

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

Injury No.: 01-095571

Employee: Kelvin Venerable
Employer: Kansas City Star (Settled)
Insurer: St. Paul/Travelers Insurance Company (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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 7, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued October 7, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 14th day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD DENYING COMPENSATION
Second Injury Fund Only

Employee: Kelvin Venerable Injury No: 01-095571
Dependents: N/A
Employer: Kansas City Star
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Insurer: St. Paul/Travelers Insurance Company
Hearing Date: July 2, 2008
Proposed Awards Filed: August 4, 2007 Checked by: MSS/pd

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: 8/18/01
5. State location where accident occurred or occupational disease was contracted: Overland Park, Kansas.
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, St. Paul/Travelers Insurance Company
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was loading heavy boxes onto his truck when he felt pain in his neck and 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: Body as a whole.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to-date for temporary disability: \$55,944.96
16. Value necessary medical aid paid to date by employer/insurer? \$102,839.65

- 17. Value necessary medical aid not furnished by employer/insurer? \$0
- 18. Employee's average weekly wages: \$685.40
- 19. Weekly compensation rate: \$329.40
- 20. Method wages computation: Comparable employee - Mo. Rev. Stat. §287.250.1(5)
- 21. Amount of compensation payable:

Medical Expenses

Medical Already Incurred \$102,839.65
 Less credit for expenses already paid (\$102,839.65)
 Total Medical Owning \$0

Temporary Disability

Temporary Disability Incurred \$55,944.96
 Less credit for benefits already paid (\$55,944.96)
 Total TTD Owning \$0

Permanent Partial Disability

Total Award: \$0

- 22. Second Injury Fund liability: N/A None
- 0 weeks of permanent partial disability from Second Injury Fund None
- Uninsured medical/death benefits: None
- Permanent total disability benefits from Second Injury Fund: None
- weekly differential (--) payable by SIF for -- weeks beginning None
- and, thereafter, for Claimant's lifetime. None
- Total: 0.00**

- 23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW

Employee: Kelvin Venerable Injury No: 01-095571
 Dependents: N/A
 Employer: The Kansas City Star
 Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
 Insurer: St. Paul Travelers Insurance Company
 Hearing Date: July 2, 2008

On July 2, 2008, the Employee and the Second Injury Fund appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110. The Employee, Kelvin Venerable, appeared in person and with counsel, James Roswold. The Employer had previously settled with the Claimant. The Second Injury Fund appeared through Assistant Attorney General, Maureen Shine. This is an alleged permanent total disability case. The primary issue the parties requested the Division to determine was whether or not Mr. Venerable is permanently and totally disabled as a result of the alleged injury, and whether the Second Injury Fund has any liability. For the reasons outlined below, I find that Kelvin Venerable is permanently and totally disabled from the 8/18/01 last accident in isolation and, therefore, I find that there is no permanent total disability liability assessed against the Second Injury Fund. No benefits are awarded to Claimant.

STIPULATIONS

The parties stipulated that:

- On or about August 18, 2001 (“the injury date”), the Employer was operating under and subject to the provisions of the Missouri Workers’ Compensation Law with its liability fully insured by Travelers/St. Paul Insurance Company;
- Mr. Kelvin Venerable was its employee operating under and working subject to the Missouri Workers’ Compensation Law; at the time of injury, he was working in Overland Park, Kansas;
- Mr. Venerable filed his claim within the time allowed by law and gave proper notice to the Employer in a timely manner;
- Employee’s compensation rate is \$456.96/\$329.40;
- Past temporary total disability benefits of \$55,944.96 representing 122-5/7ths weeks have been paid by the Employer;
- Medical benefits have been provided by Employer totaling \$102,839.65.
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ISSUES

The parties requested the Division to determine:

- The nature and extent of disability;
- whether Kelvin Venerable is permanently and totally disabled; and
- whether Kelvin Venerable is permanently and totally disabled by either the August 18, 2001 injury in isolation or the combined effects of pre-existing disabilities with the August 18, 2001 injury.

FINDINGS

CLAIMANT'S WITNESSES: Kelvin Venerable

SIF WITNESSES: None

CLAIMANT'S EXHIBITS: Exhibits A through W were admitted into evidence.

JOINT EXHIBIT: Deposition of Claimant, Kelvin Venerable, was admitted into evidence.

SECOND INJURY FUND EXHIBITS: Deposition of vocational expert, Mary Titterington, was admitted into evidence.

Based on the above exhibits and the testimony of Kelvin Venerable, I make the following findings.

Factual Background

Kelvin Venerable is a 50-year-old married man who resides with his wife at 2229 N, 63rd Street, Kansas City, Kansas. He is a high school graduate, having graduated from Bonner Springs High School in 1976. Since 1980, Mr. Venerable has worked essentially as a dump truck driver and delivery person/driver. From 1980 to 1981, he drove a dump truck for his father hauling sand and rock at Venerable Trucking. In 1981, he purchased his own truck and performed the same work as an owner/operator dump truck driver until 1997, still with Venerable Trucking. From 1997 to 2000, Mr. Venerable worked for McGinnis Trucking, a subcontractor for the Kansas City Star, as a truck driver, loading, hauling and delivering newspapers for the Star. Thereafter, from 2000 to 2001, he performed the same work for the Kansas City Star directly.

Prior to that time, Mr. Venerable worked as a machine operator for Sewell Plastics where he sustained a crush/partial amputation injury to his left hand for which he underwent surgery and approximately one-and-one-half to two years of treatment. He filed a workers' compensation claim for that injury in Kansas which he eventually settled for 30% to the body as a whole. Thereafter, Claimant went to work for his father as set out above. He was able to perform his work as a dump truck driver and later delivery driver with no significant problems.

On August 18, 2001, Claimant injured his neck and left shoulder when, during the course of his employment for the Kansas City Star, he was loading heavy boxes onto his truck when he felt pain in his neck and left shoulder. He reported his injury and was sent to Occupational Health Services where he was seen by Dr. J. Ralph Payne. X-rays were taken and medicines were prescribed. An MRI of his cervical spine showed multilevel degenerative disc disease with stenosis superimposed upon disc herniations at C3-4 and C4-5. He was referred to Jonathan Chilton, M.D. Epidural steroid injections were administered. The Claimant underwent CT myelography and then was operated at Research Medical Center on November 15, 2001 for anterior cervical discectomy and fusion C5 to C7. He was given work restrictions by Dr. Chilton with avoidance of lifting, pushing, and pulling greater than 25 pounds. Due to these restrictions, Claimant was not accommodated by the Employer, who did not take him back to work.

Mr. Venerable continued to have difficulty from his neck to his left shoulder and intermittently descending down the arm toward the hand. He had intermittent difficulties of the right upper extremity with numbness and tingling. He was worsened by looking upward or rotating his head to the left as well as by any lifting and was continued on narcotic medication. Due to these problems, Dr. Chilton ordered another MRI which revealed severe chronic degenerative changes at C4-5 and C7-T1. He was judged to be at maximum medical improvement by Dr. Chilton on 5/31/02. A second opinion was obtained from C. Edward Wilson, M.D., who advised epidural steroid injections. Several were given without significant improvement. Thereafter, Claimant was seen by Glenn Amundson, M.D. An EMG was performed by Dr. Nalamachu which

showed evidence of chronic C5-6 radiculopathy on the left and evidence of disuse atrophy in the left first dorsal interosseous muscle. CT myelography was performed with finding of advanced osteophytic bar formation at C4-5 and C3-4. Therefore, on 3/3/03, Dr. Amundson performed an anterior cervical discectomy and fusion from C3 to C5. The patient had temporary relief, and was judged to be at maximum medical improvement on 1/11/04. He was given restrictions to be at sedentary physical activities or less and was asked to continue on Oxycontin and Percocet.

Claimant continued to have pain in his neck with worsening with all activities. In addition, he had tingling radiating to all fingers. He discontinued prescription medicine by going through a drug rehabilitation program to be free of narcotics. Due to the continuing pain, Dr. Amundson ordered additional diagnostic tests to include MRI, CT myelography and EMG for his cervical spine. For continuing upper extremity complaints, he underwent MRI studies of his thoracic spine and left shoulder. He was then transferred to the care of William O. Reed, Jr., M.D. Subacromial steroid injections were given to the left shoulder with temporary relief. On 2/22/05, Dr. Reed performed a subacromial decompression and exploration of the rotator cuff. Postoperatively, the Claimant was given additional physical therapy and, eventually, a Functional Capacity Evaluation, which found him able to lift 10 pounds floor to knuckle occasionally, 15 pounds knuckle to shoulder occasionally, 10 pounds shoulder to overhead occasionally, and to be able to do 15 pound two-handed carrying 100 feet occasionally. The Claimant never returned to work.

Claimant continued to have constant ache on both sides of his neck going to his upper back and posterior left shoulder and frequent pain about his left shoulder where he points anteriorly and posteriorly. He has difficulty looking upward, downward, or turning his head to either side. Because of the limited motion of his neck, he has difficulty driving. He is unable to lie on his left side. He has pain when reaching upward, behind his neck, or behind his back left-handed and has restricted motion and weakness. He continues to have numbness and tingling going down the left arm toward the hand. He continues to take over-the-counter ibuprofen and uses a Tens Unit intermittently.

Dr. Edward J. Prostic testified on behalf of Mr. Venerable. He opined that the Claimant has 40% permanent partial disability of the body as a whole of his cervical spine and an additional 20% PPD of the left shoulder. He imposed restrictions of no work that requires repetitious reaching, pushing, or pulling left-handed or that requires use of his left hand above shoulder height. He is unable to do work above shoulder level because of inadequate cervical extension. Dr. Prostic recommended continuation of stretching and strengthening exercises to the left shoulder and anti-inflammatory and analgesic medicines as needed.

RULINGS

In a Missouri workers' compensation case, the law clearly provides that the Employee has the burden of proving all material elements of the claim. *Fischer v. Archdiocese of St. Louis-Cardinal Richter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990). It is the Claimant's burden to prove "not only causation between the accident and the injury, but also that a disability resulted and the extent of such disability." *Griggs v. A.B. Chance Company*, 503 S.W.2d 697 (Mo. App. W.D. 1973). Further, "proof of permanency of injury requires reasonable certainty." *Id.* This proof must be based on competent and substantial evidence and not merely on speculation. *Moriarty v/ Treasurer of the State of Missouri*, 141 S.W.3d 69 (Mo. App. E.D. 2004).

The Claimant alleges that he is permanently and totally disabled. However, to show that the disability constitutes a permanent and total disability under the Missouri workers' compensation law, the Claimant must show that, given the Employee's situation and condition, he or she is not competent to compete in the open labor market. Under the Missouri Workers' Compensation Act, a total disability is defined as the inability to return to any employment. *Messex v. Sachs Elec. Co.*, 989 S.W. 2d 206, 210 (Mo. App. E.D. 1999). The words "inability to return to any employment" mean that the Employee is unable to perform the

usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v. M-G Metals and Sale*, 631 S.W.2d 919, 922 (Mo.App. S.D. 1982). The primary determination for permanent total disability is whether the Employee is able to compete in the open labor market. *Messex*, 989 S.W.2d at 210. 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*, 980 SW 2d 849, (Mo. App. 1995). There are many factors that may be considered in this assessment including a Claimant's physical and mental condition, age, education, job experience and skills in order to determine whether a Claimant is permanently and totally disabled. See *Tiller v. 166 Auto Auction*, 941, SW 2d 863 (Mo. App. 1997).

If a Claimant is found to be permanently and totally disabled, it becomes a determination for the finder of fact to determine whether the Claimant is permanently and totally disabled due to the last accident alone or as a result of a combination of the Claimant's pre-existing injuries, triggering Second Injury Fund liability. The statutory basis for determining Second Injury Fund liability is found at Section 287.220.1 R.S.Mo. By unambiguous language, the legislature has imposed potential liability on the Second Injury Fund for claimants who "at the time of the last injury had some partial disability" Section 287.220.1 R.S.Mo. The administrative law judge is to consider the degree of the Employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained. This statutory formula for determining Second Injury Fund liability incorporates a medical causation component. The Employer's liability must be determined first and the statute provides that the Employer shall be liable only for the disability resulting from the last injury considered alone, in and of itself. The statute then provides if the compensation for which the Employer at the time of the last injury is less than the compensation provided in the chapter for permanent and total disability, then, in addition to the compensation by the Employer, the Employee shall be paid the remainder of the compensation that would be due for permanent and total disability from the Second Injury Fund. Applying this language, if it is clear that the last injury considered alone and of itself results in permanent and total disability, the Employer is responsible for the full permanent and total disability benefits and the Second Injury Fund has no liability. *Gasson v. Treasurer of the State of Missouri*, 134 S.W.3d 75 (Mo. App. W.D. 2004). When these cases and the relevant statutes are applied to the facts of this case, it is clear that Employee's permanent and total disability results from the last accident considered alone and in isolation.

Based upon the Claimant's testimony at the hearing, together with the medical records and the deposition testimony of vocational expert, Mary Titterington, as well as the other medical and vocational testimony, I find that Claimant has not met his burden of proving that he is permanently and totally disabled as a result of the combination of his preexisting left hand and right ankle injuries with the 8/18/01 cervical injury. I find that Claimant's current condition results from the 8/18/01 primary injury in isolation.

Claimant testified that after recovering from the 8/18/01 left hand injury, he was able to return to work with his father in the family business, Venerable Trucking, hauling rock, sand and asphalt from 1980 to 1997. This required driving a manual transmission 13-speed dump truck, performing general maintenance duties on the truck such as changing the oil, lubing, cleaning out the bed, fueling the truck, checking fluid levels, etc., as well as lifting and carrying 30 pounds. He also maintained the daily documentation on trips made. He testified that there were no physical restrictions imposed by his treating physicians regarding his left hand, that he never missed any time from work after recovering from the injury, and that he was able to perform his job satisfactorily and to the best of his ability despite his left hand condition. He did state that he had difficulty with tarping the loads as he could not pull himself up with his left hand, and that his left hand would get sore from driving. In addition, he had to take periodic breaks in cold weather to warm up his left hand. Nevertheless, he drove his own dump truck continuously from 1981 to 1997 without any significant problems.

In 1997, Claimant took a job with McGinnis Trucking, a subcontractor for the Kansas City Star, hauling and

delivering newspapers for the Star. Claimant testified that, despite his left hand condition, he was able to perform that job satisfactorily without significant problems. He was able to fulfill the job requirements of driving a 5-6 speed manual transmission truck to haul and deliver the papers. He was required to load the papers and bundles into the truck, which involved lifting and carrying 50 pounds, and unload the papers from the truck for the carriers, which also involved lifting and carrying 50 pounds. He had to lift, bend, stand and walk in this position. In addition, he was responsible for fueling and inspecting the truck which required lifting 30 pounds, as well as pushing, pulling and climbing. He also reviewed invoices for daily deliveries.

In 2000, Mr. Venerable started working for the Kansas City Star, performing essentially the same work, except that on the day of the 8/18/01 injury, he was lifting 100 pounds. He testified that he was able to perform his job tasks satisfactorily to the best of his ability at both McGinnis and the Star, despite the left hand condition. However, he did testify to difficulty in using a forklift or hand dolly to load the truck and stated that he again had to take periodic breaks in order to warm up his left hand in cold weather. Claimant testified that following the right ankle injury, it was difficult for him to climb in and out of the truck to load and unload the papers, so he stacked the papers on the side doors which kept him from having to repetitively climb in and out of the truck, and made that task easier for him. He testified that despite the left hand injury, he did not miss any time from work due to problems with the left hand prior to the 8/18/01 injury. In addition, his employers made no accommodations for him for the left hand condition. Claimant testified that after recovering from the right ankle sprain, there were no restrictions imposed by Dr. Clymer for the right ankle; he missed no time from work due to any right ankle problems; and his employer made no accommodations for him as a result. Claimant further testified that neither of his employers ever disciplined or demoted him for failing to perform his job properly.

Claimant testified that prior to 8/18/01 he never had any problems with his neck or back and that he had no injuries to his neck or back prior to that date. In addition, he testified that prior to 8/18/01 he never had any problems with his left shoulder and had no injuries to his left shoulder prior to that date. However, he stated that following the 8/18/01 cervical and left shoulder injuries and surgeries, he has pain on both sides of his neck which radiates down into his left arm. He has numbness and tingling in his left arm as well. His neck pain goes down to the middle of his back, resting in his left shoulder blade area. If he sits or stands too long, his neck pain will go all the way down to his low back. His sitting is reduced to about an hour, and he can stand for only 30-45 minutes as a result of the 8/18/01 injury. When he gets up in the morning, his pain can be a 9 out of 10 on the pain scale. Later in the day, his pain is a constant 5-6. He testified that he did not have any of this neck, back, left shoulder or left arm pain prior to the 8/18/01 injury. Claimant testified that he has limited range of motion in his neck and has a difficult time turning his head to the left to check traffic when driving. He also testified that it is painful for him to look upward following his neck surgeries. He has to limit his driving to an hour or less. Because of the left shoulder injury, Claimant tries not to lift at all and cannot reach overhead with his left arm.

Following the 8/18/01 neck and left shoulder injuries and surgeries, Claimant is unable to do any laundry, to vacuum or to take out the trash. He is unable to do yard work or to go fishing with his son. However, he testified that prior to the 8/18/01 injury he was able to all of those things. He admitted that the 8/18/01 neck and left shoulder injury has changed his life completely.

Claimant further testified that, due to his pain, he has difficulty sleeping through the night and cannot sleep for more than 2-3 hours before waking up due to sharp shooting pain in his neck and left shoulder, at which time he has to get up and move around to try to alleviate the pain. He testified that he never had this problem before the 8/18/01 injury and never had to lie down during the day due to neck pain. In fact, Claimant was working full time hauling and delivering newspapers for the Kansas City Star on a full-time basis prior to the 8/18/01 neck/left shoulder injury. As a result of his neck and left shoulder pain, Claimant testified that he had to lie down during the day.

Of note is the fact that Claimant's testimony was obviously coached at numerous points in his testimony. For example, despite all of these problems with his neck and left shoulder and the fact that he settled the 8/18/01 injury with the Employer for \$200,000.00, Claimant, out of the blue, testified that the neck/left shoulder injury would not keep him from working: he could still work with the neck/left shoulder injury and that it is the left hand and right ankle injury which is keeping him from working. Never mind the fact that he was able to continue working all the way up to the 8/18/01 injury despite the left hand and right ankle injury. In addition, in response to cross-examination questions which clearly would have elicited responses indicating that his physical and subjective complaints were a result of the 8/18/01 injury, he would respond "it's a combination." At one point, in response to his counsel's question to the effect of "if you could find a job and work despite your neck/left shoulder injury, would you need to lie down during the day?" Claimant's response was "No." This, despite the fact that his neck and left shoulder pain is a 9 in the morning when he gets up, and a constant 5-6 on the pain scale during the rest of the day, in addition to the fact that he also testified that it is the neck and shoulder pain which is creating the need to lie down currently.

The Claimant, a man of moderate education and a life history of manual labor, was fully aware of the complex medical procedures and surgeries which were done to him and could in very rapid fire answers admit he was fully aware of said procedures and what they were performed to accomplish. In fact, the Claimant was so well coached in his testimony that he would answer the questions at times before the question was fully asked, causing the court reporter to ask on several occasions for the Claimant to wait for the question before he submitted his answer. In contrast, on cross-examination, the Claimant seemed confused and unable to answer basic questions regarding daily activities, tasks that were made more difficult or that he was unable to perform after the last accident. Claimant did not appear to be attempting to mislead the Court, but was so obviously over-coached to answer clearly leading questions with yes/no answers that on cross-examination he struggled and seemed unable to explain his earlier testimony.

The only medical testimony in evidence was that of Edward J. Prostic, M.D. Dr. Prostic testified that Claimant is permanently and totally disabled. Dr. Prostic so opined without the aid of the substantial medical records in this case, many to the contrary, and with a short unexplained narrative. Counsel for the Second Injury Fund properly objected to this testimony as lacking foundation as Dr. Prostic is not a vocational expert.

Vocational expert, Michael Dreiling, testified on behalf of the Claimant. He opined that the Claimant is unemployable in the open labor market. However, he did no vocational testing, with the exception of the Wonderlic test, which is not the current criteria/standard for intelligence/vocational testing. The Wonderlic test results indicated that Claimant is of average intelligence. Mr. Dreiling testified that Mr. Venerable reported to him that he had to lie down several times a day for up to an hour due to neck and left shoulder pain (Dreiling, p. 27). Mr. Dreiling admitted that if the Claimant has to lie down during the day as reported as a result of the effects of the 8/18/01 injury, that fact alone would render the Claimant unemployable, in isolation. (See the following question and answer from Mr. Dreiling's deposition, p. 65.)

"QUESTION: So, if he didn't need to lie down at unpredictable times during the day prior to the August 18, 2001 injury and now needs to lie down during the day intermittently, that renders him unemployable, isn't he unemployable due to the August 18, 2001 injury in isolation?"

"ANSWER: If you are asking me to ignore any other issues and say we have a worker who will represent that he has to lay down intermittently throughout a workday at any type of job setting, yes, that is going to eliminate the type of work that he would be qualified to do."

Thus, Mr. Dreiling essentially concluded that Claimant's current condition results from the 8/18/01 injury, in isolation.

Mary Titterington testified on behalf of the Second Injury Fund. She did not meet with Mr. Venerable but performed a meticulous review of the medical records, Claimant's deposition, and the depositions of Dr. Prostic and Mike Dreiling and rendered a report. Ms. Titterington opined that if one takes Claimant's rendition of his condition as fact, he is unemployable in the open labor market due to the 8/18/01 injury in isolation. This is due to the fact that he has neck and left shoulder pain of a 9 in the morning when he gets up, which decreases to a constant 5-6 later on in the day, and the fact that Claimant needs to lie down during the day due to pain resulting from the 8/18/01 injury.

Ms. Titterington opined: "The first is that, with the restrictions established by, literally, all of the physicians, he cannot return to his former work. He can't do the lifting, the vibration, the motion of the neck. So he cannot return to any of his former jobs. Those jobs were primarily unskilled or low semiskilled jobs, therefore, he has no transferable skills. So he's an unskilled worker. The next step in my sequential type of evaluation is to look at him as a total person. So we've got a gentleman with a high school diploma who tested at the average range of intellectual ability. In applying the restrictions set by the physicians in the records, and with the restrictions in the record, my determination was that he could return to work in the open labor market, and I gave some examples, possibly a gate tenderer, a night desk clerk, information clerk. There would be others. He could do light delivery. He could do some guard work, some security monitor work. So there's some jobs, definitely, within the restrictions established by the various doctors. Dr. Amundson's are the most restrictive, and Dr. Reed's and Dr. Wilson's are the widest, in terms of actual restrictions. Then the next step after that is determining whether he can return—could he benefit from vocational rehabilitation. And given the average intelligence, the high school diploma, his age of 49, good work history, he would be a good candidate for vocational rehabilitation. Then the next step is to really apply Mr. Venerable's assessment of his abilities separated from the doctors. And when you take his assessment of how he's functioning with a nine level pain during the day because of his neck and shoulder pain, that alone takes him out of the work force. People cannot work – generally someone with a nine level pain is in the emergency room. So you can't work at that level with that kind of pain. So just the pain alone, as he rated it in his deposition, would make him unemployable. He also indicated that he needs to lie down to control his pain. That's a totally unacceptable work behavior. So he would be. . . He would be unemployable based on the need to lie down to control his pain. So when you look at what he's reporting, and I think Dr. Prostic confirmed it, those assessments would remove him from the work force." (Titterington 23-25)

Ms. Titterington opined that the need to lie down during the day and the neck and shoulder pain all result from the 8/18/01 injury, and that those problems, in isolation, render Kelvin Venerable unemployable (Titterington 25). She noted that the medical records did not document any physical restrictions resulting from the 2000 right ankle injury, or from the 1978 left hand injury (Titterington 25-27). She pointed out that Claimant "had an excellent work history and worked for at least 25 years following those amputations" performing medium to heavy exertion level work: "I mean, driving a dump truck does require really bilateral grasping. So he has to have some grasp with that left hand. I mean, those trucks are not easy to control." (Titterington 26) Ms. Titterington further opined that if it were not for the August 18, 2001 neck and left shoulder injury, Mr. Venerable could work, even with the combination of the left ankle at the prior hand injury: "Well, he was. . . I mean, he was for a number of years, right, with his injuries." (Titterington 27) She opined that there are no restrictions from the doctors, other than Dr. Prostic's conclusions based on Dr. Chilton's restrictions which take Mr. Venerable out of the work force, and it is only when Mr. Venerable's assessment of his neck and left shoulder pain and his need to lie down during the day are accepted, that he is unemployable (Titterington 28-29). In summary, Ms. Titterington testified that if Kelvin Venerable is found to be unemployable, that is due to the August 18, 2001 neck and left shoulder injury in isolation, because of the extreme neck and left shoulder pain he is experiencing and his need to lie down during the day. On Cross examination, Ms. Titterington maintained her opinion that if one accepts Claimant's assessment of his functioning, he is unemployable as a result of the 8/18/01 injury in isolation. This opinion was reiterated time and time again throughout the combative and abusive cross-examination by Claimant's counsel, and Ms. Titterington repeated comments in her testimony that his deposition would be terminated if Claimant

continued his unacceptable behavior.

Claimant admitted that he settled the 8/18/01 injury claim with the Employer for a total of \$200,000.. The initial agreement to settle for that sum was made verbally by the parties at the original hearing of 11/21/06 after the trial had started. However, the settlement stipulation was not submitted to the Division of Workers' Compensation for approval until September 21, 2007, at which time it was signed by the Administrative Law Judge. The settlement stipulation sets forth that "This settlement is based upon an approximate disability of fifty-two (52) percent permanent partial disability of the Body as a Whole, in the amount of \$68,515.20; that 0- weeks of disfigurement is included; that the sum of \$19,596.20 represents compensation for future medical expenses (refer to June 15, 2006 MSA attached), excluding future medical treatment related to the replacement of prosthetic devices, which shall remain open (see paragraph 9); and that the sum of \$111,888.60 represents compensation for all remaining issues in dispute, including, but not limited to: past medical treatment; past and future temporary benefits; and the need for home modifications (refer to home modifications documentation attached)."

According to Claimant, at the time of the initial agreement to settle the case for a total of \$200,000.00, the notion of home modifications never came up. Apparently, it was not until after claimant's settlement demand of \$60,000.00 from the Second Injury Fund was rejected that the notion of home modifications arose, presumably to get around the fact that the Employer intended to settle the permanent total disability claim for a lump sum of \$200,000. It was not until after the Second Injury Fund made an offer which was not to Claimant's counsel's liking that he obtained a 12/5/06 report from a physical therapist suggesting modifications to claimant's house, that the issue of home modifications arose. Subsequently, Claimant's counsel obtained a 12/19/06 bid outlining home modifications. However, the settlement was not finalized with the Employer/Insurer until nine months thereafter. I am not bound by this settlement stipulation. By evaluating all of the evidence and in looking at the last accident first and in isolation, the Claimant is rendered permanently and totally disabled as a result thereof.

Claimant on cross-examination admitted there were no unpaid temporary total disability benefits and no housing modifications performed to date. In fact, looking at the suggested list of home modifications reveal a wish-list of creature comforts most would enjoy but certainly can do without, including a different refrigerator with easier access, a more comfortable bed and a therapeutic tub.

After carefully reviewing all of the evidence, including the Claimant's coached testimony, his deposition, as well as the depositions of Dr. Prostic, and vocational experts, Michael Dreiling and Mary Titterington, I find that Kelvin Venerable has proven that he is unemployable in the open labor market and therefore permanently and totally disabled as a result of the 8/18/01 injury in isolation. I am relying more heavily on the testimony of Mary Titterington than that of Mike Dreiling in rendering this decision. Missouri case law has consistently held that where the opinions of experts conflict, the fact-finding body determines which opinion is more credible. See *Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3rd 43, 48 (Mo. App. E.D. 1999); *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo. App. 1984). And, where there are conflicting opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3rd 43, 48 (Mo. App. E.D. 1999); *George v. Shop 'N Save Warehouse Foods*, 855 S.W.2d 460 (Mo. App. 1993); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986). Therefore, I agree with the proposition that looking at Mr. Venerable's overall presentation attributable to the 8/18/01 neck injury, physically, it is a very severe disability which is totally disabling. That evidence coupled with the evidence of Mr. Venerable's current inability to perform a majority of the pre-8/18/01 injury household tasks and hobbies, coupled with his severe pain, inability to sleep through the night, need to lie down on a daily basis, and the inability to access the open labor market are all a result of the 8/18/01 neck/shoulder injury in isolation, and find permanent total disability on that basis.

In this case, Claimant did not meet his burden of proving that liability for permanent and total disability rests with the Second Injury Fund. When pertinent case law and the relevant statutory authority are applied to the facts in this case, it is clear that Mr. Venerable is permanently and totally disabled due to the 8/18/01 neck/left shoulder injury in isolation. All of the substantial and competent evidence demonstrates that his inability to access the open labor market results from the effects of the 8/18/01 neck/left shoulder injury and cervical fusion necessitated therefrom in isolation. Therefore, I find that Mr. Venerable is permanently and totally disabled as a result of the August 18, 2001 cervical/left shoulder injury in isolation. Thus, I do not find that the Second Injury Fund has any liability for permanent total disability. No benefits are awarded in this case.

Date: _____

Made by: _____

Mark Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeff Buker
Director
Division of Workers' Compensation