

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

Injury No.: 01-167788

Employee: George Sutton
Employer: The Doe Run Company (Settled)
Insurer: Pacific Employers Insurance Company (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

Affirmative credibility findings

Employee, in his brief, notes that the administrative law judge summarized the evidence, but declined to state which (if any) medical or vocational opinions he found to be credible.

Section 287.460.1 mandates that an award in a contested workers' compensation case be accompanied by findings of fact and conclusions of law. The Missouri Supreme Court has declared that such statutory requirements contemplate an unequivocal affirmative finding as to what the pertinent facts are.

Stegman v. Grand River Reg'l Ambulance Dist., 274 S.W.3d 529, 533 (Mo. App. 2008) (citations omitted).

We find persuasive the opinions from Dr. Margolis and the vocational expert Timothy Lalk (and we so find) that employee's permanent and total disability results from the effects of the injuries employee sustained on January 28, 2001, in combination with employee's preexisting conditions of ill.

Permanent total disability – subsequent injury

We agree with the administrative law judge that, although employee is permanently and totally disabled, employee is unable to meet his burden in this case of proving the Second Injury Fund is liable for permanent total disability benefits. This is because each of the experts to address the topic included the effects of a subsequent January 28, 2001, injury in their opinions finding employee to be permanently and totally disabled. As the administrative law judge noted, employee voluntarily dismissed his claim against the

Employee: George Sutton

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Second Injury Fund referable to the January 2001 injury as part of his settlement with employer in Injury No. 99-175488, and thus it cannot be considered now.

Conclusion

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

The award and decision of Administrative Law Judge Gary L. Robbins, issued October 22, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3rd day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARDS

Employee: George T. Sutton Injury No. 99-175488,
00-179497 and 01-167788

Dependents: N/A

Employer: The Doe Run Company

Additional Party: Second Injury Fund

Insurer: Pacific Employers Insurance Company

Appearances: Robert W. Meyers, attorney for employee.
Gregg N. Johnson, attorney for Second Injury Fund.

Hearing Date: July 18, 2012 Checked by: GLR/rm

SUMMARY OF FINDINGS IN 99-175488

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? February 3, 1999.
5. State location where accident occurred or occupational disease contracted: Iron 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: The employee twisted his right knee as he was getting into a bobcat.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Right knee.
14. Nature and extent of any permanent disability: The employee settled his claim with the employer-insurer for 30% permanent partial disability of the right knee.
15. Compensation paid to date for temporary total disability: \$0.
16. Value necessary medical aid paid to date by employer-insurer: \$10,218.97.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$569.18.
19. Weekly compensation rate: The employee's rate for temporary total and permanent total disability is \$379.45 per week. His rate for permanent partial disability is \$294.73 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: None.

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Robert W. Meyers.

SUMMARY OF FINDINGS IN 00-179497

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? December 19, 2000.
5. State location where accident occurred or occupational disease contracted: Iron 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: The employee developed bilateral wrist problems due to the requirements of his job.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Bilateral wrists.
14. Nature and extent of any permanent disability: The employee settled his claim with the employer-insurer for 20% permanent partial disability of each wrist.
15. Compensation paid to date for temporary total disability: \$0.
16. Value necessary medical aid paid to date by employer-insurer: \$0.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$569.18.
19. Weekly compensation rate: The employee's rate for temporary total and permanent total disability is \$379.45 per week. His rate for permanent partial disability is \$314.26 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.

22. Second Injury Fund liability: See Award.
23. Future requirements awarded: None.

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Robert W. Meyers.

SUMMARY OF FINDINGS IN 01-167788

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? January 28, 2001.
5. State location where accident occurred or occupational disease contracted: Iron 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: The employee developed hearing loss due to noise exposure at his workplace.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Hearing loss.

14. Nature and extent of any permanent disability: The employee settled his claim with the employer-insurer for 7.3 % of the body as a whole for hearing loss.
15. Compensation paid to date for temporary total disability: \$0.
16. Value necessary medical aid paid to date by employer-insurer: \$22.45.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$569.18.
19. Weekly compensation rate: The employee's rate for temporary total and permanent total disability is \$379.45 per week. His rate for permanent partial disability is \$314.26 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: \$0. See Award.
22. Second Injury Fund liability: \$0. See Award.
23. Future requirements awarded: None.

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Robert W. Meyers.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On July 18, 2012, the employee, George T. Sutton, appeared in person and with his attorney, Robert W. Meyers for a hearing for final awards. The employer-insurer was not present at trial as they already settled their cases with the employee. Assistant Attorney General Gregg N. Johnson represented the Second Injury Fund. 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 a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS IN 99-175488:

1. The Doe Run Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Pacific Employers Insurance Company.
2. On February 3, 1999, George T. Sutton was an employee of The Doe Run Company and was working under the Workers' Compensation Act.
3. On February 3, 1999, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$569.18. His rate for temporary total and permanent total disability is \$379.45 per week. His rate for permanent partial disability is \$294.73 per week.
7. The employee's injury was medically causally related to the accident of occupational disease.
8. The employer-insurer paid \$10,218.97 in medical aid.
9. The employer-insurer paid \$0 in temporary disability benefits.
10. The employee had no claim for previously incurred medical bills.
11. The employee had no claim for mileage.
12. The employee had no claim for future medical care.
13. The employee had no claim for any temporary disability benefits.
14. The employee had no claim for permanent partial or permanent total disability as to the employer-insurer.
15. The parties agreed that the employee reached maximum medical employment on August 23, 2003.

ISSUES IN 99-175488:

1. Liability of the Second Injury Fund for permanent partial and/or permanent total disability.
2. Liability of the Second Injury Fund for permanent total disability under the Schoemehl decision.

UNDISPUTED FACTS IN 00-179497:

1. The Doe Run Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Pacific Employers Insurance Company.
2. On December 19, 2000, George T. Sutton was an employee of The Doe Run Company and was working under the Workers' Compensation Act.
3. On December 19, 2000, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$569.18. His rate for temporary total and permanent total disability is \$379.45 per week. His rate for permanent partial disability is \$314.26 per week.
7. The employee's injury was medically causally related to the accident of occupational disease.
8. The employer-insurer paid \$0 in medical aid.
9. The employer-insurer paid \$0 in temporary disability benefits.
10. The employee had no claim for previously incurred medical bills.
11. The employee had no claim for mileage.
12. The employee had no claim for future medical care.
13. The employee had no claim for any temporary disability benefits.
14. The employee had no claim for permanent partial or permanent total disability as to the employer-insurer.
15. The parties agreed that the employee reached maximum medical employment on July 1, 2003.

ISSUES IN 00-179497:

1. Liability of the Second Injury Fund for permanent partial and/or permanent total disability.
2. Liability of the Second Injury Fund for permanent total disability under the Schoemehl decision.

UNDISPUTED FACTS IN 01-167788:

1. The Doe Run Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Pacific Employers Insurance Company.
2. On January 28, 2001, George T. Sutton was an employee of The Doe Run Company and was working under the Workers' Compensation Act.
3. On January 28, 2001, the employee sustained an accident arising out of and in the course of his employment.

4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$569.18. His rate for temporary total and permanent total disability is \$379.45 per week. His rate for permanent partial disability is \$314.26 per week.
7. The employee's injury was medically causally related to the accident of occupational disease.
8. The employer-insurer paid \$22.45 in medical aid.
9. The employer-insurer paid \$0 in temporary disability benefits.
10. The employee had no claim for previously incurred medical bills.
11. The employee had no claim for mileage.
12. The employee had no claim for future medical care.
13. The employee had no claim for any temporary disability benefits.
14. The employee had no claim for permanent partial or permanent total disability as to the employer-insurer.
15. The parties agreed that the employee reached maximum medical employment on January 28, 2001.

ISSUES IN 01-167788:

1. Liability of the Second Injury Fund for permanent partial and or permanent total disability.
2. Liability of the Second Injury Fund for permanent total disability under the Schoemehl decision.

EXHIBITS IN ALL CASES:

The following exhibits were offered and admitted into evidence:

Employees Exhibits:

- A. Social Security disability records.
- B. Medical records from Doe Run, Mineral Area Regional Medical Center, William A. Christmas, D.O. and Walter C. Boardwine, D.O.
- C. Medical records from Mineral Area Regional Medical Center and Walter C. Boardwine, D.O.
- D. Medical records of David A. Goran, M.D.
- E. Medical records from Washington University Orthopaedics.
- F. Medical records of Craig K. Reiss, M.D. and Alan N. Weiss, M.D.
- G. Medical records of Beverly Field, Ph.D.
- H. Medical records of John W. McKinney, M.D.
- I. Medical records from Central Institute for the Deaf and David Mason, Ph.D.
- J. Medical records from Barnes Jewish Hospital.
- K. Medical records from Kneibert Clinic and David R. Gayle, D.O.
- L. Medical records of Heidi Prather, D.O.

- M. Settlement in Injury Number 99-175488.
- N. Settlement in Injury Number 00-179497.
- O. Settlement in Injury Number 01-167788.
- P. Medical records from Lucy Lee Hospital.
- Q. Deposition of Robert P. Margolis, M.D.
- R. Deposition of Timothy G. Lalk.
- S. Marriage license and marriage certificate.
- T. Medications list.

The Second Injury Fund exhibits:

1. Deposition of Susan Shea.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT

The employee was the only person to personally testify at trial. All other evidence was presented in the form of written records, medical records and deposition testimony.

Three injuries were consolidated for trial.

In Injury Number 99-175488 the employee filed a claim indicating that he injured his right knee on February 3, 1999. The employee is claiming that the Second Injury Fund/SIF has either permanent partial or permanent total disability liability. The employee had his initial knee surgery on February 18, 2001. The employee testified that he has had a total of four knee surgeries with two being related to his work accidents. At trial the SIF stipulated to accident. The employee settled his claim with the employer-insurer on June 3, 2008 for 30% permanent partial disability of his right knee.

In Injury Number 00-179497 the employee filed a claim indicating that that he developed bilateral carpal tunnel syndrome as of December 19, 2000. The employee is claiming that the SIF has liability for either permanent partial or permanent total disability liability. The employee had carpal tunnel surgery on May 20, 2003. At trial the SIF stipulated to accident or occupational disease. The employee settled his claim with the employer-insurer on June 3, 2008 for 20% permanent partial disability of each wrist.

In Injury Number 01-167788 the employee filed a claim indicating that he has bilateral hearing loss as of January 28, 2001. The employee is claiming that the SIF has either permanent partial or permanent total disability liability. At trial the SIF stipulated to accident. The employee settled his claim with the employer-insurer on June 3, 2008 for 7.3 % permanent partial disability for hearing loss.

On January 28, 2001 the employee had another injury. He was working light duty due to his January 18, 2001 right knee surgery from Injury Number 99-175488. He was injured when

he fell as he was standing up from a chair. In addition, as the employee was being taken to the hospital, the attendants dropped the employee's stretcher with him on it. The employee claims he hurt his body as a whole including his back and neck. The employee had filed a claim for this event that was assigned Injury Number of 01-009180. This case was dismissed on June 13, 2008. This case was dismissed as part of the employee's stipulation in Injury Number 99-175488 where the employee agreed to dismiss this case with prejudice. (Note-Employee Exhibit M is incomplete as pages 2 and 5 were omitted by counsel. The entire stipulation is contained in the files of the Division of Workers' Compensation). **The incident of January 28, 2001 is a subsequent event as at trial there was no claim filed or pending before the Court for a January 28, 2001 injury regarding the above mentioned factual situation.**

The employee received social security disability in 2001. He testified that he was told to apply for social security disability prior to 1999. The disability was based on the employee's history of back problems, polio, the incident when he hurt his right knee on February 3, 1999 and the chair incident when he was injured when he fell on January 28, 2001.

The employee had injuries that pre-dated his 1999 right knee accident:

- Polio. The employee testified that he had polio since he was three years old. He indicated that his left leg is shorter than his right, he has foot drop and his foot turns at the ankle. He also testified that he had to wear a brace in later years to assist with the foot drop. He indicated that he never played in the gym at school and that when he was 18 the military turned him down. He remembers that he wore built up shoes. Mr. Sutton testified that the polio caused him to limp at work and that one leg being shorter than the other caused back pain. He reported that standing at work caused his back to hurt. He was allowed to use slip on boots due to his problems. He indicated that he got treatment for his degenerative back problems including Oxycontin and Hydrocodone and epidural injections and this helped his leg also. Despite these problems he testified that he did what he had to at work to get his job done. He testified that he had seniority and did not have to do the hardest jobs. He added that he missed some work over the years due to his polio but he could not remember when.
- Degenerative back. The employee has had degenerative back problems for a long time prior to his February 3, 1999 knee accident. The records of Drs. Prather and Gayle document that they had treated the employee for longstanding degenerative prior back problems that pre-dated the employee's work related accident and continued after his work related accidents. Medical records indicate that prior to January 28, 2001 the employee had been diagnosed with degenerative disc changes at L5-S1 and an annular tear at L4-5. He was treated with narcotic medication and steroid injections for these problems. As of November 9, 1999, Dr. Gayle reported treating the employee for several years for back pain. He had been the employee's treating physician for 20 years. On January 31, 2001 he reported that the employee is no longer able to be actively employed. He said the employee was permanently and totally disabled due to vascular disease, degenerative joint disease of the lumbar

spine, diverticulosis of the colon, degenerative joint disease and surgery of the right knee and a recent injury to the spine and neck from a recent fall at work. On October 18, 2000, Dr. Prather had been treating the employee for long term back problems. She said that the employee had reached MMI but has significant impairment with completing a job of anything with lifting, bending, twisting, stooping, climbing, or any repeated motions of rotation.

At the time of the trial the employee was 62 years old. He was married to his present wife, Connie on February 14, 1961. They had two children that are grown and not dependent. He had worked for Doe Run from the 1970's until January 28, 2001, when he was injured in the chair incident. The employee testified that he completed the 9th grade but was in special education classes. He said that he had trouble reading and never got a GED.

The employee testified that he was taking narcotic medication prior to his work accidents and continues to take them as of the trial. He reported that he spends most of his days in his chair but that he also has to lie down for as much as 6-7 times a day due to the increased back pain that he has had since the chair incident of January 28, 2001. He testified that even daily activities aggravate his back. He indicated that his neck is not bothering him other than arthritis.

The employee testified that he has pain due to his polio, his back, his right knee and both wrists. In addition to his other problems he testified that he suffers from sleep apnea, heart problems and depression.

Dr. Margolis

Dr. Margolis evaluated the employee at the request of his counsel. He saw the employee on June 7, 2002 and again on August 5, 2004. He reviewed medical records and prepared reports dated November 12, 2002 and December 3, 2004. Dr. Margolis took a history from the employee on both dates he saw him. He also conducted a physical exam.

In his November 12, 2003 report the doctor stated that:

- The employee's disabilities combined to a greater disability.
- The employee's conditions are hindrances and obstacles to employment.
- Dr. Margolis concluded that "It is also my opinion that based on the patient's disabilities as well as his age, educational level and work experience that the average employer would not hire this patient in the normal course of doing business and therefore, I consider him to be totally and completely disabled from all forms of employment, however, I would defer to a vocational rehabilitationist". It is important to note that he included the chair events of January 28, 2001 as part of his assessment.

In his December 3, 2004 report, Dr. Margolis considered other problems of the employee including bilateral carpal tunnel surgery and additional knee surgery. He opined that the employee continues to be totally and completely disabled.

As a result of both of his examinations, Dr. Margolis provided his opinions and ratings:

- The employee has a 30% permanent partial disability of each wrist.
- He has a 45% permanent partial disability of the right knee. He took into account the employee's additional surgery.
- Dr. Margolis deferred the tinnitus opinions to the experts.
- The employee has a 35% permanent partial disability of the lumbar spine, 20% for the prior degenerative disease of the lumbar spine and 15% from the January 28, 2001 accident. The doctor reported that the degeneration was significant referencing the MRI reports in 1999 and 2001.
- The employee had a 20% permanent partial disability due to polio.

In his deposition testimony, Dr. Margolis opined that the employee was permanently and totally disabled after his first examination in 2002 and again after his second examination. Dr. Margolis further opined that the employee's heart condition did not create any significant disability. He provided and stated that his limitations applied to the employee's hands, his knee, his low back and neck.

Dr. Margolis opined that the "primary injuries along with the tinnitus, the bilateral wrists, right knee combined for a greater total disability to his entire body with the pre-existing degenerative back and polio for a greater disability to his entire body". He indicated that they combined synergistically. His opinion was that the right knee combined with the prior polio and degenerative disc disease for a greater disability to his entire body. He stated that the main synergism is between the knee, the back and the polio. He stated that the employee's hand injury makes it that much more difficult to deal with the other injuries. He testified that when he saw employee the first time he was taking Vioxx, Fiorinal, Oxycontin and muscle relaxers. The second time he was taking Vioxx, APAP with codine and Oxycontin. He indicated that he had no recollection about what Dr. Gayle said about the employee going on disability prior to the string of injuries.

Dr. Margolis testified that the employee was permanently and totally disabled after his first report. He said that his knee surgery and bilateral CTS were not necessary for him to opine that employee was permanently and totally disabled. He said that the subsequent knee problem just made a bad knee worse. He testified that the employee offered no complaints regarding his hands in the first report and he did not consider it at that time. But he added that his subsequent carpal tunnel surgery just made the employee more total.

Dr. Margolis testified that the January 28, 2001 accident/falling re the chair contributed to the employee's total disability as that accident exacerbated his back. He indicated that the employee reported his back was worse after the chair incident which was consistent with what he found. He also agreed that the employee having to lie down 6-7 times a day for pain control, after the chair incident, is consistent with his findings that this accident made his back worse.

Dr. Margolis testified that the treatment for the employee's hands and the subsequent knee surgery were for things that happened prior to January 2001. He stated that the second time

he saw the employee the main difference was that the employee had the carpal tunnel surgery and the subsequent surgery out of the 1999 incident.

Tim Lalk

Mr. Lalk evaluated the employee at the request of his counsel. Mr. Lalk saw the employee on May 11, 2005 and prepared a report dated June 10, 2005. He testified by deposition on August 31, 2010. Mr. Lalk reviewed medical records, took a history from the employee and performed some testing.

Mr. Lalk testified that his overall testing indicated that the employee is not a candidate for post secondary training. He said that the employee is not likely to benefit from remedial training and pursuing a GED. Mr. Lalk further indicated that the employee would have difficulty performing many occupations even at unskilled levels.

Mr. Lalk testified that his report was based on a totality of all of the employee's injuries and illness and educational background. He indicated that the employee has always had a limitation in terms of finding jobs that would require reading beyond his ability, and now he is restricted by his physical limitations.

Mr. Lalk indicated that the employee's work history was primarily as a laborer. He stated that from what the employee described he would not expect him to do any type of physical work on a routine basis. He reported that the employee's complaints become too great even from minimal type activities and he would be limited to at best a sedentary or near sedentary job. In addition Mr. Lalk testified that there are no jobs that would accommodate the employee lying down for short periods.

Mr. Lalk testified that the medical records corroborate the symptoms that the employee reported. He testified that with the employee's vocational capability he did not see any possibility of him finding a job in a competitive manner. He also testified that the employee has no transferable skills, he is not a candidate for retraining and he cannot do his past work.

Mr. Lalk was aware that the last day that the employee worked was January 28, 2001 and that was the day of the accident where the employee fell out of a chair and then was dropped off the gurney when he was being taken to the hospital. After this event the employee was treated conservatively for cervical symptoms and back symptoms. Mr. Lalk testified that the employee's back symptoms worsened from what they were before falling out of the chair.

When Mr. Lalk saw the employee in 2005 he knew that the employee had had back problems for many years and was using a tens unit and was taking Oxycontin and Tylenol 3. He did not indicate how long he had been taking narcotic drugs. He testified that the employee had to lie down multiple times a day primarily due to his back. He reported that as of 2000, Dr. Prather was giving the employee epidural steroid injections. He indicated that between the summer of 2000 and the accident of January 28, 2001 there are no records that the employee had to lie down 5-6 times a day. The employee told Mr. Lalk that after 1998 his back problems

increased and he then had injections. In this period, Dr. Gayle apparently told the employee he should quit what he was doing, repetitive bending seemed to exacerbate his symptoms.

In summary Mr. Lalk reported that:

- Based on the restrictions of Dr. Margolis the employee could not do his former jobs at Doe Run.
- The employee could not do any labor, even light labor because of the restrictions on repetitive activities involving his hands and back.
- The employee has no training that would allow him to pursue skilled sedentary or near sedentary jobs.
- Due to his restrictions in verbal skills and ability to read and understand the employee could not do a cashier type job.
- Based on the employee's pain complaints in his back that prevents standing and walking and requires him to periodically lie down, the employee is not employable in the open labor market.

Susan Shea

Ms. Shea was retained by the SIF to conduct a records review. She reviewed records and reviewed the employee's deposition testimony. She testified by deposition on January 10, 2012. She did not have the opportunity to personally interview the employee.

She said she concluded that the employee is permanently and totally disabled. She outlined part of her reasoning as:

- The employee is an older man.
- He had a past history of polio and stomach problems.
- He had a hearing deficiency.
- He twisted his right knee in 1999 and had surgery; up to then he was able to work full duty.
- The employee returned to work on crutches and fell on January 28, 2001 injuring his back and knee and then they dropped his stretcher.
- He subsequently had pain and restrictions that would not allow him to continue working.

Ms. Shea's specific opinion was that the employee was permanently and totally disabled due only to the accident of January 28, 2001. She supports her conclusion stating:

- Up until that time the employee was working full duty. She opined that he had problems in the past but they were not things that kept him from working and he would have been able to continue working had it not been for the injury of January 28, 2001.
- She agreed that even if the employee had not had his other past injuries, the January 28, 2001 injuries would be enough for her to say that he is permanently and totally disabled.

- She stated that the employee lying down 6 times was caused by the last accident due to his back pain.
- She agreed that anyone who has to lie down 6 times a day due to pain would not be able to hold a job.

Ms. Shea reported that she did not review records from Dr. McKinney, Dr. Mason, Dr. Gayle, or Kneibert Clinic.

Ms. Shea agreed that the employee's back got worse after the January 28, 2001. She testified that the employee worked full duty until the time he injured his right knee in 1999. He was on light duty after the January 18, 2001 right knee surgery but he was working when he had his January 28, 2001 accident when he fell out of the chair and was subsequently dropped while he was on a stretcher.

RULINGS OF LAW IN 99-175488, 00-179497 AND 01-167788

The issues are the same in 99-175488, 00-179497 and 01-167788. In each case the employee claims that the SIF has liability for permanent partial or permanent total disability with the emphasis being placed on permanent total disability.

Permanent Total Disability

The employee alleges that the Second Injury Fund is liable for permanent total disability benefits resulting from a combination of his pre-existing injuries and the injuries from his 99-175488 case, or his 00-179488 case or his 01-167788 case. Under Section 287.220 RSMo., the employee has the burden of proving that he is permanently and totally disabled and unemployable in the open labor market.

The Second Injury Fund is only liable if the combination of employee's pre-existing injury and the primary injury had a synergistic affect which causes employee's total disability to exceed the sum of the disabilities from the pre-existing and the primary injury. In cases in which an employee is determined to be totally disabled Section 287.220 RSMo. sets forth the steps in calculating the compensation due an employee and from what source. Kizior v. Trans World Airlines, 5 SW3d. 195, 200 (Mo.App. 1999). In that case the court stated as follows:

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 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.

The first decision that has to be made is whether the employee is permanently and totally disabled. That decision is easy; there is no question that at the time of his trial the employee was permanently and totally disabled. The Court so finds. The greater and more difficult question is what caused the employee to be permanently and totally disabled?

The employee has the burden of proof on the issue of permanent total disability. He has the responsibility to prove by competent and credible expert medical testimony that his work related and or pre-existing disabilities combine under Section 287.220 RSMo. to create permanent total liability for the SIF. In this case he must show that the pre-existing disabilities combine with the disabilities from each of his three cases that were pending at the time of trial. A critical piece of evidence in this case is that in Injury Number 01-009180, the chair incident of January 28, 2001 was not before the Court for adjudication as the employee dismissed it in 2008 as part of his settlement in Injury Number 99-175488.

When you examine the opinions of Dr. Gayle, Dr. Prather, Dr. Margolis, Tim Lalk and Ms. Shea, they all agreed that the employee was permanently and totally disabled. The only substantial difference was that Ms. Shea said that the employee was permanently and totally disabled only from the chair incident of January 28, 2001. All of the others opined that the employee was permanently and totally disabled in combination. **In each of their opinions, whether in their reports or deposition testimony, they all included and considered the events of the January 28, 2001 chair incident where the employee injured his back and neck in their determinations of permanent total disability.** The Court must look at this event as a subsequent incident that was not before the Court for determination. There was no claim pending before the Court that involved the liability of the Second Injury Fund for this event standing alone or in combination. Not one of the expert medical opinions determined permanent total disability without including this subsequent event in their determination of disability.

The employee fails in his efforts to prove that he was permanently and totally disabled in any of his three cases under the requirements of Section 287.220. He has not met his burden of proof to show by competent expert medical opinion that the SIF has any liability for permanent total disability. The employee's claim for permanent total disability is denied in each of the employee's three cases.

Liability of the Second Injury Fund for permanent total disability under the Schoemehl decision.

As the Court denied the issue of permanent total disability, this issue is moot.

Permanent Partial Disability

The employee in each of his cases alleges that the Second Injury Fund is liable for permanent partial disability benefits. The employee alleges that he has pre-existing disabilities of such a serious nature as to constitute a hindrance or obstacle to employment or re-employment. The employee has the burden of proving that the pre-existing disabilities exceed the applicable statutory threshold of 12½ % for the body as a whole or 15% of a major extremity. The Second Injury Fund is only liable if the combination of employee's pre-existing injury and the primary

injury had a synergistic affect which causes the employee's total disability to exceed the sum of the disabilities from the pre-existing and the primary injury.

While the Court has ruled that the employee has not met his burden of proof documenting SIF liability for permanent total disability, he has certainly provided more than ample evidence documenting SIF liability for permanent partial disability.

Injury Number 99-175488

In this case, as of his November 12, 2003 rating, Dr. Margolis rated the employee's prior degenerative disc disease at 20% permanent partial disability of the body as a whole. He rated that employee's pre-existing polio at 20% permanent partial disability of the body as a whole. In addition, in this first evaluation he rated the employee as having a 35% permanent partial disability of his right knee.

Based on a consideration of all of the evidence that Court finds:

- The employee's rate for permanent partial disability is \$294.73.
- The employee settled his case for \$14,147.04 which equates to 30% permanent partial disability of the knee.
- The Court finds that the employee has a pre-existing 20% permanent partial disability due to his back.
- The Court finds that the employee has a pre-existing 20% permanent partial disability due to polio.
- The Court finds that the employee does in fact have a 30% permanent partial disability of his knee.
- The employee's pre-existing disabilities synergistically combine with his primary disabilities to create a hindrance or obstacle to employment or re-employment.
- The Court assigns a 15% loading factor to this case.

The Second Injury Fund is ordered to pay \$9,195.58 to the employee as compensation in this case.

Injury Number 00-179497

In this case Dr. Margolis rated the employee as having a 30% permanent partial disability of each wrist.

The Court adopts the ruling in 99-175488 in this case. Based on a consideration of all of the evidence the Court finds:

- The employee's rate for permanent partial disability is \$314.26.
- The employee settled his case for \$23,331.77 which equates to a 20% permanent partial disability of each wrist.
- The Court finds that the employee does in fact have a 20% permanent partial disability to each wrist.

Employee: George T. Sutton

Injury No. 99-175488,
00-179497 and 01-167788

- The employee's pre-existing disabilities synergistically combine with his primary disabilities to create a hindrance or obstacle to employment or re-employment.
- The Court assigns a 15% loading factor in this case.

The Second Injury Fund is ordered to pay \$13,104.64 to the employee as compensation in this case.

Injury Number 01-167788

The employee's rate for permanent partial disability is 314.26.

The employee settled his case for a 7.3% hearing loss.

The Second Injury Fund is not ordered to pay any permanent partial disability to the employee as this settlement does not meet the "threshold" requirements of Section 287.220.

ATTORNEY'S FEE:

Robert W. Meyers, attorney at law, is allowed a fee of 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:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation