

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

Injury No.: 07-097297

Employee: James Vann
Employer: A & E Custom Manufacturing Technologies (Settled)
Insurer: Fidelity & Guaranty Insurance Co. c/o Frank Gates USA (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 section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 28, 2010. The award and decision of Administrative Law Judge Carl Mueller, issued September 28, 2010, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 8th day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: James Vann Injury No: 07-097297
Dependents: N/A
Employer: A&E Custom Manufacturing Technologies (Settled)
Additional Party: Treasurer of the State of Missouri as the Guardian of the Second Injury Fund
Insurer: Fidelity & Guaranty Insurance Co. c/o Frank Gates USA (Settled)
Hearing Date: August 19, 2010 Checked by: RCM/rm

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: on or about February 01, 2007
5. State location where accident occurred or occupational disease was contracted: Riverside, 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: Employee was attempting to close an overhead door by pulling on a strap when he injured his left shoulder.
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: twenty three and seven-tenths percent (23.7%) – left shoulder at the 232-week level
15. Compensation paid to-date for temporary disability: \$10,449.54
16. Value necessary medical aid paid to date by employer/insurer? \$31,265.66
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$522.44
19. Weekly compensation rate: \$348.29
20. Method wages computation: Stipulation

21. Amount of compensation payable: N/A

22. Second Injury Fund liability:

Permanent total disability benefits from Second Injury Fund:.....Yes

-- weekly differential (\$0) payable by SIF for 55 weeks beginning June 01, 2009.....\$0

-- and, thereafter \$348.29 per week, for Claimant's lifetime.....Indeterminate

TOTAL: Indeterminate

23. Future requirements awarded: Benefits paid at \$348.29 per week for duration of Employee's life.

Said payments to begin as of date of this award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a twenty-five percent (25%) lien in favor of David A. Slocum, Attorney, for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Vann

Injury No: 07-097297

Dependents: N/A

Employer: A&E Custom Manufacturing Technologies (Settled)

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

Insurer: Fidelity & Guaranty Insurance Co. c/o Frank Gates USA (Settled)

On August 19, 2010, the Employee and the Second Injury Fund appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Mr. James Vann, appeared in person and with counsel, David A. Slocum. The Second Injury Fund appeared by and through its counsel, Assistant Attorney General, Andy Dickson. The primary issues the parties requested the Division to determine were: (1) whether or not Mr. Vann suffered any disability and, if so, the nature and extent of his disability; and (2) whether the Second Injury Fund is liable to Mr. Vann for any disability compensation. For the reasons noted below, I find that Mr. Vann's work accident of February 01, 2007 caused the disabilities that he complained of, and that the disability attributable to the February 01, 2007 work accident is equal to twenty three and seven-tenths percent (23.7%) to the left shoulder. I further find that Mr. Vann is permanently and totally disabled following the February 01, 2007 accident as a result of a combination of Mr. Vann's preexisting disabilities and the residuals attributable to the February 01, 2007 work injury.

STIPULATIONS

The parties stipulated that:

1. On or about February 01, 2007 ("the injury date"), A&E Custom Manufacturing Technologies was an employer operating subject to Missouri's Workers' Compensation law, and that A&E Custom Manufacturing Technologies' liability under the Workers' Compensation Act was fully insured by Fidelity & Guaranty Insurance Co. c/o Frank Gates USA;
2. Mr. Vann was its employee working subject to the law in Riverside, Jackson County, Missouri;
3. Mr. Vann sustained an accident arising out of and in the course and scope his employment on February 01, 2007;
4. Mr. Vann notified Custom Manufacturing Technologies of his injury and filed his claim within the time allowed by law;
5. Custom Manufacturing Technologies provided Mr. Vann with medical care equal to \$31,265.66;
6. Mr. Vann's average weekly wage was \$522.44 rendering compensation rates of \$348.29 for temporary total, permanent total and permanent partial disability; and

ISSUES

The parties requested the Division to determine:

1. Whether or not Mr. Vann suffered any disability and, if so, the nature and extent of his disability?
2. Whether the Second Injury Fund is liable to Mr. Vann for any disability compensation?

FINDINGS OF FACT

Mr. Vann testified on his own behalf and presented the following exhibits, all of which were admitted into evidence:

- Exhibit A – Deposition, P. Brent Koprivica MD, August 02, 2010, with exhibits attached.
- Exhibit B – Deposition, Michael Dreiling, July 19, 2010
- Exhibit C – Transcript of KS Settlement hearing, February 20, 2009
- Exhibit D – List of Current left shoulder complaints
- Exhibit E – List of physical complaints to right and left knees before February 01, 2007
- Exhibit F – List of physical complaints to right wrist before February 01, 2007
- Exhibit G – List of physical complaints to the right shoulder before February 01, 2007
- Exhibit H – List of physical complaints to Low Back before February 1, 2007
- Exhibit I – A & E Termination letter dated September 21, 2007

The Second Injury Fund did not present any additional evidence.

Based on the above exhibits and the testimony of Mr. Vann, I make the following findings:

Mr. Vann is a, 63-year old gentleman. Mr. Vann graduated high school in 1964 from Boy's Town in the State of Nebraska. Other than a training course that Mr. Vann completed through Trans-World Airlines in the early 1990's related to engine mechanics, Mr. Vann has had no vocational training and has no typing or computer skills.

Mr. Vann has primarily worked in labor type jobs. Over the last 15 years Mr. Vann's jobs have included: fabricator, asbestos removal laborer, railroad worker, animal control officer, auto-parts stocker, parts inspector, airplane cleaner, dump truck driver, maintenance mechanic and delivery driver.

At the time of the accident, Mr. Vann was working at Custom Manufacturing Technologies. He began at Custom Manufacturing Technologies as a delivery driver in 2006 after working similar jobs at FedEx Home Delivery, Straight Shot Express and J.W.I Supply.

On February 01, 2007, Mr. Vann was trying to close the overhead door of his trailer by pulling on a strap with his left arm when he felt a pop and immediate pain in his shoulder. Of note, Mr. Vann testified that although he is right hand dominant, he was pulling on the strap with his left arm because of permanent limitations with his right shoulder that are the outgrowth of an injury that he sustained in 2002.

After his injury, Mr. Vann notified his employer and was directed to Occupational Health Services for treatment on February 02, 2007. The note from OHS records that on February 01, 2007 Mr. Vann was "standing at the rear of his truck and lifting up over his head with his left arm to close the sliding rear drawer (sic) of his truck. The door was stuck and he had to yank on the strap. This caused some immediate darting pain in the front of his left shoulder...He has never had trouble with his shoulder in the past." This is consistent with Mr. Vann's testimony and Mr. Vann testified that the note was an accurate description of how the work accident occurred.

Following the initial treatment that Mr. Vann received at OHS he was referred for physical therapy. Unfortunately, the physical therapy was unsuccessful in permanently eliminating Mr. Vann's left shoulder complaints.

Because of his ongoing complaints Mr. Vann was referred to the Diagnostic Radiology institute of Kansas City for an MRI of his left shoulder on February 23, 2007. The impressions of the radiologist were "1. Rotator cuff tear, 2. Acromioclavicular degenerative change, 3. Degenerative change in the humeral head with subchondral cyst formation, 4. Small shoulder joint effusion."

Following the results of the MRI Mr. Vann was referred to Dr. Prem Parmar who performed a "left arthroscopic rotator cuff repair, subacromial decompression, distal clavicle excision and glenohumeral debridement of type 1 SLAP tear and posterior labral tear" on May 01, 2007.

Unfortunately, the surgery performed on May 01, 2007 was unsuccessful in resolving Mr. Vann's left shoulder complaints. As a result, Mr. Vann was scheduled for an MRI left shoulder arthrogram on September 12, 2007. According to the radiologist's report, the MRI arthrogram revealed postoperative and degenerative changes as well as "...thickening, increased signal and irregularity of the distal supraspinatus tendon at its insertion consistent with tendonopathy and/or partial tear. Fluid is seen in the subacromial/subdeltoid bursa...which may be postoperative in nature versus tiny pinhole full thickness tear of the supraspinatus tendon."

Due to the abnormalities noted on the September 12, 2007 MRI arthrogram, Mr. Vann underwent a second left shoulder surgery on November 27, 2007. On that date, Dr. Parmar performed a "left shoulder arthroscopic rotator cuff repair and glenohumeral debridement" for a "left shoulder partial-thickness rotator cuff tear of the supraspinatus-partial articular supraspinatus tendon avulsion (PASTA) lesion."

Mr. Vann testified that the second left shoulder surgery performed by Dr. Parmar was not successful in completely resolving his left shoulder complaints. However, despite Mr. Vann's ongoing left shoulder complaints he was released by Dr. Parmar at maximum medical improvement on April 02, 2008.

In his report dated July 15, 2008, Dr. Parmar noted that Mr. Vann continued to have left shoulder crepitus, decreased forward elevation, decreased internal rotation and decreased strength.

Mr. Vann testified at the hearing that he continues to have left shoulder complaints. These complaints include: "constant pain and throbbing, popping and cracking, decreased range of motion and decreased strength. These complaints affect Mr. Vann's ability to lift and carry, comb his hair and dress, as well as, open doors or push and pull."

Because of Mr. Vann's ongoing left shoulder complaints he entered into a compromised settlement with his employer and its insurance company under the Kansas Workers' Compensation Act. According to the settlement hearing transcript, Mr. Vann settled his claim under Kansas law for \$19,031.76, or about 55 weeks of compensation at the stipulated rate of \$348.29.

Prior to February 01, 2007, Mr. Vann had significant disability related to his bilateral knees, right shoulder, right wrist and low back.

The first medical record of note related to Mr. Vann's right knee dates back to July 28, 1986 when Dr. Lipsey performed an arthroscopy with articular debridement and patellar shaving and arthrotomy with repair of the meniscus. This surgery was the result of a work-related injury sustained by Mr. Vann while he was working at Union Pacific Railroad. Mr. Vann testified that following the surgery for this injury he continued to have problems with his right knee. In fact, according to Mr. Vann's testimony, his right knee condition continued to deteriorate from 1986 to 2007.

Mr. Vann also had documented left knee complaints prior to February 01, 2007. On January 15, 2003 Mr. Vann presented to Dr. Alexandra Strong complaining of left knee pain. Dr. Strong's note records "He states he has trouble with his left knee. It has been off and on for with (sic) little while. For the last two weeks it has been worse....the last couple of weeks it has been swollen. Even before that, it would hurt to sit for a long time, feel like something is catching in there, and it hurts to twist." Mr. Vann testified that Dr. Strong's note was an accurate history of his left knee complaints.

For his left knee complaints Mr. Vann was scheduled for an MRI the same day of his evaluation with Dr. Strong. According to the medical records, the MRI revealed "1. Medial meniscus tear. 2. High-intensity signal change surrounding the medial collateral ligament fibers extending along eh meniscocapsular junction. The findings are suggestive of peripheral synovitis/bursitis; in light of the history a grade 1 sprain may also be contributing. 3. Tricompartmental chondral loss/chondromalacia with degenerative arthritic change. 4. Large volume joint effusion and popliteal cyst formation posteromedially."

Following the MRI findings, Dr. Strong recommended a left arthroscopy with medial meniscectomy. Unfortunately, due to financial considerations Mr. Vann was not able to pursue the treatment recommended by Dr. Strong.

Mr. Vann testified to his physical complaints with respect to his knees before February 01, 2007. According to Mr. Vann's testimony he had the following complaints with his knees on an ongoing basis before he was injured at work on February 01, 2007: "constant pain; popping; cracking; limited mobility due to pain; problems with bending, kneeling, squatting, and climbing stairs; decreased strength; swelling with activity; and pain with sitting." Mr. Vann further testified that his knee complaints affected his ability to work before February 01, 2007 in the following ways: "had trouble climbing in and out of truck; trouble loading and unloading boxes due to throbbing pain; problems sitting in the truck for long periods of time; trouble climbing into the back of the truck; had to ask for help with lifting and carrying boxes especially when delivering upstairs; had to slow down and take extra breaks and difficulty inspecting trucks." For these complaints Mr. Vann took Aleve on a daily basis.

Mr. Vann testified that he continues to have the bilateral knee complaints that he had before his work injury of February 01, 2007.

Mr. Vann's right wrist complaints date back to a work accident that he had in 1989 while working for the Unified Government of Wyandotte County as an animal control officer. According to Mr. Vann's testimony, he injured his right wrist when he banged his wrist on an animal cage while trying to euthanize that animal. For his injury Mr. Vann underwent a "proximal row wrist arthroscopy with resection of synovitis and trimming of margins triangular fibrocartilage tear" on February 07, 1991. The surgery was performed by Dr. Storm.

Because his injury was the result of a work accident, Mr. Vann settled this workers' compensation claim under the Kansas Workers' Compensation Act for 20% disability to the right upper extremity.

Unfortunately, Mr. Vann re-injured his right wrist in 1995 while working for O'Reilly Automotive as an auto-parts stocker. For this injury Dr. Hummel performed a "reduction of the scapholunate association with scaphocapitate inner carpal arthrodesis using autologous iliac bone graft."

Because this injury was the result of a work accident, Mr. Vann settled this workers' compensation claim under the Missouri Workers' Compensation Act (95-175777) for 17% permanent partial disability to the right upper extremity. Interestingly, this claim was settled at the 232-week shoulder level.

Mr. Vann testified to his ongoing physical complaints with his right wrist prior to February 01, 2007. According to Mr. Vann's testimony, before he sustained the February 01, 2007 work injury he suffered from: "constant throbbing pain; loss of mobility; trouble bending and twisting the wrist; trouble grasping and holding items and loss of strength and weakness." This affected Mr. Vann's ability to do his jobs by: "harder to do job; trouble picking up boxes, used left arm more; shifting (the manual transmission truck) caused pain; steering and twisting caused pain; took extra breaks to help alleviate pain; asked for help with heavy or big boxes." For these complaints Mr. Vann took Aleve on a daily basis.

Mr. Vann continues to have the right wrist complaints that he had prior to the February 01, 2007 work injury.

Mr. Vann suffered from right shoulder disability before the February 01, 2007 work injury.

According to Mr. Vann's testimony, he injured his right shoulder while working for Straight Shot Express as a delivery driver. Apparently, Mr. Vann was pushing on some freight when he felt a pop in his right shoulder.

For this injury, Mr. Vann was treated by Dr. Craig Satterlee. On October 08, 2002 Dr. Satterlee performed a "right shoulder rotator cuff repair with arthroscopic subacromial decompression, tenodesis long head of the biceps, and distal clavicle excision complete with placement of catheter for postoperative pain pump." The postoperative diagnosis of Mr. Vann's injury was "right shoulder rotator cuff tear, acromioclavicular joint arthritis and tear of the long head of the biceps tendon."

Unfortunately, the surgery performed by Dr. Satterlee on October 08, 2002 was not successful in eliminating Mr. Vann's right shoulder complaints. As a result, Dr. Satterlee performed a second surgery on January 28, 2003. On that date, Dr. Satterlee performed a "right shoulder arthroscopic rotator cuff repair and placement of catheter for post operative pain."

Ultimately, Mr. Vann was released from treatment by Dr. Satterlee on July 28, 2003. In his note of the same date, Dr. Satterlee assigned permanent restrictions of 45 pounds lifting occasionally from ankle to overhead, 75 pounds lifting ankle to bench, 35 pounds ankle to bench endurance lift and overhead pulling of 40 pounds.

Because Mr. Vann's right shoulder injury was the result of a work accident, Mr. Vann settled this workers' compensation claim under the Kansas Workers' Compensation Act for 17% permanent partial disability to the right shoulder.

Mr. Vann testified to the right shoulder complaints that he had on an ongoing basis before he injured his left shoulder on February 01, 2007. Mr. Vann's right shoulder complaints included: "daily pain in the right shoulder; popping and cracking with movement; decreased mobility; loss of strength and weakness; trouble reaching and lifting because of pain." This affected Mr. Vann's ability to perform his job duties by: "limiting lifting to 25lbs; used left arm more; steered with left arm because right arm would get tired; shifting (the trucks manual transmission) caused increased pain; had to ask dock worker for help lifting boxes over 25lbs; had to ask for help when had to lift over head; slower deliveries because needed help from dock workers; slower loading trucks because lifting forklift controls hurt right shoulder; had to ask for help to carry boxes."

Mr. Vann continues to have the physical problems with his right shoulder that he had before the February 01, 2007 work injury.

Mr. Vann also had disability to his low back on an ongoing basis before February 01, 2007.

According to the medical records Mr. Vann injured his low back in 1995 when he fell off of a board causing him to fall to the ground and land on his right hip, knee, leg and lower back. At that time Mr. Vann's main complaints were low back pain on the right side, right hip pain and right knee pain. X-Rays taken on July 18, 1995 revealed "subluxations: L1, and L3 were right, L2 was left, The left ilium was 4mm superior to the left." Other significant findings on X-Ray examination were "The lumbrosacral disk angle was increased to 24 degrees, the lumbar angle was increased to 49 degrees the sacral base angle was increased to 43 degrees, posterior weight bearing by 2mm." Based on these findings Mr. Vann was diagnosed with "1. Acute post-traumatic grade II lumbar sprain/strain, 2. Acute post-traumatic grade II sacroiliac sprain/strain, 3. Facet syndrome L5, 4. Multiple subluxations throughout the spine."

Mr. Vann testified that for these conditions he underwent physical therapy and spinal injections. Unfortunately, this treatment did not permanently resolve Mr. Vann's low back complaints.

Because Mr. Vann's low back injury was the result of a work accident, Mr. Vann settled this workers' compensation claim under the Missouri Workers' Compensation Act for 5% permanent partial disability to the low back in 1996.

Mr. Vann's low back condition worsened from 1996 to 2007. By the time Mr. Vann injured his left shoulder on February 01, 2007, he experienced constant low back pain.

Mr. Vann testified with respect to the low back complaints that he had on an ongoing basis before the February 01, 2007 work injury. Specifically, Mr. Vann experienced: "pain; limited range of motion; trouble bending, kneeling and squatting;

trouble sitting for long periods of time; trouble standing and walking for long periods of time.” These complaints affected Mr. Vann’s work by: “trouble bending over to pick up boxes; back pain caused right leg to go to sleep and I would have to use left leg to shift the truck; had to slow down due to back pain and job took longer to do; had to ask for help from dock workers to lift and carry heavy boxes.”

Mr. Vann continues to suffer from the low back complaints that he had on an ongoing basis before the February 01, 2007 work injury.

For his multiple complaints Mr. Vann was examined by Dr. P. Brent Koprivica on November 01, 2008. After conducting a thorough medical records review, examination and interview of the patient, Dr. Koprivica concluded that Mr. Vann sustained permanent injuries as a result of the February 01, 2007 work accident.

With respect to the February 01, 2007 work accident, Dr. Koprivica opined that “Mr. Vann’s work injury of February 01, 2007 represents the direct, proximate and prevailing factor in Mr. Vann’s identified rotator cuff tear and labral pathology on the left. It is medically reasonable and a direct necessity of this injury that Mr. Vann has received the care and treatment outlined, including the performance of the two separate surgeries for rotator cuff repair.”

For Mr. Vann’s left shoulder injury Dr. Koprivica assigned the following permanent restrictions: “...Mr. Vann would be restricted from repetitive or sustained activities above the shoulder girdle on the left. I would restrict Mr. Vann from climbing activities where he would have to rely on his left upper extremity at the shoulder. Mr. Vann should avoid repetitive reaching or repetitive pushing/pulling types of tasks using his left upper extremity. As a general guideline, I would restrict Mr. Vann to 20 pounds for overhead lifting types of task using his left upper extremity.”

In his report Dr. Koprivica assigned permanent partial disability for Mr. Vann’s conditions that predated February 01, 2007.

For Mr. Vann’s knee conditions Dr. Koprivica assigned twenty-five percent (25%) permanent partial disability to the right and twenty percent (20%) permanent partial disability to the left for noted degenerative joint disease of both knees with histories of surgery and recommended surgery for the right and left knees respectively.

For Mr. Vann’s bilateral knee conditions Dr. Koprivica assigned the following permanent restrictions: “...Mr. Vann would be restricted from frequent or constant squatting, crawling, kneeling or climbing tasks. His bilateral knee pain impairments also contribute to reduced standing capabilities. I would restrict him to interval of less than one hour standing, especially on hard surfaces.”

For Mr. Vann’s right wrist condition that predated February 01, 2007 Dr. Koprivica assigned twenty-five percent (25%) permanent partial disability. Dr. Koprivica rated the right wrist condition at the 200-week level. Dr. Koprivica explained in his report “I would note that I am assigning the permanent partial disability at the forearm level based on the proximal row arthroscopy and synovectomy, which is at the junction between the forearm and wrist...”

For the right wrist condition Dr. Koprivica assigned the following permanent restrictions: “...Mr. Vann would be restricted from repetitive right wrist and hand activities, including repetitive grasping, repetitive pinching, repetitive wrist flexion/extension or repetitive ulnar deviation of the wrist. Mr. Vann would have an

obstacle to performing work such as more physically demanding assembly tasks that require constant right hand use activities, as an example.”

The last condition that Dr. Koprivica identified as a pre-existing disabling condition relates to Mr. Vann’s low back. For Mr. Vann’s “chronic mechanical back pain and noted clinical findings,” Dr. Koprivica assigned twelve and one-half percent (12.5%) permanent partial disability to the body as a whole.

Dr. Koprivica further opined “In terms of his lumbar condition, Mr. Vann would have an obstacle to performing work requiring frequent or constant bending at the waist, pushing, pulling or twisting. He should avoid sustained or awkward postures of the lumbar spine. In general, I would recommend that he only occasionally lift or carry. I would limit lifting or carrying to 50 pounds or less pre-dating the February 01, 2007 work injury.”

In his initial report Dr. Koprivica opined “A vocational expert would need to provide input on this case. At [Mr. Vann’s] advanced age, I believe it is doubtful that an ordinary employer would employ Mr. Vann within the multiple restrictions that are necessary. If it is determined by the vocational expert that Mr. Vann is permanently totally disabled, it my opinion that the permanent total disability is based on Second Injury Fund liability attributable to the impact of combining the pre-existent industrial disabilities I have outlined and their resultant restrictions with the additional disability attributable to the primary injury of February 01, 2007. As I have already mentioned, I do not believe the February 01, 2007, injury is totally disabling considered in isolation, in and of itself.”

Following the examination by Dr. Koprivica, Mr. Vann was evaluated by Vocational Consultant, Michael Dreiling, on April 15, 2009. In his report, Mr. Dreiling concludes that:

When taking into account the totality of this individual’s vocational profile, including the numerous medical disabilities and limitations identified by Dr. Koprivica, this individual is not a realistic candidate to compete for or perform work in the open labor market.

Furthermore, based upon his entire vocational profile, it is my opinion that no employer in the normal course of business would reasonably be expected to employ this individual, given his physical condition. This individual did attempt a return to lighter work after his more recent surgeries on his left shoulder but due to problems with his knees, he cannot even tolerate the lighter-duty activity.

See, Claimant’s Exhibit B at 45-46.

Upon reviewing Mr. Dreiling’s report, Dr. Koprivica testified in his deposition that “My opinion is that when you consider the synergism of combining the disabilities that predated February 1st, 2007 with the additional disability of February 1st, 2007, Mr. Vann is permanently and totally disabled.”

RULINGS OF LAW

The two issues that this Court has been asked to address is whether or not Mr. Vann suffered any disability as a result of the February 01, 2007 work accident and, if so, the nature and extent of his disability; and (2) whether the Second Injury Fund is liable to Mr. Vann for any disability compensation

I find, based on the preponderance of credible evidence that the work injury of February 01, 2007 caused permanent partial disability equal to 23.7% to the left shoulder at the 232-week level.

“For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. The testimony of a lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. An injury, however, may be of such a nature that expert opinion is necessary to show that it was caused by the accident to which it is assigned. Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. Proper opinion testimony as to causal connection is competent and can constitute substantial evidence.” Landers v. Chrysler Corporation, 963 S.W.2d 275 (Mo.App. E.D. 1997).”

In his report, Dr. Koprivica opined that “Mr. Vann’s work injury of February 01, 2007 represents the direct, proximate and prevailing factor in Mr. Vann’s identified rotator cuff tear and labral pathology on the left. It is medically reasonable and a direct necessity of this injury that Mr. Vann has received the care and treatment outlined, including the performance of the two separate surgeries for rotator cuff repair.”

Mr. Vann credibly testified at the hearing that he continues to have left shoulder complaints. These complaints include: constant pain and throbbing, popping and cracking, decreased range of motion and decreased strength. These complaints affect Mr. Vann’s ability to lift and carry, comb his hair and dress, as well as, open doors or push and pull. Mr. Vann’s complaints are corroborated by Dr. Parmar’s records which record left shoulder crepitus, decreased forward elevation, decreased internal rotation and decreased strength.

For Mr. Vann’s left shoulder condition Dr. Koprivica assigned the following permanent restrictions: “...Mr. Vann would be restricted from repetitive or sustained activities above the shoulder girdle on the left. I would restrict Mr. Vann from climbing activities where he would have to rely on his left upper extremity at the shoulder. Mr. Vann should avoid repetitive reaching or repetitive pushing/pulling types of tasks using his left upper extremity. As a general guideline, I would restrict Mr. Vann to 20 pounds for overhead lifting types of task using his left upper extremity.”

Because of Mr. Vann’s ongoing left shoulder complaints he entered into a compromised settlement with his employer and its insurance company under the Kansas Workers’ Compensation Act. According to the settlement hearing transcript, Mr. Vann settled his claim under Kansas law for \$19,031.76, or about 55 weeks of compensation at the stipulated rate of \$348.29. Under Missouri law, 55 weeks of compensation at the 232-week level is equal to 23.7% permanent partial disability.

The Second Injury Fund presented no medical evidence on the issue.

As a result, I find, based on the preponderance of credible evidence that the work injury of February 01, 2007 caused permanent partial disability equal to 23.7% to the left upper extremity at the 232-week level.

Mr. Vann claims he is permanently, totally disabled. I agree. I find by a preponderance of the credible evidence that Mr. Vann's preexisting disabilities combine with the work injury sustained on February 01, 2007 to create a synergistic effect of greater overall disability resulting in permanent, total disability. Therefore, I find Mr. Vann is entitled to permanent total disability benefits from the Second Injury Fund.

Section 287.020.5 RSMo. 1986 defines total disability as the inability to return to any employment and not merely...to return to the employment in which the employee was engaged at the time of the accident. The terms "any employment" mean "any reasonable or normal employment or occupation." Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo.App. 1996); Crum v. Sachs Electric, 786 S.W.2d 131 (Mo.App. 1989); Kowalski v. M-G Metals and Sales, 631 S.W.2d 919 (Mo.App. 1992); Groce v. Pyle, 315 S.W.2d 482 (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 the employee be unable to compete in the open labor market. See Fletcher v. Second Injury Fund, Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 1173 (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 the test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether an employer in the usual course of business would be reasonably expected to employ the employee in his present condition. Sullivan v. Masters Jackson Paving Company, 35 S.W.3d 879 (Mo.App.S.D. 2001). See Garcia v. St. Louis County, 916 S.W.2d 263 (Mo.App. 1995); Lawrence v. RV-III School District, 834 S.W.2d 789 (Mo.App.1992). Thus, a determination of permanent total disability focuses 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 employment. Gordon v. Tri-State Motor Transit, 908 S.W.2d 849 (Mo.App. 1995). Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. Grgic v. P&G Construction, 904 S.W.2d 464, 466 (Mo.App.1995). Courts have held various factors may be considered, including claimant's physical and mental condition, age, education, job experience and skills in making a determination as to whether the claimant is permanently, totally disabled. See Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo.App. 1997); and Olds v. Treasurer, 864 S.W.2d (Mo.App. 1993).

In order to establish Second Injury Fund liability for permanent, total disability benefits, Mr. Vann must prove that: (1) he has permanent disability resulting from a compensable work-related injury; (2) he has permanent disability predating the compensable work-related injury which is of "such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployed," §287.220.1 RSMo. 1993; Garribay v. Treasurer, 930 S.W.2d 57 (Mo.App. 1996); Rose v. Treasurer, 899 S.W.2d 563 (Mo.App. 1995); Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo.App. 1995); and Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo.App 1995); and (3) the combined effect of the disability resulting from the work-related injury and the disability 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 152 (Mo.App. 1994).

In deciding whether the Second Injury Fund has any liability, the first

determination is the degree of disability from the last injury. Stewart v. Johnson, 398 S.W.2d 850, 852 (Mo. 1966); Roller v. Treasurer of Mo., 935 S.W.2d 739, 741 (Mo.App.S.D. 1996). "Until that disability is determined, it is not known whether the Second Injury Fund has any liability" Stewart, 398 S.W.2d at 854. Accordingly, a claimant's preexisting disabilities are irrelevant until employer's liability for the last injury is determined. Kizior v. Trans World Airlines, 5 S.W.3d 195, 201 (Mo.App.W.D. 1999); Roller, 935 S.W.2d at 743-44. If a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. Id.

As discussed above, I find that Mr. Vann sustained permanent partial disability equal to 23.7% to the left shoulder as a result of the February 01, 2007 work injury. Accordingly, Mr. Vann has satisfied the first element to establish his claim for permanent total disability against the Second Injury Fund.

The next element that Mr. Vann must establish is that he has permanent disability predating the compensable work-related injury which is of "such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment." I find that he did.

In the present claim, Dr. Koprivica provided expert medical evidence with respect to the nature and extent of Mr. Vann's disabilities that predated February 01, 2007. For his right and left knee conditions Dr. Koprivica assigned 25% and 20% permanent partial disability at the 160-week levels respectively. For Mr. Vann's pre-existing right upper extremity conditions Dr. Koprivica assigned 25% permanent partial disability at the 200-week level and 25% permanent partial disability at the 232-week level. With respect to Mr. Vann's pre-existing low back condition Dr. Koprivica assigned 12.5% permanent partial disability to the body as a whole.

Mr. Vann testified to the many ways that his pre-existing conditions were disabling prior to February 01, 2007.

Related to pre-existing bilateral knee conditions Mr. Vann testified that he experienced: constant pain; popping; cracking; limited mobility due to pain; problems with bending, kneeling, squatting, and climbing stairs; decreased strength; swelling with activity; and pain with sitting. Mr. Vann further testified that his knee complaints affected his ability to work before February 01, 2007 in the following ways: he had trouble climbing in and out of truck; he had trouble loading and unloading boxes due to throbbing pain; he had problems sitting in the truck for long periods of time; he had trouble climbing into the back of the truck; he had to ask for help with lifting and carrying boxes especially when delivering upstairs; he had to slow down and take extra breaks and had difficulty inspecting trucks. For these complaints Mr. Vann took Aleve on a daily basis.

With respect to his pre-existing right wrist Mr. Vann testified that he experienced: constant throbbing pain; loss of mobility; trouble bending and twisting the wrist; trouble grasping and holding items and loss of strength and weakness. This affected Mr. Vann's ability to do his jobs by: making it harder to do his job; he had trouble picking up boxes, used his left arm more; shifting (the manual transmission truck) caused pain; steering and twisting caused pain; he took extra breaks to help alleviate pain; he asked for help with heavy or big boxes. For these complaints Mr. Vann took Aleve on a daily basis.

Mr. Vann testified that due to his pre-existing right shoulder condition he experienced: daily pain in the right shoulder; popping and cracking with movement; decreased mobility; loss

of strength and weakness; trouble reaching and lifting because of pain. This affected Mr. Vann's ability to perform his job duties by: limiting his lifting to 25lbs; he had to use his left arm more; steered with left arm because right arm would get tired; shifting (the trucks manual transmission) caused increased pain; he had to ask dock workers for help lifting boxes over 25lbs; had to ask for help when had to lift over head; he was slower at deliveries because needed help from dock workers; he was slower loading trucks because operating the forklift controls hurt his right shoulder; he had to ask for help to carry boxes.

Mr. Vann also had preexisting disability to his low back. He testified that as a result of this condition he experienced: pain; limited range of motion; trouble bending, kneeling and squatting; trouble sitting for long periods of time; trouble standing and walking for long periods of time. These complaints affected Mr. Vann's work by: causing trouble when bending over to pick up boxes; his back pain caused his right leg to go to sleep and so he would then use his left leg to shift the truck; he had to slow down due to back pain and jobs took longer to do as a result; he had to ask for help from dock workers to lift and carry heavy boxes.

The Second Injury Fund presented no evidence to dispute the testimony of Mr. Vann or the opinions of Dr. Koprivica.

Based on the testimony of Dr. Koprivica, Mr. Vann and the medical records offered at the hearing, I find that Mr. Vann clearly suffered from permanent disability predating the compensable work-related injury of February 01, 2007. I further find that Mr. Vann's preexisting disability was of such seriousness as to constitute an obstacle or hindrance to his employment or reemployment as required by Missouri law. As a result, I find that Mr. Vann has satisfied the second element required to establish a permanent total disability against the Second Injury Fund.

The final element that Mr. Vann needs to establish to successfully claim permanent total disability benefits from the Second Injury Fund is that the combined effect of the disability resulting from the February 01, 2007 work injury and the disability attributable to all conditions existing at the time the last injury was sustained results in permanent, total disability

I find that the evidence presented is sufficient to persuade me that Mr. Vann is permanently, totally disabled due to the combined effect of the disability resulting from the February 01, 2007 accident at work and the disability attributable to his preexisting conditions. As a result, I find that Mr. Vann has satisfied the final element needed to establish a claim for permanent total disability benefits against the Second Injury Fund.

The only vocational input in this claim is the report and testimony of vocational consultant, Michael Dreiling. In his report, Mr. Dreiling states "When taking into account the totality of this individual's vocational profile, including the numerous medical disabilities and limitations identified by Dr. Koprivica, this individual is not a realistic candidate to compete for or perform work in the open labor market. Furthermore, based upon his entire vocational profile, it is my opinion that no employer in the normal course of business would reasonably be expected to employ this individual, given his physical condition. This individual did attempt a return to light work after his more recent surgeries on his left shoulder but due to problems with his knees, he cannot even tolerate the lighter-duty activity."

In his first report, Dr. Koprivica opined "A vocational expert would need to provide input on this case. At [Mr. Vann's] advanced age, I believe it is doubtful that an ordinary employer would employ Mr. Vann within the multiple restrictions that are necessary. If it is determined by the vocational expert that Mr. Vann is permanently totally disabled, it is my opinion that the permanent total disability is based on Second Injury Fund liability attributable to the impact of

combining the pre-existent industrial disabilities I have outlined and their resultant restrictions with the additional disability attributable to the primary injury of February 01, 2007. As I have already mentioned, I do not believe the February 01, 2007, injury is totally disabling considered in isolation, in and of itself.”

After reviewing Mr. Dreiling's report, Dr. Koprivica testified “My opinion is that when you consider the synergism of combining the disabilities that predated February 1st, 2007 with the additional disability of February 1st, 2007, Mr. Vann is permanently and totally disabled.”

The Second Injury Fund attempts to argue that Mr. Vann's current level of activity is consistent with the ability to compete in the open labor market. To further this argument the Fund points to Mr. Vann's attempt to return to a light-duty, part-time job at Avis rental car. However, when asked during his deposition “Can you describe for the Court why this short-term, part-time employment is not synonymous with competing in the open labor market in your opinion?” Mr. Dreiling responded “Well, I think what we've got here is a gentleman who tried to go back to work---tried to find one of the lighter jobs he's ever---he's ever done. It was on a part-time basis. He was working six hours a day, three days a week.” If he had problems doing that which basically would allow between some standing, walking, and sitting, if he couldn't tolerate that, it's very unlikely that he'd be able to tolerate any other kind of work setting, either sedentary or light.” As a result, Mr. Dreiling concluded that Mr. Vann was permanently totally disabled. Furthermore, the Fund failed to provide any vocational evidence to substantiate its argument.

The Fund also points to Mr. Vann's DUI to argue that he is capable of sustaining work in the open labor market. While Mr. Vann's DUI is regrettable, it is not the same as obtaining and maintaining employment, and the Fund presented no evidence to the contrary. It should also be noted that at the time of hearing Mr. Vann had voluntarily pursued in-patient treatment for alcohol abuse.

More than anything, the Fund's arguments fail to consider that Mr. Vann need not be “completely inactive or inert in order to meet the statutory definition of permanent total disability,” he need only prove that he is unable to compete in the open labor market and “even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable.”

I agree with Mr. Dreiling and Dr. Koprivica that Mr. Vann is permanently, totally disabled. I find that Mr. Vann's preexisting disabilities combine with the work injury sustained on February 01, 2007 to create a synergistic effect of greater overall disability resulting in permanent, total disability. I do not believe that an employer in the usual course of business would be reasonably expected to employ Mr. Vann in his present condition. Furthermore, I applaud Mr. Vann's attempted return to work albeit an unsuccessful one.

Therefore, I find that Mr. Vann is permanently, totally disabled as a result of the combination of his preexisting disabilities and the disability attributable to the February 01, 2007 work injury. As a result, the Second Injury Fund is liable for: \$0 beginning June 01, 2009 and extending for fifty five weeks; and, thereafter \$348.29 per week for life. The Second Injury Fund shall remain liable for such benefits for so long as Mr. Vann remains so disabled or until his death.

Claimant's counsel, David A. Slocum, requested a fee equal to twenty five percent (25%) of all amounts awarded. I find such fee is fair and reasonable and order a lien attached to all benefits awarded equal to 25%.

Date: _____

Made by: _____

Carl Mueller
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation