

**FINAL AWARD ALLOWING COMPENSATION**

Injury No.: 06-069030

Employee: Clarence Thomas  
Employer: Board of Police Commissioners of Kansas City, Missouri (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of the 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.<sup>1</sup> Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the amended award of the administrative law judge (ALJ) 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 of the ALJ dated November 25, 2009, by issuing a separate opinion allowing compensation in the above-captioned case.

**Preliminaries**

Employee settled his claim against employer and proceeded to final hearing against the Second Injury Fund. The ALJ heard this matter to consider the nature and extent of any Second Injury Fund liability.

The ALJ found that employee's primary injury combined with his preexisting disabilities to result in a permanent partial disability enhancement of 10% above the simple arithmetic sums of the separate disabilities.

Employee appealed to the Commission alleging that the ALJ erred in denying him permanent total disability benefits against the Second Injury Fund.

Therefore, the only issue currently before the Commission is the nature and extent of Second Injury Fund liability.

**Findings of Fact**

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are incorporated and adopted by the Commission herein.

Dr. Koprivica opined in his original independent medical evaluation report that employee is employable, but that he would defer to a vocational expert on that issue. He further opined that if it is determined by a vocational expert that employee "can indeed access the open labor market within the restrictions [he] outlined[,] ... [he] would consider an enhancement factor of 10 percent above the simple arithmetic sum of the separate disabilities to be appropriate."

Mr. Dreiling provided the only vocational expert opinion in this case. He opined that employee would not be a candidate to maintain employment in the open labor market.

After reviewing Mr. Dreiling's report, Dr. Koprivica issued an addendum to his original report and concluded, based on Mr. Dreiling's findings, that employee is permanently and totally disabled.

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2005 unless otherwise indicated.

Employee: Clarence Thomas

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Mr. Dreiling testified during his deposition that Dr. Koprivica's restrictions do not take employee out of the workforce. Mr. Dreiling also admitted during his deposition that in reviewing employee's medical records he did not find any restrictions regarding employee's right knee, low back, left wrist, or left shoulder. Mr. Dreiling was aware that employee was working full duty at the time of the primary injury.

### **Conclusions of Law**

#### **Primary Injury**

With regard to employee's primary injury, the ALJ found that because employee settled his claim against employer for 23% permanent partial disability of the body as a whole, the doctrine of collateral estoppel precludes employee from relitigating the nature and extent of permanent partial disability attributable to the primary injury in his case against the Second Injury Fund. Based on this finding, the ALJ determined that employee was bound by his prior settlement and summarily concluded that employee sustained 23% permanent partial disability of the body as a whole as a result of the primary injury.

We find that the ALJ's discussion and application of collateral estoppel amounts to a misstatement of the law. Therefore, we do not adopt the ALJ's legal findings with respect to the nature and extent of employee's permanent partial disability resulting from the primary injury. However, based upon all of the testimony, medical records, independent medical evaluations, and the evidence as a whole, we agree with the ALJ's ultimate conclusion and find that employee sustained 23% permanent partial disability of the body as a whole as a result of the primary injury.

#### **Second Injury Fund Liability**

In awarding employee enhanced permanent partial disability benefits of 10%, the ALJ rejected Dr. Koprivica and Mr. Dreiling's ultimate conclusions that employee is permanently and totally disabled as a result of a combination of his primary injury with his preexisting disabilities. We agree with the ALJ's credibility findings, but find that additional support for said findings is warranted.

Mr. Dreiling largely based his opinion on employee's problems relating to the right knee, back, and left upper extremity. However, Mr. Dreiling admitted during his deposition that in reviewing employee's records he did not find any restrictions regarding employee's right knee, back, or left upper extremity.

Mr. Dreiling notes in his report that he did not even perform any type of vocational testing on employee before arriving at his conclusions. Further, as noted above, Mr. Dreiling testified during his deposition that Dr. Koprivica's medical restrictions do not preclude employee from working. Mr. Dreiling even stated that there are some security guard posts that would allow him to alternate sitting, standing, and walking, as required by Dr. Koprivica's restrictions.

Based on these contradictions and lack of basis for his ultimate conclusion, we do not find Mr. Dreiling's vocational opinion credible. We further find that because Dr. Koprivica's supplemental opinion that employee is permanently and totally disabled is based entirely on Mr. Dreiling's opinion, Dr. Koprivica's supplemental opinion is not credible either.

The evidence is clear that employee's preexisting conditions did cause him some minimal difficulties before his accident on July 23, 2006; however, he continued to remain employed full-time, and worked full-time for almost a year after the 2006 accident as well. Employee continued to work through March of 2007 and only stopped working because he had reached 30

Employee: Clarence Thomas

years of employment at the Kansas City Missouri Police Department at which time all officers are forced to take a mandatory retirement.

We find that the totality of the evidence shows that while employee has physical problems that somewhat limit his ability to compete for more physically demanding jobs, he has numerous other skills, which would assist him in obtaining and maintaining employment in the open labor market. For these reasons, we find Dr. Koprivica's initial opinion that employee is employable to be the most credible. Therefore, in accordance with Dr. Koprivica's initial opinion we find that employee's primary injury combined with his preexisting disabilities to result in a permanent partial disability enhancement of 10% above the simple arithmetic sums of the separate disabilities.

**Award**

We affirm the ALJ's award of 10% enhanced permanent partial disability benefits against the Second Injury Fund for the reasons set forth 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.

The amended award and decision of Administrative Law Judge Rebecca S. Magruder, issued November 25, 2009, is attached and incorporated to the extent it is not inconsistent with this final award.

Given at Jefferson City, State of Missouri, this 26<sup>th</sup> day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

DISSENTING OPINION FILED  
\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

Employee: Clarence Thomas

**DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be modified and employee should be awarded permanent total disability benefits against the Second Injury Fund.

First, there is no dispute that employee suffered an accident that arose out of and in the course of his employment on July 23, 2006, and that the injuries resulting from said accident combined with employee's preexisting disabilities to trigger Second Injury Fund liability. The issue is whether the combination of employee's primary injury and preexisting disabilities resulted in employee's permanent and total disability.

Permanent and total disability is defined by § 287.020.7 RSMo as the "inability to return to any employment ...."

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. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

*Gordon v. Tri-State Motor Transit Company*, 908 S.W.2d 849, 853 (Mo.App. 1995) (citations omitted).

When Dr. Koprivica issued his initial report, he clearly deferred to a vocational expert's opinion with regard to employability. Dr. Koprivica even stated that "[i]f it were determined by a vocational expert that [employee] is permanently totally disabled, I would consider the permanent total disability to arise based on the impact of combining all of the disabling conditions that I have identified."

Mr. Dreiling provided the only vocational expert opinion in this case. Mr. Dreiling found that even though employee has an impressive educational background, his criminal justice degrees are simply not transferable outside of law enforcement. Mr. Dreiling reasoned that his pain issues and his unreliability as a worker day in and day out make it unlikely that he would be able to maintain competitive employment in the open labor market. For these reasons, Mr. Dreiling found that employee is unable to compete in the open labor market.

The majority's reliance on Dr. Koprivica's initial assessment that employee is employable is misguided. Dr. Koprivica identified his lack of expertise as to employability and correctly stated that he would defer to a vocational expert with regard to that issue. After reviewing the only vocational expert opinion, Dr. Koprivica came to the correct conclusion that employee is permanently and totally disabled.

There is no contrary evidence with regard to employee's employability. The ALJ's rejection of Dr. Koprivica and Mr. Dreiling's opinions is without basis and against the great weight of the evidence. As such, I would modify the award of the ALJ merely awarding employee permanent partial disability benefits and award employee permanent total disability benefits against the Second Injury Fund.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

**Amended FINAL AWARD**  
**Amended on 11/24/2009 due to clerical error**  
**Amended by authority to correct such orders**  
*A Nunc pro Tunc Order*

Employee: Clarence Thomas Injury No. 06-069030  
Dependents: N/A  
Employer: Board of Police Commissioners of Kansas City, Missouri  
Insurer: Self-Insured  
Additional Party: Missouri State Treasurer as Custodian for the Second Injury Fund  
Hearing Date: September 15, 2009 Checked by: RSM/pd

**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: July 23, 2006
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:

Mr. Thomas was attempting to place a woman's ex-boyfriend under arrest when the assailant resisted arrest, causing himself and Mr. Thomas to fall to the ground injuring both of his shoulders and left wrist.

- 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: Both shoulders and left wrist.
- 14. Nature and extent of any permanent disability: 23 percent permanent partial disability to the body as a whole.
- 15. Compensation paid to-date for temporary disability: \$821.57 (11 days)
- 16. Value necessary medical aid paid to date by employer/insurer? \$7,942.22
- 17. Value necessary medical aid not furnished by employer/insurer? Medical left open for left wrist as to the employer for 5 years.
- 18. Employee's average weekly wages: \$1,078.00
- 19. Weekly compensation rate: \$718.87/\$376.55
- 20. Method wages computation: By agreement of the parties.

**COMPENSATION PAYABLE**

- 21. Second Injury Fund liability: Yes.  
20.8 weeks of permanent partial disability from Second Injury Fund at \$376.55  
per week..... \$7,833.24
  
- TOTAL from Second Injury Fund..... \$7,833.24**

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Mr. Frank Eppright, Employee's attorney, for necessary legal services rendered

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Clarence Thomas Injury No. 06-069030  
Dependents: N/A  
Employer: Board of Police Commissioners of Kansas City, Missouri  
Insurer: Self-Insured  
Additional Party: Missouri State Treasurer as Custodian for the Second Injury Fund  
Hearing Date: September 15, 2009 Checked by: RSM/pd

On September 15, 2009, the employee and the Second Injury Fund appeared for a hearing. The employee, Mr. Clarence Thomas, appeared in person and with counsel, Mr. Frank Eppright. The Second Injury Fund appeared by counsel, Ms. Kimberley Fournier. At that hearing, the parties stipulated to the following:

1. that on or about July 23, 2006, the Board of Police Commissioners of Kansas City, MO, was an employer operating under the provisions of the Missouri Workers' Compensation Law and that their liability was fully insured by the authority to self-insure;
2. that on or about July 23, 2006, Clarence Thomas was an employee of the Board of Police Commissioners of Kansas City, MO and was working under the provisions of the Missouri Workers' Compensation Law;
3. that the employer had notice of the injury and that a claim for compensation was filed within the time prescribed by law;
4. that the applicable compensation rate was \$718.87 per week for permanent total disability benefits and \$376.55 for permanent partial disability benefits;
5. that compensation has been paid by the employer in the amount of \$821.57 for 11 days, December 6 – 16, 2006 and December 20 – 21, 2006; and
6. that medical has been provided in the amount of \$7,942.22.

The evidence consisted of Mr. Thomas' live testimony and two exhibits:

Claimant's Exhibit A: Deposition testimony of Dr. P. Brent Koprivica, M.D. with attached records

Claimant's Exhibit B: Deposition testimony of Michael J. Dreiling with attached records

No exhibits were offered by the Second Injury Fund.

The issue to be determined by the hearing is the liability, if any, of the Second Injury Fund under Section 287.220, RSMo (2000).

Based upon the evidence presented, I make the following Findings of Fact and Conclusions of Law:

Mr. Clarence Thomas is a 58-year-old man who resides in Kansas City, Missouri. Mr. Thomas was employed by the Board of Police Commissioners of Kansas City, Missouri (Employer) as a Kansas City, MO Police Officer. Additionally, Mr. Thomas performed private security work when he was not on duty with the Kansas City, Missouri Police Department (Exhibit B, Page 52).

Mr. Thomas began working for the Kansas City, Missouri Police Department in 1977 as a police officer and worked in that capacity until 1982 (Exhibit B, Page 52). In 1982, he was promoted to the rank of sergeant. With that promotion, Mr. Thomas began supervising other officers and also overseeing some of the work of the detectives (Exhibit B, Page 52). He typically worked a 10-hour shift, where the first hour was dedicated to roll call and basic paperwork; he would spend the rest of his shift on the streets (Exhibit B, Page 52). He was employed at the rank of sergeant through his retirement date of March 20, 2007. Mr. Thomas' retirement from the Kansas City, Missouri Police Department in March 2007 was based on a mandatory retirement after reaching 30 years on the force. This retirement was required whether or not he was given a regular or disability retirement.

Mr. Thomas' educational background consists of an Associate's Degree in Criminal Justice, a Bachelor's Degree in Criminal Justice, and a Master's Degree in Criminal Justice (Exhibit B, Page 50). Mr. Thomas acknowledged that his grade-point average in his master's program was 4.0 and he averaged B's in his bachelor's program (Exhibit B, Page 50). He has participated in ongoing training and education in law enforcement and has utilized his formal education and training in the labor market (Exhibit B, Page 50).

On July 23, 2006, Mr. Thomas sustained injury while in the course and scope of his employment during a police call when he was apprehending a suspect and he fell on his left wrist and left shoulder.

Mr. Thomas was seen at Research Medical Center the night of the injury. At that time he reported complaints involving both shoulders and the left wrist (Exhibit A, Page 469). Dr. Robert Leitch noted that there was a complete fracture through the wrist of the scaphoid. (Exhibit A, Page 471). Dr. Leitch also reviewed images of the left shoulder and noted there was no fracture (Exhibit A, Page 472). Mr. Thomas was initially placed in a thumb spica splint for the injury to the left wrist (Exhibit A, Page 463).

Mr. Thomas was seen by Dr. Harris on July 27, 2006 and ordered an MRI scan of the left wrist. Dr. Harris placed him on light duty with no lifting, push, pull, or significant use of the left wrist (Exhibit A, Page 376). The MRI scan revealed chronic and ununited fracture of the proximal pole of the scaphoid (Exhibit A, Page 485). There was also some evidence of moderate degenerative arthrosis at the radioscaphoid joint (Exhibit A, Page 485).

Mr. Thomas was next seen by Dr. Harris on August 17, 2006. At that time, Dr. Harris believed that an MRI of the left shoulder was needed to assess if there was a rotator cuff tear (Exhibit A, Page 375). MRI of Mr. Thomas's left shoulder was taken on August 21, 2006. It

revealed marked degenerative changes of the left acromioclavicular joint and a normal rotator cuff (Exhibit A, Page 404). Based on these findings, Dr. Harris believed the Mr. Thomas was suffering from a strain of the rotator cuff (Exhibit A, Page 374). He recommended a round of physical therapy and restrictions of no lifting or repetitive use of the shoulder (Exhibit A, Page 374).

Dr. Harris injected the left shoulder in the subacromial space with steroid on September 1, 2006 (Exhibit A, Page 373). On September 22, 2006, Dr. Harris re-injected Mr. Thomas's left shoulder and instructed him to continue on home program and range of motion; furthermore, Dr. Harris instructed Mr. Thomas to back off and rest the shoulder for the next couple of weeks since he had finished physical therapy and the shoulder had been aggravated recently by the resistive exercises (Exhibit A, Page 372).

Mr. Thomas was seen by Dr. Harris on December 7, 2006 primarily for his right shoulder pain (Exhibit A, Page 368). Dr. Harris stated that the pain in the right shoulder had previously resolved to some extent but that Mr. Thomas had experienced a flare-up within the last week before the appointment (Exhibit A, Page 368). Dr. Harris scheduled Mr. Thomas for an MRI of the left shoulder and kept him on light duty with no repetitive motion or lifting right shoulder or left wrist (Exhibit A, Page 368). The MRI revealed moderate impingement with acromioclavicular degenerative joint disease, but no tear was identified (Exhibit A, Page 408). Mr. Thomas returned to Dr. Harris for an injection in the right shoulder on December 19, 2006 (Exhibit A, Page 367). Dr. Harris instructed Mr. Thomas to remain on light duty status with no repetitive use or lifting of the right shoulder (Exhibit A, Page 367).

On January 9, 2007, Dr. Harris believed that the Mr. Thomas had reached MMI in regards to both shoulders as well as the wrist (Exhibit A, Page 366). At that visit, Dr. Harris noted that Mr. Thomas's shoulder had improved (Exhibit A, Page 366). Dr. Harris believed that Mr. Thomas was unable to do repetitive motion of either shoulder or lift over about 5 to 10 pounds and likewise no repetitive motion of the left wrist, no pushing, pulling, or lifting over 1 to 2 pounds on an occasional basis (Exhibit A, Page 366).

Dr. Lofgreen, Concentra Medical Center, conducted an examination of the Mr. Thomas on January 23, 2007 (Exhibit A, Page 834). Dr. Lofgreen's examination revealed that Mr. Thomas could reach overhead and that he had a normal range of motion in both shoulders bilaterally with no significant impingement or instability. Mr. Thomas could flex at the waist without difficulty and his gait appeared normal. Further exam of the extremities indicated some modest restriction in the range of motion involving the left wrist and some decrease in her grip strength as compared with the right side (Exhibit A, Page 834). Dr. Lofgreen stated that grip strength testing indicated a flat response on the affected left side indicating insincere effort and, therefore, that his capabilities appeared greater than he chose to portray (Exhibit A, Page 834).

Dr. James Stuckmeyer, an orthopedic surgeon, performed the initial Independent Medical Evaluation and provided a rating at the request of Mr. Thomas's attorney (Exhibit A, Page 308). He felt that Mr. Thomas had suffered a 25% permanent partial disability to the left wrist, 20% permanent partial disability to the right shoulder for the diagnosis of impingement syndrome, right rotator cuff, with sternoclavicular dysfunction and 5% disability to the left shoulder, all causally related to the 2006 work accident (Exhibit A, page 314). Dr. Koprivica apportioned a 35% permanent partial disability of the left upper extremity at the level of the forearm (Exhibit

A, Page 99). For the chronic impingement syndrome of the right shoulder, he assigned a 10% permanent partial disability of the right upper extremity at the level of the shoulder (232-week level) and a 25% permanent partial disability of the left upper extremity at the level of the shoulder (232-week level). Globally he assigned 40% permanent partial disability to the body as a whole based on the multiple traumatic injuries sustained on July 23, 2006.

Mr. Thomas continued to work during the course of his treatment for these injuries. From July 23, 2006 until March 20, 2007, he continued to work for the Kansas City, Missouri Police Department. He performed numerous administrative functions while on desk/light duty and he also admitted to consulting for the Department while on light duty. He was able to perform the functions of these jobs on a full-time basis for this time span without hindrance or obstacle.

Claimant entered into a lump sum compromise settlement with his employer, which was approved on September 15, 2009. The terms of that settlement provide that the Employer was to pay no money to the Claimant due to a collateral agreement between the Employer and Employee based on Claimant receiving disability retirement from the Police Department. However, Employer agreed to leave medical open for five years and agreed that Claimant had "sustained an injury arising out of and in the course of his employment" resulting in disability of 23 percent to the body as a whole. Additionally, the Employer paid medical and temporary total disability on this claim. The settlement document demonstrated that the Employer considered this a compensable claim under the Missouri Workers' Compensation Law.

Prior to his 2006 work injury, I find that Claimant had significant disability related to his low back and right knee. While Claimant had several other injuries and medical conditions, I did not find these other conditions to be an obstacle or hindrance to his ongoing employment or employability.

With regard to his prior low back condition, Mr. Thomas was treated conservatively with pain medications and muscle relaxers from 2002 through 2003 (Exhibit B, Pages 620; Exhibit B, 602; Exhibit B, Page 601; Exhibit B, Page 598). In 2004, Mr. Thomas's back pain and left sciatic pain caused him to again seek treatment and medications (Exhibit B, Page 597, Exhibit B, Page 596). On March 9, 2004, an MRI scan was performed on Mr. Thomas's lumbar spine which revealed degenerative disk disease and facet arthrosis with a broad-based left paracentral to left foraminal disc protrusion at L4-L5, which produced impingement on the left L5 nerve root and had possible contact with the left L4 nerve root (Exhibit B, Page 689-690). There was also moderate annular disk bulging at L5-S1 resulting in bilateral neuroforaminal narrowing (Exhibit B, Page 690). Mr. Thomas continued taking muscle relaxers for this condition in 2004 (Exhibit B, Page 595) and was considered to be symptomatic until his 2006 injury.

Dr. Koprivica rated Mr. Thomas's low back pain with significant disk protrusion at the L4-L5 level at 15% permanent partial disability to the body as a whole and restricted him from frequent or constant bending at the waist, pushing, pulling or twisting. Additionally, it was felt that he should avoid sustained or awkward postures of the lumbar spine. Dr. Stuckmeyer did not rate this condition.

Claimant's right knee problems began in 1968 when he suffered a football injury requiring a surgical intervention (Exhibit A, Page 388). Mr. Thomas didn't require further treatment for the knee until July of 2004 at which time he was diagnosed with moderate to advanced osteoarthritis of the right knee (Exhibit A, Page 388).

Further diagnostic tests revealed a severe degenerative tear of the medial meniscus, a lateral meniscal tear, severe degenerative joint disease involving the entire knee, greatest at the medial compartment, but no actual tear of the anterior cruciate ligament (Exhibit A, Page 348-349). In July 2004, he could walk without his crutches and knee immobilizer (Exhibit A, Page 387). Dr. Sheffer recommended a right knee arthroscopy with medial and lateral meniscectomy and debridement, but Mr. Thomas wanted to give it some thought because his knee had gotten so much better, that he thought he might not have to have the surgery at that point in time (Exhibit A, Page 387). So, Mr. Thomas underwent extensive therapy and additional conservative treatment which included aquatic therapy, medications and injections (Exhibit A, Pages 384-386, 519, 527, 696, 699-700).

After failed conservative treatment, Mr. Thomas went for additional opinions regarding his knee. Dr. McNamara believed that he was a candidate for a total knee replacement. (Exhibit A, Page 509). Dr. Chris Barnthouse recommended total knee arthroplasty (Exhibit A, Page 504), as did four other physicians. Instead of opting for the recommended knee replacement, Mr. Thomas returned for additional conservative treatment with Dr. Bohn and underwent Synvisc injections (Exhibit A, Page 383). At Mr. Thomas's final follow-up with Dr. Bohn in March of 2005, he reported that his knee felt well enough that he no longer needed a cane and wanted to report back to police work (Exhibit A, Page 377). Dr. Bohn, who reviewed the job objectives and essential functions as related to his occupation with the Kansas City Police Department, believed that Mr. Thomas had rehabilitated to the point that he could function as a police officer in the Kansas City, Missouri Police Department (Exhibit A, Page 417). Dr. Bohn released Mr. Thomas back to full duty police work as of Wednesday, March 23, 2005 (Exhibit A, Page 377).

Dr. Koprivica rated Mr. Thomas's right knee at 35 percent permanent partial disability to the right lower extremity at the level of the knee (160-week level) and restricted him from squatting, crawling, kneeling or climbing. Dr. Stuckmeyer rated the pre-existent degenerative arthritis of the right knee at 15 percent permanent partial disability to the right knee (Exhibit A, Page 314).

Mr. Thomas has alleged he is permanently and totally disabled. In order to determine whether an employee is deemed totally disabled under the Missouri Workers' Compensation Law, it must be found that the Claimant is unable to return to any employment. Section 287.020(7) RSMo (2000) defines total disability as "an inability to return to any employment and not merely . . . inability to return to the employment which the employee was engaged at the time of the accident." The terms "any employment" mean any reasonable or normal employment or occupation. Reese v. Gary & Roger Link, Inc., 5 S.W. 3d 522 (Mo. App. 1999); Fletcher v. Second Injury Fund, 922 S.W. 2d 402 (Mo. App. 1996); Kowalski v. M-G Metal and Sales, Inc., 631 S.W. 2d 919, 921 (Mo. App. 1982); Groce v. Pyle, 315 S.W. 2d 482, 490 (Mo. App. 1958). It is not necessary that an individual be completely inactive or inert in order to meet the statutory definition of permanent total disability. It is necessary, however, that they be unable to compete

in the open labor market. *See* Reese v. Gary & Roger Link, Inc., 5 S.W. 3d 522 (Mo. App. 1999); Carlson v. Plant Farm, 952 S.W. 2d 369, 373 (Mo. App. 1997); Fletcher v. Second Injury Fund, 922 S.W. 2d 402 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft, 894 S.W. 2d 173 (MO. App. 1995); Reiner v. Treasurer, 837 S.W. 2d 363 (Mo. App. 1992); Brown v. Treasurer, 795 S.W. 2d 478 (Mo. App. 1990).

Missouri courts have repeatedly held that the test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the Employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition. *See* Garcia v. St. Louis County, 916 S.W. 2d 263 (Mo. App. 1995); Lawrence v. R-VIII School District, 834 S.W. 2d 789 (Mo. App. 1992); Carron v. St. Genevieve School District, 800 S.W. 2d 6 (Mo. App. 1991); Fischer v. Arch Diocese of St. Louis, 793 S.W. 2d 195 (Mo. App. 1990). In other words, a determination of permanent total disability should focus on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employments. Gordon v. Tri-State Motor Transit, 908 S.W. 2d 849 (Mo. App. 1995). The courts of this state have held that various factors may be considered, including a claimant's physical and mental condition, age, education, job experience and skills in making the determination as to whether a claimant is permanently and totally disabled. *See e.g.*, Tiller v. 166 Auto Auction, 941 S.W. 2d 863 (Mo. App. 1997); Olds v. Treasurer, 864 S.W. 2d 406 (Mo. App. 1993); Brown v. Treasurer, 795 S.W. 2d 439 (Mo. App. 1990); Patchin v. National Supermarkets, Inc., 738 S.W. 2d 166 (Mo. App. 1987); Laturno v. Carnahan, 640 S.W. 2d 470 (Mo. App. 1982); Vogel v. Hall Implement Company, 551 S.W. 2d 922 (Mo. App. 1977). The commission is the sole judge of witness credibility and is free to disbelieve the testimony of any witness even if there is no contrary or impeaching evidence. Anderson v. Emerson Elec. Co., 698 S.W. 2d 574, 576 (Mo. App. 1985).

Most of the cases involving a determination of whether a claimant is permanently and totally disabled contain language only about the employee's ability to compete on the open labor market. Some of these cases, however, also contain language about whether an employer can reasonably expect an employee to successfully perform the work. The inquiry into permanent total disability is a factual one: whether Claimant is employable. Messex v. Sachs Electric Co., 989 S.W. 2d 206, 210 (Mo. App. 1999).

In order to establish Second Injury Fund Liability for permanent total disability benefits, the Claimant must prove:

- 1) that he or she has a permanent disability resulting from a compensable work-related injury, *See* § 287.220.1 RSMo (2000);
- 2) that he or she has permanent disability predating the compensable work-related accident which is "of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployable." § 287.220.1 RSMo (2000), Messex v. Sachs Electric Co., 989 S.W. 2d 206 (Mo. App. 1997); Garibay v. Treasurer, 964 S.W. 2d 474 (Mo. App. 1998); Rose v. Treasurer, 899 S.W. 2d 563 (Mo. App. 1995); Leutzinger v. Treasurer, 895 S.W. 2d 591 (Mo. App. 1995); and County Drywall, 898 S.W. 2d 615 (Mo. App. 1995); and
- 3) that the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time the last injury

was sustained results in permanent total disability. Boring v. Treasurer, 947 S.W. 2d 483 (Mo. App. 1997); Reiner v. Treasurer, 837 S.W. 2d 363 (Mo. App. 1992); Frazier v. Treasurer, 869 S.W. 2d 152 (Mo. App. 1994). See Miller v. State Treasurer, 978 S.W. 2d 808 (Mo. App. 1998) where court held Claimant's fibromyalgia from last injury combined with pre-existing aneurysm was sufficient to establish permanent total disability against the Second Injury Fund.

Because the Claimant has alleged he is permanently and totally disabled as to the Second Injury Fund, my analysis will begin with whether the Claimant has a permanent disability resulting from a compensable work-related injury. Obviously, I find that the Claimant does, indeed, have permanent disability resulting from his 2006 accident. The Second Injury Fund even stipulates to this fact. Claimant entered into a compromise settlement with the Employer which was approved by the Administrative Law Judge on September 15, 2009. The terms of this settlement provided that the Employee sustained 23 percent permanent partial disability to the body as a whole. The doctrine of collateral estoppel, or issue preclusion, bars the relitigation of the same issue in a later case if each of the following elements are satisfied: (1) the issue decided in the earlier adjudication was identical to the issue presented in the present action, (2) the earlier adjudication resulted in judgment on the merits, (3) the party against whom collateral estoppels is asserted was a party or in privity with a party to the prior adjudication, and (4) the party against whom collateral estoppels is asserted had an opportunity to litigate the issue in the prior adjudication. Since all of these elements have been established in this case, Claimant is precluded from relitigating the extent of permanent partial disability attributable to the last accident in this case against the Second Injury Fund. See Reidelberger v. Hussman Refrigerator Co., 135 S.W. 3d 431 (Mo.App. 2004). I therefore find Claimant sustained 23 percent permanent partial disability to the body as a whole from the October 2006 accident.

The next step in determining Second Injury Fund liability under Section 287.220 is a determination of whether any disability predating the 2006 accident was of such seriousness as to "constitute a hindrance or obstacle" to employment or to obtain reemployment. I find, based on the Claimant's trial testimony as well as nearly all the medical evidence, that Claimant's right knee and low back conditions predating the 2006 accident were "obstacles and hindrances to his employment" at the Kansas City, Missouri Police Department and would have been obstacles to reemployment in any job requiring repetitive heavy lifting or repetitive kneeling or squatting. While the Claimant continued to do his job prior to 2006 as a police officer, I find that he did self-accommodate and self-limit when his physical conditions required him to do so. I further believe his testimony that he did have difficulty sitting in the police car and driving the police car for any length of time. He gave numerous examples in his trial testimony as to how his knee and low back conditions impacted his employment and made his employment more difficult and were therefore hindrances to his employment. I was not persuaded by the Second Injury Fund's arguments that these conditions were not obstacles or hindrances to the Claimant's employment.

The last and final issue in determining whether there is Second Injury Fund liability for permanent total disability benefits is as follows: A determination as to whether the effects of the 2006 injury combined with Claimant's pre-existing conditions caused him to be unable to compete for gainful employment on the open labor market. While I find that the Claimant had both significant pre-existing disability as well as significant disability resulting from this 2006 accident, I do not find the Claimant is unable to compete for gainful employment.

Mr. Thomas testified that he believes his inability to work is based on a combination of the injuries to his shoulders, left wrist, low back and knees. The Claimant has not worked since March of 2007, but he admitted that he has not looked for work since retiring from the Police Department. While I believe the Claimant's testimony that he is no longer able to mow his yard (for more than 40 minutes at a time) and that he is no longer able to play basketball, lift weights or work with his hands on his car because he has little strength, I do find that Claimant has many other skill sets which would aid him in reemployment. The Claimant has advanced education, has supervisory and managerial experience and has a long history of continued employment with the Kansas City, Missouri Police Department. These are all excellent credentials for finding reemployment. Dr. Koprivica even testified that in looking at Mr. Thomas's advanced education alone, he would be employable. Mr. Dreiling performed no vocational testing because Mr. Thomas had completed a Bachelor's and Master's Degree in Criminal Justice and, therefore, it was fairly obvious to Mr. Dreiling that Mr. Thomas could acquire additional skills and knowledge. Finally, the fact that Mr. Thomas successfully worked at a desk-type administrative job for several consecutive months after his 2006 injury demonstrated to me that the Claimant was employable on the open labor market. While he may, indeed, need a job that would allow him a sit-and-stand option, I believe if anyone has the credentials and skill sets needed to obtain that type of employment, Mr. Thomas is one of those people. I did consider Mr. Dreiling's and Dr. Koprivica's ultimate conclusions in this case that the Claimant was permanently and totally disabled as a result of a combination of his disabilities. However, I reject those ultimate conclusions and find Claimant is able to compete for gainful employment on the open labor market.

Although I have found that Claimant is not entitled to permanent total disability benefits from the Second Injury Fund, I believe he is entitled to permanent partial disability benefits from the Fund. I have found that he sustained 35 percent permanent partial disability to the body as a whole as a result of his 2006 accident and have found that his pre-existing conditions were substantial and were a hindrance and obstacle to his employment. I find based on the Claimant's testimony and the medical evidence presented in this case that the Claimant has 15 percent permanent partial disability to his body as a whole referable to his low back, which predated the 2006 accident. I find that he has a significant disc protrusion at the L4-L5 level and had this condition predating July 23, 2006. I further find with reference to his end stage degenerative joint disease of his right knee that he has 35 percent permanent partial disability at the 160-week level.

Based on Dr. Koprivica's report of July 30, 2008, I find an enhancement factor of 10 percent above the simple arithmetic sums of the separate disabilities to be appropriate in this case. Therefore, Claimant is entitled to 20.8 weeks of compensation based on the percentage of disability I have assigned. I have found 60 weeks of disability referable to the Claimant's prior low back condition, 56 weeks referable to his prior left knee condition, and 92 weeks referable to his 2006 injury. The total weeks of permanent disability the Claimant has is 208 weeks, and 10 percent of that amount is 25.6 weeks. Therefore, I find the Second Injury Fund is responsible for the payment of 20.8 weeks at the permanent partial disability rate of \$376.55 for a total of \$7,832.24. The Second Injury Fund is therefore ordered to pay this amount to the Claimant.

I reject the Second Injury Fund's argument that the Fund's liability is triggered only if the employer actually makes a payment to an injured employee for permanent disability. Section 287.220 clearly sets out the requirements for establishing Second Injury Fund liability. In order

to establish any Second Injury Fund liability, a claimant must prove that he has suffered a “compensable injury.” Nothing in the statute dictates that an employer must actually pay or have paid benefits before the Second Injury Fund liability is triggered. The Second Injury Fund relies on the following language in the statute to argue otherwise: “After the employer has paid the compensation due the employee....” This phrase relates only to the *timing* of any payments to be made by the Fund and not the underlying *obligation* to make them. See Kowalski v. M-G Metal & Sales, Inc., 631 S.W. 2d 919, 923 (Mo. App. 1982). The Supreme Court in Grant v. Neal, 381 S.W. 2d 838 (Mo. 1964), held that the liability of the Second Injury Fund and the Employer are separate. Section 287.220.1 expressly provides that the liability of the Second Injury Fund is contingent on a finding that a claimant has received an injury that is compensable under the Missouri Workers’ Compensation Law. Therefore, an employee clearly must prove that he had a compensable injury against his employer in order to prevail on his claim against the Second Injury Fund. An employee cannot have a valid Second Injury Fund claim unless he can demonstrate he has or had a valid underlying claim against his employer. In this case, the Claimant has clearly proved the foregoing. In fact, the Second Injury Fund even stipulated that the Claimant had a compensable injury arising out of and in the course of his employment. For the foregoing reasons, I find the Second Injury Fund has liability for permanent partial disability in this case and is ordered to pay \$7,832.24 to the Claimant.

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

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

Rebecca S. Magruder  
 Administrative Law Judge  
 Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this \_\_\_\_ day of \_\_\_\_\_  
 2009, by:

\_\_\_\_\_  
 Naomi Pearson  
 Division of Workers' Compensation