

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

Injury No.: 06-047647

Employee: Raymond Skirvin
Employer: Dick Herber Electric Inc. (Settled)
Insurer: Amerisure Ins. Co. (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. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the September 3, 2010, award and decision of Administrative Law Judge Henry T. Herschel. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The sole issue stipulated in dispute at the hearing was the nature and extent of Second Injury Fund liability.

The administrative law judge made the following findings: (1) employee is not in need of future medical care¹; (2) as a result of the primary injury, employee sustained a 10% permanent partial disability of the body as a whole referable to the low back; (3) as a result of the primary injury, employee sustained no more permanent partial disability "than his September 17, 2007, settlement of 15% PPD combined (120 weeks)"²; (4) employee suffers the following preexisting permanent partial disabilities: 20% of the right shoulder, 15% of the left shoulder, 15% of the right knee, and 15% of the right ankle; and (5) employee is entitled to 24 weeks of permanent partial disability compensation from the Second Injury Fund.

Employee submitted a timely Application for Review alleging the administrative law judge's award was not supported by substantial evidence and was against the weight of the law.

For the reasons set forth in this award and decision, the Commission modifies the award of the administrative law judge.

¹We do not speculate as to why the administrative law judge addressed this issue *sua sponte*; in any case, we have confined our review to the sole issue identified on the record by the parties at the hearing on June 3, 2010: the nature and extent of Second Injury Fund liability. Any findings and comments by the administrative law judge related to the issue of future medical care are not incorporated into this opinion.

²We note that the administrative law judge appears to have made two separate and conflicting findings of the nature and extent of permanent disability resulting from the primary injury.

Employee: Raymond Skirvin

- 2 -

Findings of Fact

Preexisting conditions

Prior to May 20, 2006, the date of the work injury in this matter, employee suffered from a number of preexisting conditions of ill. In 1968, employee broke the end of his right thumb, which makes it difficult for employee to form a fist. In 1998, employee injured his left shoulder carrying material up a ladder; employee underwent surgery and experiences ongoing difficulty lifting and pulling with his left arm and decreased strength and range of motion in his left shoulder. This injury adversely affected employee's ability to work as a commercial electrician. In 1999, employee injured his right shoulder pulling wire; he underwent surgery and experienced decreased strength and difficulty working overhead with the right arm.

Employee has a long history of neck and back problems stemming back to the 1980s. Employee treated intermittently throughout the 1990s with various doctors for both lumbar and cervical spine problems. In 1997, Dr. Justice diagnosed chronic musculoskeletal back pain.

Dr. Volarich evaluated each of employee's preexisting conditions of ill and provided his opinion as to the nature and extent of preexisting disability employee suffered as of May 20, 2006. Dr. Volarich opined that employee suffered from preexisting permanent partial disabilities to the following body parts and in the following amounts: 25% of the body as a whole referable to the lumbar spine, 25% of the body as a whole referable to the cervical spine, 50% of the right shoulder, 35% of the left shoulder, 25% of the right hand, 10% of the left wrist, 25% of the right ankle, 15% of the right knee, and 15% of the body as a whole referable to employee's chronic obstructive pulmonary disease.

Employee did not testify regarding the left wrist ulnar fracture rated by Dr. Volarich, or the right ankle degenerative arthritis, or the lung disease. Employee has not directed us to medical records showing any treatment for these conditions. Accordingly, we decline to make any findings regarding any preexisting left wrist, right ankle, or lung conditions. With these exceptions, we find all of the other ratings and opinions of Dr. Volarich as set forth above to be credible, and adopt them as our findings regarding the nature and extent of employee's preexisting disabling conditions.

The primary injury of May 20, 2006

On May 20, 2006, employee sustained injuries to his neck and upper right extremities when he held a heavy cable to prevent it from falling. Dr. Doll put employee on a course of home traction and pain medications, and also performed a transforaminal injection. Employee did not experience any significant relief from this course of treatment. Dr. Doll last saw employee on July 25, 2006, when he questioned employee's effort on a functional capacity evaluation, and released employee without restrictions. On that date, Dr. Doll found employee to be at maximum medical improvement and opined employee didn't suffer any permanent disability from the primary injury. We find that employee reached maximum medical improvement on July 25, 2006.

Dr. Volarich opined that the primary injury resulted in aggravation of both employee's cervical and lumbar syndromes as well as aggravation of his postoperative right shoulder condition, and that employee thereby sustained permanent partial disability

Employee: Raymond Skirvin

- 3 -

rated at 15% of the body as a whole referable to the cervical spine, 15% of the body as a whole referable to the lumbar spine, and 15% of the body as a whole referable to the right upper extremity. We find credible Dr. Volarich's diagnoses and opinion that employee did sustain permanent partial disability referable to the work injury. We find employee sustained a 15% permanent partial disability of the body as a whole referable to aggravation of his cervical spine syndrome as a result of the primary injury.

Permanent total disability

Dr. Volarich assigned considerable work restrictions and opined that employee is permanently and totally disabled due to a combination of his preexisting disabling conditions and the disability resulting from the primary injury. Ms. Gonzalez opined that employee is not even capable of sedentary work and that employee is unable to compete in the open labor market as a direct result of the effects of the primary injury in combination with his preexisting disabling conditions.

In addition to the testimony of Dr. Volarich and Ms. Gonzalez, employee provided evidence of several failed attempts to return to work following the primary injury. Employee tried to return working for employer only three days a week, but couldn't do all the work, so had to quit. Employee also tried working for Ecklecamp Electrical Company and Lee Deering Electric, but was unable to last more than a few weeks at either job. Employee described his present limitations and disabilities in detail. We find employee credible.

We find Dr. Volarich and Dr. Gonzalez to be credible. We find particularly persuasive Dr. Gonzalez, who took into account employee's attempts to return to work, and whose testimony was undiminished on cross-examination. Having evaluated all of the evidence, we find that employee is permanently and totally disabled due to the combination of his preexisting disabling conditions and the disability resulting from the primary injury.

Conclusions of Law

Liability of the Second Injury Fund

Generally

"Section 287.220 creates the Second Injury Fund and sets forth when and the amount of compensation that shall be paid from the fund in 'all cases of permanent disability where there has been previous disability.'" *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000) (citations omitted). "In order to be entitled to Fund liability, the claimant must establish either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself." *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004) (citation omitted).

Hindrance or Obstacle

"Liability of the Second Injury Fund is triggered only 'by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.'" *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002) (citation omitted). To implicate the Second Injury Fund, the employee must have an actual and measurable

Employee: Raymond Skirvin

- 4 -

preexisting disability at the time the work injury is sustained of such seriousness as to constitute a hindrance or obstacle to employment. Section 287.220.1 RSMo.

[T]he 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.”

Loven v. Greene County, 63 S.W.3d 278, 287 (Mo. App. 2001).

We have found that employee suffered from preexisting permanent partial disabilities amounting to 25% of the body as a whole referable to the lumbar spine, 25% of the body as a whole referable to the cervical spine, 50% of the right shoulder, 35% of the left shoulder, 25% of the right hand, and 15% of the right knee. The medical records reveal ongoing treatment spanning many years for certain of these conditions, such as the lumbar and cervical spine syndromes. The medical records also contain numerous preexisting work restrictions as well as suggestions from employee’s doctors that he change the type of work he was performing (for example, Dr. Orell’s suggestion on July 10, 1990, that employee change his work schedule due to the impact of overhead work on his right shoulder condition). Given the credible opinions of Ms. Gonzalez and the clear potential—demonstrated by both the treatment record and employee’s testimony—for each of employee’s preexisting conditions of ill to combine with later injuries to create greater disability than would result in their absence, we conclude that each of these conditions were hindrances or obstacles to employment as of May 20, 2006.

Given the foregoing, we conclude that employee has met his burden of proving the presence of actual and measurable disabilities of such seriousness as to constitute hindrances or obstacles to employment at the time the work injury was sustained.

Calculation of Liability

Having determined that the Second Injury Fund is implicated in this matter, we must determine the amount of Second Injury Fund liability.

[W]here a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). If the compensation to which the employee is entitled for the new injury is less than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1.

Vaught v. Vaughts, Inc./Southern Mo. Constr., 938 S.W.2d 931, 939 (Mo. App. 1997) (citations omitted).

Employee: Raymond Skirvin

We have found that employee was not permanently and totally disabled due to the effects of the work injury considered alone, but instead that employee suffered a 15% permanent partial disability of the body as a whole referable to the cervical spine. We have also found that employee is permanently and totally disabled as a result of the combination of his preexisting disabling conditions and the effects of the primary injury.

Accordingly, the Second Injury Fund is liable for permanent and total disability benefits. Because employee reached maximum medical improvement on July 25, 2006, and sustained a 15% permanent partial disability of the body as a whole attributable to the work injury, the Second Injury Fund is liable for weekly payments of \$99.37 (the difference between the rate for permanent partial and permanent total disability)³, commencing July 26, 2006, and following thereafter for 60 weeks. The Second Injury Fund will then be liable for weekly payments of \$464.45 for employee’s lifetime, or until modified by law.

Award

We modify the award of the administrative law judge. Employee is entitled to permanent total disability benefits from the Second Injury Fund. Commencing July 26, 2006, the Second Injury Fund is ordered to pay \$99.37 per week for 60 weeks. The Second Injury Fund will then be liable for weekly payments of \$464.45 for employee’s lifetime, or until modified by law.

The award and decision of Administrative Law Judge Henry T. Herschel issued September 3, 2010, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

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 6th day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

³ We note that the parties failed to stipulate to the employee’s average weekly wage on the record, but instead merely acceded to the administrative law judge’s statement that: “The rate of compensation to be paid in this case is—in other words, PPD is 365.08.” However, employee, in his Application for Review, does not take issue with the administrative law judge’s recitation, in his award, that the parties stipulated to an average weekly wage of \$696.67. Accordingly, we have used this value in calculating employee’s rate for permanent total disability.

Employee: Raymond Skirvin

Injury No. 06-047647

AWARD

Employee: Raymond Skirvin

Injury No. 06-047647

Dependents: N/A

Employer: Dick Herber Electric Inc. (Previously Settled)

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Treasurer of the State of Missouri
as Custodian of the Second Injury Fund

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

Insurer: Amerisure Ins. Co. (Previously Settled)

Hearing Date: June 3, 2010

Checked by: HTH/sb

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: May 20, 2006.
5. State location where accident occurred or occupational disease was contracted: Marion 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? No.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was setting a wire "pull" 35 feet in the air when a support came loose and claimant had to hold the wire manually.
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: Lower back.
14. Nature and extent of any permanent disability: 10%.

Employee: Raymond Skirvin

Injury No. 06-047647

- 15. Compensation paid to-date for temporary disability: \$5,575.76.
- 16. Value necessary medical aid paid to date by employer/insurer: \$7,688.68.
- 17. Value necessary medical aid not furnished by employer/insurer: N/A.
- 18. Employee's average weekly wages: \$696.67.
- 19. Weekly compensation rate: PPD \$365.08.
- 20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

- 21. Amount of compensation payable by SIF: \$8,761.92
- Total: \$8,761.92

- 22. Future requirements awarded: None.

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: Andrew Marty.

Employee: Raymond Skirvin

Injury No. 06-047647

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Raymond Skirvin

Injury No. 06-047647

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Dick Herber Electric Inc. (Previously Settled)

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

Additional Party: Treasurer of the State of Missouri
as Custodian of the Second Injury Fund

Insurer: Amerisure Ins. Co. (Previously Settled)

Checked by: HTH/sb

PRELIMINARIES

The parties appeared before the undersigned Administrative Law Judge on June 3, 2010. The Division has jurisdiction to hear this case pursuant to §287.110, RSMo 2000. The parties provided briefs on the relevant issues on approximately June 28, 2010. The record closed on June 28, 2010.

STIPULATIONS

1. The employee and the employer were operating under the provisions of the Workers' Compensation Law on or about May 20, 2006;
2. The State's liability was insured by Second Injury Fund;
3. The employee's average weekly wage was \$696.67;
4. The rate of compensation for temporary total disability was \$365.08 and \$365.08 for permanent partial disability; and
6. The employer/insurer has paid \$5,575.76 in TTD and \$7,688.68 in medical benefits to date.

DISPUTED ISSUES

1. Whether claimant is entitled to permanent total disability (PTD) or permanent partial disability (PPD) for his work-place injuries.
2. Whether Second Injury Fund (SIF) or the employer/insurer is liable for the payment of benefits, if any.
3. Whether future medical care should be awarded.

EVIDENCE

EMPLOYEE'S EXHIBITS:

- A Deposition of Delores Gonzalez
- B Deposition of Dr. D. Volarich
- C James T. Doll Medical Records
- D St. Louis Orthopedics Medical Records
- E St. Joseph Health Center Medical Records
- F Dr. G. Smith Medical Records
- G Pike County Medical Clinic Medical Records
- H Orthopedic Sports Medicine Medical Records
- I Dr. R. Orell Medical Records
- J Metro Neurology Ltd. Medical Records
- K Health South Medical Records
- L Certified Records from Division of Workers' Compensation

SECOND INJURY FUND EXHIBITS:

- 1 Pro Rehabilitation Medical Records

FINDINGS OF FACTS

Raymond Skirvin (Claimant) is a 60-year-old male who has been working as an electrician/lineman most of his working adult life.

On May 20, 2006, Claimant was in the bucket of a bucket truck assisting with a wire "pull." The bucket was elevated to approximately thirty-five feet off the ground. As the pull progressed, the wire came loose and disengaged from the lift. Claimant held onto the wire (approximately 300 pounds) with his hand while other linemen reinstalled the lift and took the weight off Claimant's arm, shoulder and back. Claimant immediately felt pain in his neck and

back. Claimant left the job site and went to the emergency room (ER). At the ER, Claimant was treated conservatively and given a prescription for pain medication.

A short time after his treatment at the ER, Claimant went to Dr. J. Doll for further treatment because his symptoms persisted. From Dr. Doll, Claimant received physical therapy and injections in his back for his pain (Cl. Exh. H, pp7-9.) The conservative treatment did not relieve Claimant's pain. (*Id.* at p5.) An MRI of the lumbar and cervical spine in June 2006 revealed a minimal bulging of his disc at L2-3, slight degeneration and atrophy at C6 & 7, a slight lumbar levoscoliosis and moderately bulging degenerative disc at L2-3, L3-4, and L4-5. (*Id.* at pp 4-5.)¹ Dr. Doll notes that Claimant's nonverbal responses to the conservative treatments and diagnosis "suggested" a non-organic basis (or magnification) for Claimant's pain complaints. (*Id.* at p3, Doll letter 7/17/2006.) Claimant settled the claim for his injuries in September 2007 for 15% PPD of BAW (neck and low back) for \$21,904.80. (Cl. Exh. L, p1.)

Claimant also had pre-existing injuries to his May 2006 injury. In April 2006, Claimant was injured while operating a trencher when the trencher wrenched his right hip and left leg. Claimant had conservative treatment for these injuries and filed no claim.

In 1968, Claimant's right thumb was injured. Dr. D. Volarich rated the thumb at 25% PPD of the right hand. (Cl. Exh. B, depo. exh. 3, p14.)

In 1998, while Claimant was climbing a ladder to attend to a dead electrical line, the line unexpectedly jerked and caused injury to Claimant's left shoulder. Claimant had rotator cuff surgery on his left shoulder. Dr. Volarich rated this injury as 35% PPD. (*Id.* at p14.)

In 1999, Claimant injured his right shoulder pulling fire alarm wire through a conduit. Claimant had surgery on the right shoulder. Dr. Volarich rated the disability of Claimant's right shoulder at 50% PPD. (*Id.* at p14.) Dr. Volarich also noted a pre-existing lumbar spine injury rating it 25% PPD of BAW and pre-existing cervical spine injury rating it 25% PPD of BAW. (*Id.* at p14.) Dr. Volarich found 10% PPD for the left wrist, 25% PPD for the right ankle, 15% PPD for the right knee, and 15% PPD of BAW for pulmonary systems due to smoke inhalation. (*Id.* at p14.) Dr. Volarich also determined that Claimant had a 7.5% PPD of BAW for an aggravation of lumbar syndrome in his April 3, 2006, injury. (Cl. Exh. B, depo. exh. 2, p9.) He also determined that Claimant suffered 15% PPD of BAW for each of cervical spine, lumbar spine, and right shoulder for the injury of May 20, 2006. (Cl. Exh. B, depo. exh. 2, pp9-10.)

Ms. Delores Gonzalez, a vocational rehabilitation expert, testified that Claimant was significantly impaired by his injuries and limitations. She testified Claimant cannot transfer his skills to other jobs. (Cl. Exh. A, depo. exh. 1, pp27-28.)

¹ I am summarizing the findings of Dr. Doll. For a complete review, see Cl. Exh. H.

CONCLUSIONS OF LAW

It is the claimant's burden of proof to prove all the issues that are alleged in the hearing under Chapter 287. As noted by the Court in Cook:

Claimant has the burden of proving all the essential elements of the claim and must establish a causal connection between the accident and injury. Cook v. Sunnen Products Corp., 937 S.W.2d 221, 223 (Mo.App. E.D. 1996) citing: Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute, 793 S.W.2d 195 (Mo.App. E.D. 1990) overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223, (Mo. banc 2003).

Claimant is asking for a determination that he is permanently and totally disabled by his back injury and his various pre-existing injuries.

PERMANENT TOTAL DISABILITY

Claimant asserts that his lower back injury in 2006 in synergy with his pre-existing injuries result in permanent total disability (PTD). The Second Injury Fund (SIF) asserts that if Claimant is PTD, that it is from the 2006 injury alone.

To determine if a person is PTD, there must be a finding that the person is unable to find any job in the open labor market. The test for PTD is the worker's ability to compete in the open labor market. Sutton v. Vee Jay Cement Contracting Co., 37 S.W.3d 803, 811 (Mo.App. 2000) (overruled in part by Hampton, 121 S.W.3d at 225). 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.*; Gassen, 134 S.W.3d at 80. ABB Power T&D Co. v. Kempker, 236 S.W.3d 43, 49 (Mo.App. E.D. 2007).

Claimant has an impressive list of pre-existing injuries, including aggravated lumbar syndrome and chronic lumbar syndrome secondary to disc bulging L3-4, L4-5 and L5-S1 with discogenic pain. Dr. Volarich rated Claimant at 25% PPD of BAW (no surgery). (Cl. Exh. B, depo. exh., p12.) Claimant also suffered a chronic cervical syndrome secondary to disc bulging at C5-6 with protrusion to the right, as well as C6-7 and foraminal narrowing at C3-4 and C4-5 causing intermittent right upper extremity radicular symptoms. For these injuries Dr. Volarich rated Claimant at 25% PPD of BAW (no surgery). (*Id.* at p13.) Dr. Volarich also rated Claimant's right shoulder internal derangement (massive rotator cuff tear, degenerative arthritis and impingement) – S/P debridement of the glenohumeral joint with open repair of the massive rotator cuff tear, distal clavicle excision and anterior acromioplasty at 50% PPD (surgical repair).

(*Id.* at p13.) On the other shoulder Claimant had an internal derangement– S/P open rotator cuff repair with distal clavicle excision and anterior acromioplasty. Dr. Volarich rated Claimant as 35% PPD (surgical repair). (*Id.* at p13.) Dr. Volarich rated Claimant’s right thumb interphalangeal joint fracture/dislocation complicated by infection – S/P ankylosis with multiple deformities as 25% PPD at 175 week level (no surgery). (*Id.* at p13.) Dr. Volarich rated Claimant’s wrists with historic mild bilateral carpal tunnel syndrome at 10% PPD at 175 week level (no surgery). (*Id.* at p13.) Claimant also had a right knee patellofemoral syndrome, which Dr. Volarich rated Claimant at 15% PPD at 160 week level (no surgery). (*Id.* at p13.) Claimant’s right ankle had degenerative arthritis and lateral compartment strain syndrome, which Dr. Volarich rated Claimant at 25% PPD at 155 week level (no surgery). (*Id.* at p13.) Claimant’s smoke inhalation causing mild restrictive lung disease and wheezing that was not treated until after 5/20/06, Dr. Volarich rated as 15% PPD of BAW. (*Id.* at p13.)

The primary injury is the aggravation to the multiple disc disease L2 through S1 spondylolistic L5-S1, which was rated at 45% PPD of BAW by Dr. Volarich. There was no surgical repair and the injury was treated conservatively with physical therapy and pain medication.

Although surgical intervention is not always an indication of the seriousness of an injury, the method of treatment sometimes can be a guide to the severity and the extent of an injury’s disability. Even though Claimant has an impressive diagnoses of cervical and lumbar incapacity from pain and stiffness, the medical notes and opinions of the doctors do not suggest an overriding need for surgical intervention. In fact, in July 2006, Dr. Doll rates Claimant as a 0% PPD for both the April and May 2006 injuries. (Cl. Exh. H, pp1-2.)

In most cases the testimony of a claimant is very persuasive when relating to the Court their subjective pain and disability. During his testimony, Claimant moaned, hissed, and gasped in such an exaggerated fashion it was hard to hear his attorney’s questions. The toll of pain seemed to wear on Claimant so heavily that unconsciousness seemed to be his only refuge. But he did not black out. He testified at length and sometimes in a rather animated fashion. I did not find his testimony to be credible and helpful in determining his disability.

In July 2006, Claimant was physically evaluated by Dr. Doll. Dr. Doll noted that Claimant’s overall effort during the testing for the Functional Capacity Evaluation was “poor.” (Cl. Exh. C, pp1-17.) Dr. Doll specifically noted:

PHYSICAL EXAMINATION: Today, Mr. Skirvin demonstrates significant facial grimacing and wincing during nearly any movement of any portion of any upper or lower extremity citing diffuse pain in the cervical and upper extremity regions. He reports shooting pains down the right arm during movement of his neck to the right side, though during other occasions will move his neck apparently freely during casual conversation without any apparent signs of discomfort. Deep tendon reflexes remained present at ¼ for bilateral elbow flexors and elbow

extensors. Collapsing weakness was noted throughout the right arm without any focal pattern citing his report of neck and upper shoulder discomfort. (*Id.* at p21.)

In August 2000, Claimant was examined by Dr. B. Randolph. Dr. Randolph noted:

In summary, Mr. Skirvin continues to have significant chronic pain complaints which are out of proportion to the objective abnormalities. Certainly, he does have legitimate disease in the shoulders as previously described and has pre-existing lumbar degenerative disc disease, which is fairly diffuse. He does appear to have a degree of mechanical pain in the back and some limitation in shoulder movements and a degree of mechanical pain in the shoulders due to prior injuries and subsequent surgeries. Even so, the extreme pain experience that he has does not appear to be totally consistent with his physical abnormalities and I detect a degree of depression. I suggested that he see his family doctor for evaluation of non-work related depression or other psychological problems. (Cl. Exh. D, p4.)

The determination of the credibility of a witness is a function of the Commission, Smith v. Richardson Bros. Roofing, 32 S.W.3d 568, 575 (Mo.App. S.D. 1994.) I do not find Claimant credible concerning his description of his injury and resulting disability.

I am further convinced of Claimant's magnification of his symptoms because of Dr. P. George's evaluation of Claimant's MRI in 2005, which found that there were little or no herniation in his spine. As noted in the findings,

Description: MRI OF THE CERVICAL SPINE WITHOUT CONTRAST

Patient History: Patient has mid-neck pain with headaches and shoulder pain.

Comparison: 5/28/02.

Technique: T1 sagittal images, FSE T2 sagittal images, FE T2 axial images, 3D FE axial T2 images.

Findings: The alignment of the cervical spine is anatomic without listhesis. The height of the cervical vertebra is normal. Signal intensity of the cervical spinal cord is unremarkable. Cerebellar tonsils are normally positioned within the posterior fossa.

C2-3: Negative for herniated nucleus pulposus, spinal stenosis or neuroforaminal narrowing.

Employee: Raymond Skirvin

Injury No. 06-047647

C3-4: There is spondylosis with posterior osteophyte/spur on the left. There is mild narrowing of the left C3-4 neuroforamen. No right sided neuroforaminal narrowing or spinal stenosis.

C4-5: Negative for herniated nucleus pulposus, spinal stenosis. There is minimal narrowing of the left neuroforamen.

C5-6: There is a tiny disc bulge. There is no spinal stenosis. There is mild neuroforaminal narrowing.

C6-7: There is diffuse spondylosis. There is mild spinal stenosis. There is bilateral neuroforaminal stenosis.

C7-T1: Negative for herniated nucleus pulposus, spinal stenosis or neuroforaminal narrowing.
(Cl. Exh. J, p5.)

An MRI on his lumbar spine in June 2006 revealed:

On 6/2/06, a lumbar MRI revealed slight lumbar levoscoliosis and moderate spondylosis with slight to moderately bulging degenerative and atrophic discs throughout most marked at L2-3, L3-4, and L4-5. No definite disc extrusion was seen. Slight to moderate foraminal stenosis at L4-5, L5-S1, and to a lesser degree at L2-3 greater on the left than the right. Grade I retrolisthesis at L4-5 and anterolisthesis at L5-S1 was observed, noted to be degenerative in nature. Schmorl's node was seen at T12 with no compression fracture.
(Cl. Exh. C report 6/21/06, p2.)

These are not results that would guide a physician to recommend surgery. These are not the results that compel me to find permanent total disability (PTD). I also do not find that Claimant is in any need of future medical care.

I believe Claimant has some pain, but a degree of it is degeneration and none of it is to the level of pain that would render Claimant PTD.

Because of Claimant's symptom magnification, it is difficult to assess Claimant's actual primary spine disability. I do not find that any disability of any part of Claimant's back is any more than his September 17, 2007, settlement of 15% PPD combined (120 weeks).

As for the pre-existing disabilities, I find that Claimant's right shoulder has a 20% PPD (46.4 weeks), and his left shoulder has a 15% PPD (34.8 weeks). Further, I find his right knee at 15% PPD (24 weeks), and his right ankle degeneration at 15% PPD (23.25 weeks) based on Dr.

Employee: Raymond Skirvin

Injury No. 06-047647

Volarich's opinion and my review of the medical files. The total of his pre-existing PPD is 248.45 weeks. I find that there is a synergy of the disabilities that are a hindrance and obstacle to employment which amounts to 24 weeks in excess of the total of Claimant's disabilities for an award of \$8,761.92 (24 x \$365.08).

Date: _____

Made by: _____

Henry T. Herschel
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation