmares, and headaches. Finally, Employee noted that he has to lie down during the day and takes medication for his symptoms.

APPLICABLE LAW:

- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:

“All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, 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. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, 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 shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.”

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be

liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the “Second Injury Fund” hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

- Section 287.020.7 RSMo. provides as follows:
The term “total disability” as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.
- The phrase “the inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the “inability to return to any reasonable or normal employment”. *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).
- Section 287.240.4 RSMo. states that a wife is conclusively presumed to be totally dependent for support upon a husband with whom she lives or who is legally liable for her support.
- In *Schoemehl v. Treasurer of State*, 217 S.W.3d 900, 902 (Mo. 2007), the Court stated, Section 287.240.4, which applies to the entire workers’ compensation chapter, states that “[t]he word ‘dependent’ as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, *who is actually dependent for support*, whole or part, *upon his or her wages at the time of the injury.*” *Emphasis added.* As such, any “dependent” would have to be born and dependent at the time of the injury.
- The holding in *Schoemehl* was subsequently abrogated with the passage of Mo. Rev. Stat. §287.230.2, which was effective June 26, 2008. However, in *Bennett v. Treasurer of Missouri*, 271 S.W.3d 49, 53 (Mo. App. W.D. 2008), the Court recognized that “recovery under *Schoemehl* is limited to claims for permanent total disability benefits that were pending between January 9, 2007, the date of the *Schoemehl* decision and June 26, 2008.” Pending means no final decision has yet been rendered. *Tilley v. USF Holland Incorporated*, 325 S.W.3d 487, 494 (Mo. App. E.D. 2010). In *Gervich v. Condaire, Inc.*,

370 S.W.3d 617, 624 (Mo. banc 2012), the Court held that even if the employee's death occurred after the statutory amendment to §287.240, the surviving spouse maintains their right to take his or her place for benefits. This right was further clarified in *White v. University of Missouri*, WD 74081 (Mo. App. W.D. 9-4-2012) as the Court explained that spouses have a future contingent benefit to receive permanent total benefits in the event that they remain married to the employee, the employee predeceases them and the spouse does not subsequently re-marry.

Issue 1. Nature and Extent of Disability & Issue 2. Liability of the Fund

Employee and Employer have stipulated that Employer shall furnish additional medical to cure and relieve the effects of the September 13, 2007 work-related injury in accordance with 287.140 RSMo. Based on the evidence and stipulations, Employer is therefore directed to furnish additional medical treatment related to Employee's September 13, 2007 work-related injury pursuant to Section 287.140 RSMo.

Employee has alleged that either Employer or the Second Injury Fund is liable for permanent and total disability benefits as a result of the September 13, 2007 work-related accident. In addition to Dr. Volarich's opinions, Employee has offered the opinion of vocational expert, James England. Employer has offered the opinion of vocational expert, Susan Shea. It is important to note that the Second Injury Fund have failed to offer sufficient credible evidence to discredit the opinions of Dr. Volarich or Mr. James England. Further, the Second Injury Fund has argued that they are not liable for permanent total disability benefits because Dr. Volarich, Mr. England, and Ms. Shea's opinions support a finding that Employer is liable for permanent total disability as a result of the last injury alone. The Second Injury Fund's argument is flawed for several reasons.

First, the Second Injury Fund noted that Dr. Volarich "did concede, however, that he would defer to a vocational expert regarding Mr. Shelton's ability to work". According to his deposition, Dr. Volarich responded to the question of deferring to a vocational expert by stating "For what...from a medical standpoint, I don't think he could work, but if a vocational counselor can find something that he thinks he might be able to do, I don't have any problems with him trying to do it, I just don't think he can work" (Employee's Exhibit A-5, Deposition Page 56). With regard to Mr. England, the Second Injury Fund noted that "Mr. England admitted if one considers these issues arising out of the last injury - that Mr. Shelton's uses narcotic medications, his need to lie down three to five hours a day, his sleep issues, and the numbness and tingling in his hands, as well as his age, education and work experience - he would be unemployable in the open labor market...with the required "last injury alone". At his deposition, Mr. England limited his response to "if all those things were due to just that injury, I think that's true." Mr. England further testified that "I defer to the doctors on the causation kind of stuff...to me it would appear to be a combination of all these things that have happened to him over the years, you know, rather than just the last injury by itself" (Employee's Exhibit B-7, Deposition Pages 26 & 34). With regard to Susan Shea, the Second Injury Fund argues that her testimony supports the last injury alone analysis because she admitted at her deposition that Employee would be permanently and totally disabled from the need to lie down alone. However,

Ms. Shea testified that Employee attributed his need to lie down to his 2007 injuries combined with pain from the prior injuries (Employer-Insurer's Exhibit 2, Deposition pages 17, 18, & 29). Consequently, I find there is not sufficient credible evidence to find that the September 13, 2007 was the sole cause of these issues. Based on the evidence, it is clear that Employee's permanent and total disability was a result of a combination of Employee's pre-existing conditions and the September 13, 2007 work-related injury.

After a thorough review of the evidence, I find the opinions of Dr. David Volarich and Mr. James England to be the most credible and supported by the evidence. Further, I find the opinions of Susan Shea to be credible to the extent that they do not conflict with Dr. Volarich's and Mr. England's opinions. Therefore, Dr. Volarich's, Mr. England's, and Ms. Shea's opinions along with the medical records unequivocally support a finding of permanent and total disability as a result of a combination of Employee's September 13, 2007 work-related injury and his pre-existing conditions. Consequently, I find that Employer is not liable for permanent total disability benefits as a result of Employee's September 13, 2007 work-related injury.

Although Employer is not liable for permanent total disability benefits, Employer is still liable for permanent partial disability. Based on this evidence, I find that as a result of the September 13, 2007 work-related injury that Employee suffered a 20% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine, a total of 35% permanent partial disability of the body as a whole at the 400 week level referable to his cervical spine, and an adjustment disorder with an associated 1% psychiatric permanent partial disability of the body as a whole. This equals 224 weeks of disability. Employer is therefore directed to pay to Employee the sum of \$361.53 per week for 224 weeks for a total award of permanent partial disability relating to the September 13, 2007 work-related injury of \$80,982.72. Based on the evidence and stipulation of the parties, I find that Employee reached his maximum level of medical improvement and the end of the healing period on February 26, 2008. Employer's permanent partial disability payments should therefore have commenced on February 27, 2008, and would have continued for 224 weeks through June 12, 2012.

Based on the evidence and my above findings, the Second Injury Fund is clearly liable for permanent total disability benefits. Employee's pre-existing injuries and the September 13, 2007 work-related accident clearly combined to make Employee permanently and totally disabled. With regard to Employee's pre-existing injuries, I find that Employee suffered a 47% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine prior to the September 13, 2007 work-related injury, a 25% permanent partial disability of his body as a whole at the 400 week level referable to his cervical spine prior to the September 13, 2007 work-related injury, a 20% permanent partial disability of his left upper extremity at the 232 week level prior to the September 13, 2007 work-related injury, and a 17% psychiatric permanent partial disability of the body as a whole at the 400 week level prior to the September 13, 2007 work-related injury. These pre-existing conditions equal 402.4 weeks of disability. I further find that these preexisting disabilities were a hindrance or obstacle to Employee's employment or reemployment and that Employee's preexisting disabilities and his September 13, 2007 work-related disabilities combined synergistically causing Employee to be permanently and totally disabled.

Since Employee's permanent partial disability rate (\$361.53) is the same as the agreed rate of compensation for permanent total disability, the Second Injury Fund is liable for the full amount of the permanent total disability benefits commencing June 13, 2012. The Second Injury Fund is therefore directed to pay to Employee the sum of \$361.53 per week commencing on June 13, 2012, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of Employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is restored to his regular work or its equivalent as provided in Section 287.200.2. Since part of the Second Injury Fund's liability has accrued prior to the date of the award, the Second Injury Fund shall make a lump sum payment for the appropriate amount that is past due.

Issue 3. Dependency under Schoemehl v. Treasurer of the State of Missouri.

Employee has alleged that his spouse, Connie Shelton, is a dependent within the meaning of Mo. Rev. Stat. §287.240 and that she would be entitled to his permanent total disability benefits in the event that she survives Employee pursuant to the *Schoemehl* decision. Based on the date of injury and claim filing, this claim was pending between January 9, 2007 and June 26, 2008. This claim was therefore pending within the time recognized by *Bennett* for the *Schoemehl* decision to be applicable. Based on the evidence, I find that Connie Shelton, the Employee's spouse, was a conclusively presumed total dependent at the time of the Employee's September 13, 2007 work accident and injury and has remained in this status at the time of trial on December 21, 2012. Consequently, I find that Employee's wife, Connie Shelton, has a future contingent entitlement to receive benefits in the event that Employee predeceases her.

ATTORNEY'S FEE:

Kenneth Seufert, attorney at law, is allowed a fee of costs plus 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation