

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

Injury No.: 05-110787

Employee: James Toebben
Employer: Fred Weber Construction (Settled)
Insurer: Self-Insured (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 parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of Administrative Law Judge Kevin Dinwiddie dated March 16, 2010.

Preliminaries

On October 25, 2005, employee suffered an injury by accident arising out of and in the course of his employment. Employee settled his claim against employer/insurer. The administrative law judge heard this matter to consider the nature and extent of permanent disability and the liability (if any) of the Second Injury Fund.

The administrative law judge found that employee sustained permanent partial disability as a result of the October 25, 2005, work injury, but also found that employee was already permanently and totally disabled due to a pre-existing back injury. The administrative law judge concluded that employee failed to prove that permanent disability from the work injury combined with any prior permanent disabilities to create a greater degree of permanent disability. Given these findings and conclusions, the administrative law judge denied employee's claim against the Second Injury Fund.

Employee filed an Application for Review with the Commission alleging that the administrative law judge's award is not supported by the evidence and is contrary to the overwhelming weight of the evidence. Employee argues that he was permanently and totally disabled due to the combined effect of his pre-existing disabilities and the October 25, 2005, work injury.

The issues currently before the Commission are the nature and extent of permanent disability and the liability of the Second Injury Fund.

Findings of Fact

Preexisting conditions

Employee was sixty years old at the time of the hearing before the administrative law judge. Employee finished high school but has no further education or training. Employee served three years in the military as a combat engineer. He ran over a landmine in Vietnam and injured his back. After he was honorably discharged from the military, employee worked for Missouri Limestone Incorporated until 1983. In March 1983, employee went to work for employer, a quarry and processing enterprise that

Employee: James Toebben

- 2 -

produces commercial rock for heavy construction projects. Employee worked for employer until January 2007. Employee's last position for employer was plant maintenance man. Employee's duties involved keeping plant machinery in good working order. This was physically demanding work which involved replacing heavy machine parts on a daily basis, welding, hammering stuck parts with sledgehammers, carrying heavy tools and equipment, operating pneumatic tools, working frequently above shoulder level, and contorting into awkward positions to reach confined spaces in the machinery.

In 1980, employee injured his left ring finger when it was caught in a conveyor belt at work. Employee was hospitalized for 27 days and the finger was amputated above the proximal interphalangeal joint. As a result of the 1980 left finger injury, employee is unable to carry small objects and has difficulty grasping items with his left hand.

Beginning in 1997, employee sought medical treatment for bilateral hand complaints. The nature of employee's work involved his hands in frequent high-impact activities. In March 2004, employee saw Dr. James Schaberg, who diagnosed advanced arthritis in both hands and prescribed medication. In May 2004, employee saw a hand surgeon, Dr. Subbarao Polineni, who treated employee with injection therapy and the use of splints. In August 2005, Dr. Polineni performed an arthroplasty of the right index finger at the metacarpophalangeal joint; in 2008 employee underwent a similar procedure for the left hand. Surgery improved the pain in employee's hands, but they remained stiff and were painful with increased use. Employee's fine motor skills also remained poor following surgery and employee had trouble grasping objects and frequently dropped tools at work.

In 2003, employee was diagnosed with avascular necrosis when he sought treatment for intermittent sharp pains in his right hip. Employee ultimately underwent a right hip replacement performed by Dr. James Schaberg. Employee's hip pain improved after surgery but he experienced stiffness and a diminished capacity to stand, sit, and walk. Employee was able to continue performing his usual duties at work, but he had to slow down and adapt to his right hip condition, especially when walking up and down stairs. Employee frequently climbed stairs at work and occasionally even had to run up the stairs to attend to malfunctioning machinery.

On January 28, 2005, employee injured his right shoulder when he was pulling on a beam at work. Employee saw Dr. Mitchell Rotman, who diagnosed a massive tear of the right rotator cuff. Dr. Rotman performed a surgical repair on March 18, 2005. Employee was released for full duty on September 13, 2005. After he was released for full duty, employee was able to complete his work tasks, but he experienced increased difficulty due to ongoing pain and discomfort in his right shoulder. After the injury to his right shoulder, employee relied heavily on his left shoulder to perform duties such as sweeping, welding, changing screens, and carrying items. Employee also occasionally asked for help from other workers to complete his tasks. Dr. Rotman performed a second surgery on May 19, 2006, to repair a re-torn rotator cuff.

Beginning in 1993, employee sought medical treatment for low back pain with occasional sharp shooting pains into his right leg. Employee saw a chiropractor and received ice pack, hot pads, and electrical stimulation treatments for thirteen years. Employee also saw his

Employee: James Toebben

- 3 -

primary care physician and an orthopedic specialist. In 2005, x-rays revealed degenerative disc disease at L5-S1. Treatment was conservative with medication and exercises. An MRI on January 13, 2006, revealed multi-level degenerative changes with central canal stenosis. On February 7, 2006, employee's orthopedic doctor sent him to Dr. Stanley Martin, a neurosurgeon, for evaluation based on employee's continuing complaints of low back pain. After additional evaluation including x-rays and another MRI, Dr. Martin diagnosed chronic low back pain without neurological involvement. Dr. Martin determined that employee was not a surgical candidate for his back condition.

Employee was able to perform his work duties despite his back pain, although he occasionally had to lie down after heavy work. If employee was doing particularly heavy work, he might lie down five or six times in one day. Other days, he would not have to lie down at all. Employee's back pain interfered with his ability to stand, sit, and walk for long periods of time. Going up and down the stairs at work caused his back to hurt a lot. Toward the end of his employment with employer, employee had to ask people to assist him with his work due to his back pain, but employee was always able to do the job if he needed to. Employee's back pain has been better since he has been off work; employee is still sore but he does not experience the throbbing and stabbing pains like before. Employee's functional limitations, however, are approximately the same as when he was working: employee still has difficulty walking, sitting, and standing for prolonged periods due to low back discomfort.

The primary injury

On October 25, 2005, employee was changing a heavy screen at work when he injured his left shoulder. Employee was diagnosed with bursitis, severe tendinopathy of the rotator cuff, and partial biceps tear. Dr. Rotman performed a left shoulder arthroscopy, limited debridement and subacromial decompression on October 13, 2006. Dr. Rotman found employee to have reached maximum medical improvement for the left shoulder on January 9, 2007. Employee experienced a number of problems performing his work following the left shoulder injury and surgery. Employee was unable to complete tasks that he had been able to perform before. Employee was unable to change screens, weld, work above shoulder level, or use sledgehammers like he used to. Employee needed the help of coworkers to perform these tasks. Employee frequently dropped things due to left shoulder weakness. Employee also had trouble sweeping and using pneumatic tools.

In January 2007, employer gave employee the option of running the high-lift machine. Employer was downsizing and offered employee this option because of his seniority with the company. Running the high-lift was lighter duty than the tasks usually involved in employee's work, in that it did not involve constant lifting, hammering, or climbing stairs. Employee was only able to run the high-lift for approximately two hours before his physical limitations prevented him from continuing. Employee could not keep his arms extended to run the controls due to his bilateral shoulder conditions. Specifically, employee's left shoulder limitations interfered with his ability to keep his left arm extended, with the effect that employee was unable to keep his left hand on the gear shifts and appropriate buttons. Employee's bilateral hand problems also interfered with his ability to grasp and operate the steering wheel and levers. Employee's back pain was aggravated by the high-lift machine bouncing up and down as employee drove it across the yard. Employee ultimately retired on January 31, 2007 because he felt that his physical limitations following the left shoulder injury rendered him unable to perform his duties.

Employee: James Toebben

- 4 -

Expert medical evidence

Dr. Jerry Meyers examined employee for purposes of an independent medical evaluation on August 28, 2007. Dr. Meyers' evaluation revealed pain in the right shoulder with both active and passive motion in all ranges and crepitus with abduction to 90 degrees; decrease in right biceps strength; general weakness of the entire right shoulder girdle; left shoulder pain with all motions; tenderness with spasms across the low back; back pain present in all motions; arthritic changes with diffuse swelling in the fingers of each hand; decreased grip strength in both hands; and decreased range of motion in the right hip.

Dr. Meyers opined that employee suffers a 45% permanent partial disability of the body as a whole attributable to the back and an additional 35% permanent partial disability of the body as a whole referable to the right hip. Dr. Meyers noted that employee is not a surgical candidate with regard to his back condition. Dr. Meyers opined that employee suffers permanent partial disability of 45% of the right hand and 40% of the left hand referable to his arthritis and surgeries. With regard to the shoulders, Dr. Meyers opined that employee suffers a permanent partial disability of 40% of the right shoulder, and 25% of the left shoulder due to the primary injury. Dr. Meyers issued the following restrictions for employee: no heavy or repeated lifting, bending, squatting, grasping, pushing, pulling, or working at or above shoulder level without rest intervals; avoid periods of repetitive arm movements; no lifting over 15 pounds or as tolerated; no working around vibrating machinery; avoid or limit work involving fine motor skills which aggravate the arthritis in employee's hands; avoid walking on uneven surfaces and stairs; avoid prolonged walking, sitting, or standing; and avoid remaining in a fixed position. Dr. Meyers opined that employee should be allowed freedom of movement for symptomatic relief of his back.

Dr. Meyers opined that the preexisting injuries and conditions to the back, right hip, both hands, and right shoulder were a hindrance and obstacle to employment and that these conditions combine with the left shoulder injury to create a greater overall disability than their simple sum. Dr. Meyers opined that employee is permanently and totally disabled due to the combination of his preexisting medical conditions and the effects of the left shoulder injury on October 25, 2005.

The Second Injury Fund did not present any medical testimony to contradict the opinions of Dr. Meyers. We find the opinions and ratings of Dr. Meyers credible, with one exception: we find that employee sustained a 20% permanent partial disability of the left shoulder as a result of the October 25, 2005, work injury.

Vocational Experts

On December 11, 2008, Mr. J. Stephen Dolan evaluated employee at his attorney's request. Mr. Dolan noted that employee is a man of advanced age who has worked in the same industry from 1972 until he last worked in 2007. Mr. Dolan noted that employee has two sets of vocational skills. The first is the ability to operate heavy machinery safely and effectively to move large amounts of material; the second is the ability to use tools to repair and maintain machinery. Mr. Dolan opined that Dr. Meyers' restrictions will prevent employee using either set of vocational skills. Mr. Dolan opined that employee, due to the accumulation of his limitations, will not be able to perform employment for which a reasonably stable labor market exists. Mr. Dolan opined that this is due to employee's

Employee: James Toebben

- 5 -

prior conditions and injuries as they existed on October 25, 2005, in combination with the left rotator cuff injury.

Mr. Dolan acknowledged that another employer would not necessarily have provided the accommodation of allowing employee to lie down during the day to rest his back. If employee had to lie down on a regular basis, Mr. Dolan opined, that could compromise his employability with other companies. Mr. Dolan clarified, however, that the need to lie down during the day does not preclude competitive employment, and that in employee's case, he was in fact competitively employed despite any such limitation.

On February 4, 2009, Mr. James England issued a vocational evaluation of employee on behalf of the Second Injury Fund. Mr. England did not personally meet with employee. Mr. England opined that he didn't see any restriction on employee's ability to return to work based on the treating physicians' records. Mr. England acknowledged that Dr. Meyers's restrictions would preclude employee returning to the job he did before, but Mr. England was of the opinion that employee is not permanently and totally disabled. Mr. England opined that employee would be able to return to work in the sedentary to light range, and that he would be most successful as a security person in an office building, or a parking booth cashier. Mr. England also opined that, with some keyboard training, employee might also be a night clerk in a hotel or work for a security company as an alarm monitor.

Mr. England contradicted his opinion as to permanent total disability somewhat when he indicated that he understood employee reported a need to lie down during the day; Mr. England testified that he was not aware of any normal job setting that would accommodate this. Mr. England appeared to reverse himself yet again on cross-examination when he testified that an employee could be considered to be in competitive employment despite a need to lie down occasionally if they are making regular wages and the employer feels the employee is worth providing accommodations for. When pressed further, Mr. England was unable to provide an unequivocal answer to the question whether an employee with a preexisting disability who is accommodated by an employer is still engaged in competitive employment.

We are not convinced by Mr. England's testimony or opinions in this case. We find the opinions of Mr. Dolan more credible than those of Mr. England.

Conclusions of Law

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may

Employee: James Toebben

- 6 -

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.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

We are convinced that employee's preexisting disabilities were serious enough to constitute hindrances or obstacles to employment for purposes of § 287.220 RSMo. Employee provided evidence of preexisting conditions including an amputated left ring finger, bilateral arthritis in his hands, right hip surgery, right shoulder injury and surgery, and chronic low back pain. Each of these conditions affected the manner in which employee performed his work and had the potential to combine with future work-related injuries so as to cause greater disability than would have resulted in the absence of these conditions. Employee dropped small objects and had trouble grasping with his left hand due to the amputated ring finger. Employee had trouble with fine motor skills due to the bilateral arthritis in his hands. Employee experienced pain and discomfort climbing stairs due to his right hip condition. Employee relied more heavily on his left shoulder following his right shoulder injury and occasionally required assistance from his coworkers in completing his duties. Employee's low back pain interfered with his ability to complete physically demanding tasks. If employee was engaged in very heavy work, he might have to lie down multiple times throughout the work day to rest his back and relieve pain. Dr. Meyers provided his expert medical opinion as to each of employee's preexisting conditions of ill, and we have found Dr. Meyers credible. We conclude that at the time he sustained the October 25, 2005, work injury, employee suffered from bilateral hand, right hip, low back, and right shoulder conditions and limitations that constituted hindrances or obstacles to employment or reemployment.

We now proceed to the question whether employee met his burden of establishing entitlement to compensation from the Second Injury Fund. Section 287.220.1 RSMo, provides, in relevant part, as follows:

After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is

Employee: James Toebben

- 7 -

liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" ...

The foregoing section requires us to first determine the compensation liability of the employer for the last injury, considered alone. We have found that employee sustained a 20% permanent partial disability of the left shoulder due to the last injury. We note that the record contains no evidence to suggest that employee is permanently and totally disabled due to the last injury alone. Of course, if employee were permanently and totally disabled due to the last injury considered in isolation, the employer, and not the Second Injury Fund, would be responsible for the entire amount of compensation. See *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). We specifically find that the injury of October 25, 2005, considered in isolation, did not render employee permanently and totally disabled.

Under § 287.220.1, employee is entitled to compensation from the Second Injury Fund in two possible scenarios:

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), citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo. App. 2001).

Both Dr. Meyers and Mr. Dolan opined that employee is permanently and totally disabled; we have found their opinions credible. Thus, employee is entitled to compensation from the Second Injury Fund if the evidence establishes that he is permanently and totally disabled due to a combination of his preexisting disabilities and the primary injury. The Second Injury Fund argues that employee was already permanently and totally disabled at the time of the primary injury, with the result that no combination of disabilities could have occurred. We disagree.

The test for permanent total disability is whether, given the employee's situation and condition, he or she is qualified to compete in the open job market. The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired.

Houston v. Roadway Express, Inc., 133 S.W.3d 173, 178 (Mo. App. 2004) (citations and quotations omitted).

The Second Injury Fund invites us to find that employee was not qualified to compete in the open job market *before* he was injured at work on October 25, 2005. The Second Injury Fund centers its argument on the evidence that employee would lie down

Employee: James Toebben

- 8 -

occasionally during the work day, and the opinion of Mr. England that most employers would not allow such an accommodation. Even Mr. England, however, admitted that if an employee is making regular wages and is able to accomplish what the employer requires, the employee is engaged in competitive employment. Mr. England agreed that a finding of permanent and total disability is fact-intensive.

Dr. Meyers' unequivocal opinion was that employee's preexisting conditions combine with the effects of the October 25, 2005, work injury to render him permanently and totally disabled. Dr. Meyers' opinion is uncontested by any other medical expert. Dr. Meyers' opinion is also supported by the facts of this case. Employee was earning his normal wages and working a normal work week before he sustained the primary injury. Employee's employment history was stable and consistent, even though he had chronic back complaints stemming from the early 1990s. Clearly, employee was capable of competing for and holding gainful employment; the undisputed evidence is that he did so every day before he was injured on October 25, 2005. We have found credible Mr. Dolan's opinion that a need to lie down during the day is not preclusive of competitive employment.

Employee's work for employer was physically demanding. Employee was frequently engaged in swinging sledgehammers, forcing stuck machine parts loose, welding in cramped and awkward positions, carrying heavy items, climbing stairs, and operating pneumatic power tools. After performing a particularly physically demanding job, employee sometimes reclined on a cot to rest his back, but the evidence was clear that this was not an everyday occurrence. Rather, employee's need to lie down was directly related to the particular and specific demands of his work on a given day. The evidence reveals that employee frequently pushed himself to perform his duties *despite* his physical limitations. This quality supports the conclusion that employee was capable of competing for and securing gainful employment notwithstanding his physical limitations—at least until he sustained the work injury of October 25, 2005.

There is also ample evidence that employee's preexisting limitations combined with his left shoulder disability following his attempt to return to work in January 2007. Prior to the last work injury, employee was dependent on the use and proper functioning of his left shoulder. Employee compensated for preexisting limitations in his right shoulder by relying on his left shoulder and upper extremities. When employee returned to work after treatment for his left shoulder, he discovered that the combination of his pre-existing disabilities and the limitations stemming from the left shoulder injury rendered him unable to perform his normal job duties. Employee could no longer swing a sledgehammer. Employee had difficulty welding. Employee could not change screens or perform any work above shoulder level. The evidence regarding employee's attempt to work as a high-lift operator provides the most compelling example of the "combination" effect of employee's preexisting disabilities with his left shoulder condition. Employee was unable to operate the high-lift for more than two hours due to his preexisting back and hand limitations, *combined with* his inability to use his left shoulder effectively.

In sum, we conclude that employee is permanently and totally disabled as a result of his preexisting disabilities and conditions of ill as they existed on October 25, 2005, in combination with the left shoulder injury he sustained on that date.

Employee: James Toebben

- 9 -

Conclusion

Based upon the foregoing, we find the Second Injury Fund liable to employee in the amount of \$331.89, the difference between employee's permanent total disability rate (\$696.97) and employee's permanent partial disability rate (\$365.08) for 46.4 weeks (20% of 232 weeks) beginning January 31, 2007 (the last date employee was able to work following maximum medical improvement for the left shoulder injury). Thereafter, the Second Injury Fund is liable to employee for weekly permanent total disability benefits in the amount of \$ 696.97 for his lifetime, or until modified by law.

The award and decision of Administrative Law Judge Kevin Dinwiddie, dated March 16, 2010, is attached solely for reference.

For necessary legal services rendered to employee, C. Dennis Barbour, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 4th day of November 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: James Toebben

Injury No.: 05-110787

Dependents: N/A

Employer: Fred Weber Construction (previously settled)

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

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: self- insured (previously settled)

Hearing Date: Wednesday, January 20, 2010

Checked by: KD/lsn

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: October 25, 2005
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident is alleged to have occurred: employee injured left shoulder while changing a screen on a rock crusher station
12. Did accident or occupational disease cause death? No Date of death: N/A
13. Part(s) of body injured by accident or occupational disease: left shoulder
14. Nature and extent of any permanent disability: See award
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A
17. Value necessary medical aid not furnished by employer/insurer? N/A

Employee: James Toebben

Injury Number 05-110787

18. Employee's average weekly wages: maximum rates
19. Weekly compensation rate: \$696.97/\$365.08
20. Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable: The claim as against the Second Injury Fund is denied. See award

23. Future requirements awarded: N/A

Employee: James Toebben

Injury Number 05-110787

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Toebben

Injury No: 05-110787

Dependents: N/A

Employer: Fred Weber Construction (previously settled)

Additional Party State Treasurer, as Custodian of the
Second Injury Fund

Insurer: self-insured (previously settled)

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: KD/lsn

The employee, Mr. James Toebben, appeared at hearing in person and by his counsel, C. Dennis Barbour. The claimant seeks a final award for benefits relating to his claim as against the State Treasurer, as Custodian of the Second Injury Fund. Assistant Attorney General Tracey E. Cordia appeared on behalf of the Second Injury Fund. The claim as against the employer/insurer has previously settled. The parties stipulated that on or about October 25, 2005, the employee sustained an injury by accident arising out of and in the course of his employment. The parties further stipulated that the issues to be resolved in Injury Number 05-110787 are as follows:

Permanent disability; and
Liability of the Second Injury Fund.

Mr. James Toebben testified on his own behalf. The claimant also submitted the deposition testimony of Mr. J. Stephen Dolan, and of Jerry Meyers, M.D. The Second Injury Fund submitted the deposition testimony of Mr. James England.

EXHIBITS

Claimant's Exhibits A through I were offered and received in evidence without objection. The Second Injury Fund objected to the offer Claimant's Exhibit J, a copy of the settlement between the employee and the employer for this injury number. Inasmuch as permanent disability is in issue, and to the extent that the Second Injury Fund was not a party to the settlement marked as Claimant's Exhibit J, and has not otherwise stipulated to any percentages of permanent disability, the objection of the Second Injury Fund is sustained, to the extent that is not bound by any statement as to permanent disability contained within Exhibit J.

Employee: James Toebben

Injury Number 05-110787

Second Injury Fund Exhibit Roman Numeral I was offered and received in evidence without objection. The following exhibits are in evidence:

Claimant's Exhibits

- A. Medical records of James M. Cuellar, M.D.
- B. Certified medical records of James E. Schaberg, M.D.
- C. Medical records of Subbarao Polineni, M.D.
- D. Certified medical records of St. Peters Bone & Joint Surgery
- E. Chiropractic records of Kuhn Chiropractic Center
- F. Certified medical records of Metropolitan Neurosurgery, Inc. (Stanley B. Martin, M.D.)
- G. Certified medical records of Mitchell B. Rotman, M.D.
- H. Deposition of Jerry R. Meyers, M.D., taken on 9/18/08
- I. Deposition of J. Stephen Dolan, taken on 8/11/09
- J. Stipulation for Compromise Settlement in Injury Number 05-110787

Second Injury Fund Exhibits

- I. Deposition of James England, Jr., taken on 9/16/09

FINDINGS OF FACT AND RULINGS OF LAW

Mr. Toebben, 60 years old as of the date of hearing in this matter, is a high school graduate and a Vietnam veteran, who after three years as a combat engineer was honorably discharged and began working for Missouri Limestone Incorporated. Mr. Toebben was with Missouri Limestone for approximately ten years, and then began working for Fred Weber Construction in March of 1983. Mr. Toebben worked for Fred Weber for almost 24 years, or until his last day on February 1, 2007.

Mr. Toebben relates that Fred Weber produced crushed rock, sold commercially for road, highway, and other building construction. Claimant worked for a year or two as a night welder; and for several years as a high lift operator, loading crushed rock into hoppers and into commercial trucks. Claimant also operated a portable rock crushing plant in the early 1990's.

For the last 8 to 10 years or so of his career with Fred Weber, Mr. Toebben worked as a plant maintenance man. Mr. Toebben would maintain all manner of crushers, conveyor belts, conveyor belt rollers, screens, wear plates, hammers, and crushing mills used in the process of running quarry rock through the crushing process. Mr. Toebben was constantly building chutes and replacing or repairing parts used in the crushing process, and his tools of the trade included cutting torches, welders, sledgehammers, pry bars, wrenches, pipe wrenches, and all manner of pneumatic tools. The screens weighed anywhere from 35 to 90 pounds each, and used screens

Employee: James Toebben

Injury Number 05-110787

even heavier from the accumulation of wet rock and mud that would cause them to rip and to need replacement on a daily basis. Hammers used to crush the rock weighed anywhere from 80 to 425 pounds, depending on the mill in use. Claimant would use all tools at his disposal, including power jacks and sledgehammers to dislodge hammers that had become stuck. Removing hammers sometimes required removing or cutting bolts, and then using sledgehammers, pry bars, and pneumatic jacks as necessary to knock the hammer off the shanks that held them in place.

Rock crushing hours ran from 7:30 a.m. to 3:30 p.m., and Mr. Toebben would arrive at work 1 to 2 hours before crushing started, and would usually work to five or six at night.

Mr. Toebben exhibited at hearing a left ring finger amputated at the proximal joint of the hand, which he suffered while working at Missouri Limestone around 1980.

Medical records from Kuhn Chiropractic Center document the history provided by Mr. Toebben of seeking treatment for a sore back from time to time from 1993 through 2005.

Mr. Toebben also has submitted the records of his personal physician, Dr. Cuellar, documenting treatment from 1997 through early 2007. Those records reveal that Mr. Toebben would complain to Dr. Cuellar from time to time as to hand and back pain and soreness, and would be prescribed anti-inflammatory medication.

In 2003 Mr. Toebben was diagnosed with avascular necrosis of the right hip. Medical records from Dr. Schaberg reveal that in late February of 2003 Mr. Toebben complained of right hip pain, and on 3/21/03 Dr. Schaberg performed a total right hip replacement. Dr. Schaberg also operated on the right ankle, removing a small mass over the right ankle, and also removed a mass in the left thumb, believed to be "a giant-cell tumor of the tendon sheath". Subsequent follow ups into 2004 and 2005 indicated that claimant was doing well with his right hip, with stable functional range of motion and minimal complaints, until September 12, 2005, when he reported pain in the gluteal region and over the lateral aspect of the hip, and mild low back pain. X-ray was reported as showing a degenerative L5-S1 disk. Claimant was provided with anti-inflammatory medications. On 1/9/06 Dr. Schaberg noted that the hip was doing fine, but Mr. Toebben complained of some mild aching in the low back, with bilateral gluteal pain. An MRI ordered by Dr. Schaberg and taken at Metro Imaging on 1/13/06 revealed "multilevel degenerative changes, most significant at the L2-L3 level, with mild central canal narrowing at the remaining levels. There is evidence for neural foraminal stenosis, most significant at the L4-L5 level encroaching upon the nerves in the neural foramen". On 1/23/06 Dr. Schaberg met with Mr. Toebben and noted that the MRI further showed "some significant problems at L2-3 with spinal stenosis and a questionable ruptured disk". A referral was made to Dr. Stan Martin.

On 2/7/06 the claimant met with Dr. Martin and provided a history low back pain for three or four months. Claimant complained of midline low back pain radiating into the hips bilaterally, worsened by walking and standing and better with rest. Claimant was reported as performing a physical job at Fred Weber, and having more and more trouble getting his work done due to the pain. Dr. Martin performed physical and neurological examinations, but there is nothing in his one page record from 2/7/06 as to his conclusions and recommendations. Claimant returned to see Dr. Martin on 2/9/07 at the request of Dr. Cuellar. At this point the claimant was retired from his employment with Fred Weber. Dr. Martini performed a neurologic exam, and concluded that Mr. Toebben suffered a syndrome of low back pain, chronic in nature, with no good evidence of neurogenic claudication, and no evidence of neurologic deficits. Dr.

Employee: James Toebben

Injury Number 05-110787

Martin concluded that the risks of lumbar disc replacement or fusion would outweigh the potential benefit. He further recommended pain management, and a lower body bone scan to rule out hip or pelvis disease, given the chronicity of the pain.

Included in the records of Dr. Martin, but without further comment from Dr. Martin, are the results of x-rays of the lumbosacral spine and of bones scans completed on 2/13/07.

Mr. Toebben acknowledged at hearing that the hip replacement surgery improved his pain complaints, and caused no problems at work leading up to his work injury to his left shoulder on 10/25/05, at least to the extent that while his hip may have slowed him down, he was still able to walk up as many as 135 steps when necessary. Claimant further testified that for the five years prior to his injury on 10/25/05, his back complaints would wax and wane with the level of his physical activity, and that he would lie down on a cot in the corner of his maintenance shop as many as five or six times a day as needed. Mr. Toebben further testified that at the end of his employment with Fred Weber, he began having others perform the heavy work, such as dislodging hammers, and lifting heavy objects. Claimant notes that the slowing down at work as to what he was previously capable of performing was a gradual progression, and did not necessarily all predate the injury in October of 2005.

Mr. Toebben has further submitted the records of Dr. Polineni, documenting a finding of degenerative arthritis of the right hand with conservative treatment eventually leading to right index finger and right middle finger metacarpophalangeal joint arthroplasty, with the placement of prostheses. Those procedures were performed on 8/10/05 and on 8/17/05 respectively. While there are no records in evidence to document surgery on the left hand, Mr. Toebben testified that those same two procedures were later performed on his left hand.

Mr. Toebben testified that the arthritic condition of his fingers caused him to have trouble gripping tools before and after his surgeries, but acknowledges that the surgeries lessened his pain complaints.

On 3/10/05 Dr. Mitchell B. Rotman performed a physical evaluation of Mr. Toebben, reviewed an MRI, and concluded that the claimant exhibited a massive rotator cuff tear on the right shoulder. On 3/18/05 Dr. Rotman performed a right shoulder arthroscopy and mini-open rotator cuff repair, with subacromial decompression and a biceps tenodesis. Physical therapy was prescribed, and claimant had follow ups with Dr. Rotman. On 9/13/05 Dr. Rotman discharged the claimant from his care, and returned him to full activities at work.

In his report dated 11/08/05 Dr. Rotman notes that claimant presented with a history of left shoulder pop, and having had an MRI scan of the left shoulder performed previously. Dr. Rotman notes that the MRI scan showed "quite a bit of fluid in the subacromial space, consistent with bursitis. He also had severe tendinopathy of his rotator cuff and even a partial biceps tear, which was noted in the report". Dr. Rotman did not find the symptoms warranted an injection, and recommended that claimant continue with his regular activities. On 11/17/05 claimant had worsening symptoms and was given an injection to the subacromial space of the left shoulder. On 1/17/06 no injection was deemed warranted, and the focus was on biceps complaint, possibly aggravated from running a high lift.

On 3/21/06 claimant was complaining of both right and left shoulder pain. Injection was provided to the left shoulder glenohumeral joint. In his note dated 5/31/06, Dr. Rotman acknowledges that he performed a re-repair of the right shoulder rotator cuff repair. Contained

Employee: James Toebben

Injury Number 05-110787

within the notes of Dr. Rotman is the operative note dated 5/19/06, indicating that Dr. Rotman performed a repair of a re-tear of the right rotator cuff.

Mr. Toebben continued to treat and follow up on the right shoulder. On 10/13/06 Dr. Rotman performed surgery on the left shoulder for impingement. In his note dated 10/26/06, Dr. Rotman finds no tearing of the left rotator cuff in need of reattachment, but did find impingement; an old biceps rupture; and debris along the superior labrum that was cleaned up. Decompression of acromial and distal clavicle spurs was performed. Claimant was found to be doing well on the left shoulder decompression, and was to continue with physical therapy while on light duty.

On 11/28/06 Dr. Rotman found more weakness and loss of internal rotation on the right to be expected, given the nature of the findings in the repaired shoulders. On 1/9/07 Dr. Rotman declares the claimant to be at maximum medical improvement, releases him to his full activities at work, and rated disability of the respective shoulders.

Mr. Toebben suffered injury to his left shoulder on 10/25/05 while attempting to free a screen that was in need of being replaced. Claimant notes that he is right handed, and that after his right shoulder injury he was unable to swing a sledgehammer, and either relied on others to do the work or otherwise attempt to compensate by using his left side.

Claimant was unable to perform his usual duties with his left shoulder post surgery, such as lift and swing sledgehammers or use welders. Claimant attempted to operate a high lift in January of 2007 when business was slow and he faced a short term layoff, but was unable to perform that job due to his shoulder, back, and hand complaints. Claimant further relates that he was simply unable to perform his usual maintenance duties, and left his employment after discovering he was incapable of operating the high lift.

PERMANENT DISABILITY/LIABILITY OF THE SECOND INJURY FUND

Second Injury Fund liability is triggered when the preexisting injury is a hindrance or obstacle to employment or to obtaining reemployment. "If the Second Injury Fund is to fulfill its acknowledged purpose, the proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the *potential* that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition." Wuebbling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

The liability of the employer for disability related to a work injury must first be determined before the liability of the Second Injury Fund, if any, can be determined. For example, if the last injury, considered alone, is the sole cause of a permanent and total disability, the employer shall be responsible for that liability, and the Second Injury Fund shall have no liability for the combination of disabilities that are pre-existing and work related. Section 287.220 RSMo; Vaught v. Vaughns, Inc., 938 S.W.2d 931 (Mo.App. S.D. 1997); Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966).

Total disability means the inability to return to any reasonable employment; it does not require that the employee be completely inactive or inert. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990). The test for permanent total disability is whether, given the

Employee: James Toebben

Injury Number 05-110787

claimant's situation and condition, he is competent to compete in the open labor market. Laturno v. Carnahan, 640 S.W.2d 470, 472 (Mo.App. 1982). This test measures the worker's prospects for returning to employment. Patchin v. National Supermarkets, Inc., 738 S.W.2d 166, 167 (Mo.App. 1987). The question is whether in the ordinary course of business an employer would reasonably be expected to hire the claimant in his present physical condition, reasonably expecting him to perform the work for which he is hired. Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982).

Section 287.220 imposes liability upon the Second Injury Fund in certain cases of permanent disability where there has been a preexisting disability. The Second Injury Fund is to provide compensation to employees for that portion of the disability attributable to the preexisting condition. Gassen v. Liebengood, 134 S.W.3d 75, 79 (Mo.App.2004) (citation omitted). The Second Injury Fund is liable where a claimant establishes either that the preexisting partial disability combined with a disability from a subsequent injury to create a permanent and total disability, or the two disabilities combined result in a greater disability than that which would have occurred from the last injury alone. *Id.*; (citing Karoutzos v. Treasurer of State, 55 S.W.3d 493, 498 (Mo.App.2001). Whether the combination of injuries resulted in permanent and total disability is determined based upon the worker's ability to compete in the open labor market. Knisley v. Charleswood Corp., 211 S. W.3d 629, 635 (Mo.App.2007) (citations omitted). "The primary determination is whether an employer can reasonably be expected to hire the employee, given his or her present physical condition, and reasonably expect the employee to successfully perform the work." *Id.*

The evidence persuades that the left shoulder injury suffered by Mr. Toebben on 10/25/05 resulted in permanent partial disability at the shoulder level, but did not in and of itself render the claimant unemployable on the open labor market. Dr. Rotman returned the claimant back to work to full activities post the left shoulder repair. Dr. Myers, who performed a disability evaluation at the claimant's request on August 28, 2007, concluded that the claimant suffered a 25% permanent partial disability to the left shoulder, and further concluded that Mr. Toebben was permanently and totally disabled due to the combination of pre-existing conditions of the back, right hip, hands and right shoulder in combination with the left shoulder injury.

Mr. J. Stephen Dolan, a certified rehabilitation counselor and licensed professional clinical counselor, offered his expert vocational rehabilitation opinion as to the ability of Mr. Toebben to be employable on the open labor market. Mr. James M. England, Jr. likewise offered his opinion, as a vocational rehabilitation counselor, as to the employability of Mr. Toebben on the open labor market.

Dr. Meyers noted an extensive history of low back pain radiating into the right lower extremity. He noted a history of extensive chiropractic care and therapy for the back beginning in 1993. In his report dated October 1, 2007 (Exhibit 2 to Claimant's Exhibit H), he further states:

The lumbar MRI performed on January 13, 2006 confirmed the presence of long-standing pathology including multi-level degenerative changes, central canal narrowing and neural foraminal stenosis at L4-5 with nerve compression consistent with his complaints of low back pain and sciatica in the right lower extremity. He exhibited reduced range of motion of the hip and back along with spasms. His pain is aggravated with activities such as sitting, standing, walking, lifting, carrying and remaining in a fixed position. His hip continues to feel stiff. It is my opinion

Employee: James Toebben

Injury Number 05-110787

that he has 45% PPD of the body as a whole attributable to the back and an additional 35% PPD of the right hip.

At deposition, when asked to describe the complaint of Mr. Toebben during the physical examination on 8/28/07, Dr. Meyers noted as follows:

A: Okay. He continued to complain and suffer from chronic low back pain which radiated into the right leg. This pain was aggravated with sitting, standing, walking, lifting, carrying moderate to heavy objects. If he remained in any fixed position or even a short time, he had increased back pain. The pain was also noted with squatting, climbing stairs, and stated that he could walk about a half a mile at the most. He had pain even with limited bending of the back and it was exacerbated by trying to lift up an object when bending over, results with some stiffness of the hip. (Claimant's Exhibit H, at p.18)

At hearing Mr. Toebben related that for the last five years of his employment with Fred Weber, he would lie down on a cot as many as five or six times a day as needed to relieve his back complaints. Both vocational rehabilitation experts were asked what effect the need to lay down during the course of a work day would have on employability. When asked whether there were any sedentary or light positions that would fit within the restrictions laid out by Dr. Meyers, Mr. Dolan responded as per the following question and answer:

A: Not at the competitive level, no, not in competitive employment, because he talks about needing to have rest intervals as tolerated.

Q: Okay. And I wanted to ask you about that. You said earlier that Mr. Toebben's job would have been considered competitive employment even though he testified that he was- he was getting to lie down during the day on a cot eight to ten times, is that what you testified to?

A: I don't think I mentioned the eight to ten times, but other than that, yes.

Q: Okay. And generally speaking, if one were to ask you if someone comes in with a restriction that they have to lie down periodically throughout the day, would it be true that generally speaking that would be inconsistent with competitive employment?

A: Yes. (Claimant's Exhibit I, at p 48.)

On further cross examination, Mr. Dolan agreed that if Mr. Toebben had to lie down on a regular basis prior to having any shoulder problems at all, that would certainly have compromised his employability with other companies. (Claimant's Exhibit I, at pp. 49-50)

Likewise, Mr. England was asked as to the import of Mr. Toebben having to lie down during a work day, as follows:

Q: And you noted, sir, in your report that Mr. Toebben had reported, in his deposition testimony, that prior to all of these shoulder problems beginning that, because of back pain, he was lying down during the day, eight to ten times, on a cot at work?

A: Correct.

Q: If you assumed that that history is correct, would that history have been consistent with what would be considered competitive employment?

Employee: James Toebben

Injury Number 05-110787

A: I don't think so. I mean, I think it—I'm not aware of any normal regular job setting that would allow somebody to lay down eight to ten times per day for relief of pain. No. (SIF Exhibit No. I)

At hearing Mr. Toebben was asked what types of employment he might be able to perform, and responded that his back complaints would prevent him from performing a sedentary job such as a motel clerk or a security guard.

When Dr. Myers was asked as to his observations of Mr. Toebben on examination, and specifically as to his walk, he responded as follows:

A: He walked in bent over. He did not have an erect gait. And I asked him, how come you are all bent over, and he said, my back's killing me. Having been through that, I know what he was going through. (Claimant's Exhibit H, at p. 21).

Dr. Myers went on to note that his examination of the lower back showed tenderness with some spasm; pain in all motions; loss of range of motion with flexion and extension, but none with rotation; and an inability to determine the strength of the back because of limitation of motion with associated pain during the examination. (Claimant's Exhibit H, at p. 22).

Both vocational experts testified that the need to lie down at work due to back complaints was inconsistent with competitive employment. Mr. Toebben testified to his need to lie down while employed at Fred Weber due to his back complaints, and attributed his inability to perform a sedentary job to his back complaints. The evidence persuades that it was a pre-existing condition alone as to the back that has caused the claimant to be unable to compete for employment on the open labor market. The claimant has failed to prove that permanent disability from the last work injury combines with any prior permanent disabilities to create a greater degree of permanent disability compensable from the Second Injury Fund. The Second Injury Fund claim is denied.

Employee: James Toebben

Injury Number 05-110787

This award is a final determination of the issues raised at hearing on this claim for workers' compensation benefits, and is considered to be ripe for appeal under the act.

Made by: /s/ KEVIN DINWIDDIE
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 16th day of March, 2010.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation