

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

Injury No.: 99-166347

Employee: Salvatore Vitale
Employer: Vee-Jay Cement Construction Company
Insurer: Fairmont Insurance Company/TIG
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: November 22, 1999
Place and County of Accident: Various work locations

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 May 6, 2005. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued May 6, 2005, 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 12th day of October 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING
William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Salvatore Vitale

Injury No.: 99-166347

Dependents: N/A Before the
Division of Workers'
Employer: Vee-Jay Cement Construction Co. **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Fairmont Ins. Co./TIG
Hearing Date: January 31, 2005 Checked by: KOB

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 onset of occupational disease: November 22, 1999.
 5. State location where accident occurred or occupational disease was contracted: Various work locations.
 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. Other insurers named are not liable for benefits.
 11. Describe work employee was doing and how accident occurred or occupational disease contracted: As an ironworker, Claimant used his right upper extremity in a repetitive manner.
 12. Did accident or occupational disease cause death? No.
 13. Part(s) of body injured by accident or occupational disease: Right upper extremity at the elbow and wrist.
 14. Nature and extent of any permanent disability: 17 1/2% of the elbow and 40% of the wrist, plus disfigurement.
 15. Compensation paid to-date for temporary disability: \$34,583.00
 16. Value necessary medical aid paid to date by employer/insurer? \$35,774.72
- Employee: Salvatore Vitale Injury No.: 99-166347
17. Value necessary medical aid not furnished by employer/insurer? \$0
 18. Employee's average weekly wages: \$1,100.00
 19. Weekly compensation rate: \$578.48 / \$303.01
 20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

57 2/7 weeks of temporary total disability:*	\$ 33,138.64
106.75 weeks of permanent partial disability from Employer:	\$ 32,346.32
8 weeks of disfigurement from Employer:	\$ 2,424.08

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$275.47) payable by SIF for 106 5/7 weeks beginning
February 4, 2002 and, thereafter, \$578.48 per week for Claimant's lifetime;

INDETERMINATE

*This issue was deferred to final award in the prior temporary award.

TOTAL: \$67,909.04 from Employer;
Indeterminate sum from SIF

23. Future requirements awarded: None, other than permanent total disability benefits identified above.

Said payments to begin immediately 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 lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Kurt Hoener of Cooper and Hoener, P.C.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Salvatore Vitale	Injury No.: 99-166347
Dependents:	N/A	Before the Division of Workers'
Employer:	Vee-Jay Cement Construction Co.	Compensation Department of Labor and Industrial
Additional Party:	Second Injury Fund	Relations of Missouri Jefferson City, Missouri
Insurer:	Fairmont Ins. Co./TIG	
	Checked by: KOB	

PRELIMINARIES

This matter proceeded to final hearing on January 31, 2005 at the Division of Workers' Compensation in the City of St. Louis. Attorney Kurt Hoener represented Salvatore Vitale ("Claimant"). Richard Day represented Vee-Jay Cement Construction Company ("Employer"), and its Insurer, Fairmont Insurance Co /TIG ("Fairmont"). James Thoenen represented Employer and its Insurer, Amerisure Insurance Co./Michigan Mutual Insurance Co. ("Amerisure"). Julie Madsen represented St. Paul Fire and Marine Insurance Co. ("St. Paul"). Assistant Attorney General Diana Bartels represented the Second Injury Fund. Claimant seeks lifetime permanent total disability benefits.

The parties stipulated that on or about November 22, 1999, Claimant sustained the onset of an occupational disease arising out of and in the course of his employment. Employment, venue, notice and timeliness of the claim are not at issue. Claimant earned an average weekly wage of \$1,100.00, which corresponds to rates of compensation of \$578.48 for total disability benefits and \$303.01 for permanent partial disability benefits. Claimant has received temporary total disability benefits totaling \$34,583.00, covering periods of time from January 7, 2000 to April 11, 2000, June 5, 2000 to December 27, 2000, and October 8, 2001 to February 3, 2002. Medical benefits paid on Claimant's behalf total \$35,774.72. The parties stipulated that the date of filing of Claimant's claim for compensation was June 15, 2000.

The undersigned Administrative Law Judge previously issued a temporary award on June 4, 2001 wherein Employer and Amerisure, the only insurance company named at the time, were ordered to provide additional workers compensation benefits associated with Claimant's upper extremity complaints. Subsequently, Fairmont and St. Paul were added as parties, and had the opportunity to fully participate in the final hearing. As to coverage dates, the parties stipulated Amerisure had Employer's coverage from April 1, 1999 to March 31, 2000; Fairmont from April 1, 2000 to April 1, 2001; and St. Paul from

December 14, 1999 to December 14, 2000 for work at BJC cites ONLY.

The following issues presented for determination at the final hearing:

1. Which insurance company is responsible to pay benefits due Claimant;
2. Does the Division of Workers' Compensation have jurisdiction to order one insurance company to reimburse another;
3. Is Claimant entitled to temporary total disability benefits from December 28, 2000 to February 2, 2002; [\[1\]](#)
4. What is the nature and extent of Claimant's disability; and
5. What is the liability of the Second Injury Fund?

SUMMARY OF THE EVIDENCE

Claimant & Records

Claimant is a 61-year-old man who was born in Sicily, Italy. He learned to read and write in Italian even though he left school when he was approximately 11 years old to begin his working career. In his homeland, he had laborer and truck driving jobs. Claimant came to the United States in 1967, but continues to rely on his native tongue to communicate. Although he can understand spoken English, he does not read or communicate well in English, and he has always worked with or for other Italian-speaking people. He is able to drive, shop, and generally function independently even with the language barrier. Claimant's daughter was present at hearing and provided assistance as a translator under oath.

Claimant has worked for Employer for over 20 years. Initially a laborer, Claimant worked as an ironworker since 1990. Claimant was able to complete his training as an ironworker by watching demonstrations of new techniques and talking with other workers in his native tongue. On a daily basis, Claimant's job as an ironworker involved pushing and pulling steel rods up to 100 pounds, lifting up to 20 pounds several hundred times a day and using tools such as power saws, hammers, pliers, and torches. Claimant is right hand dominant. Prior to his right upper extremity problems, Claimant only had minor injuries that left no lasting disability: he sliced the tip of his right index finger, and broke his collar bone.

In the mid-1990's, Claimant developed right upper extremity symptoms of pain, numbness, tingling and burning. After his family doctor diagnosed carpal tunnel syndrome ("CTS") in 1999, Claimant underwent a surgical release by Dr. Kostman at the direction of Employer on January 7, 2000. Dr. Brown, who saw Claimant in follow up, found cubital tunnel problems on April 7, 2000, provided conservative treatment, and released Claimant to return to work on April 11, 2000. Claimant returned to work as an ironworker through May 23, 2000, and worked several job, including Bridge Data, MCI-World Com, YMCA, BJC, and Home Depot. [\[2\]](#) During this time, he had some assistance, and limited the use of his right hand where possible, but he did the work of an ironworker, was sometimes the only ironworker at the job, used tools such as bolt cutters and pliers, and received his fully salary. The pain and swelling he was having in the right hand continued and got worse during this time. Claimant did not work any job after May 24, 2000.

Under the care of Dr. Benz, Claimant had a second surgery on June 27, 2000, and pursuant to the Temporary Award, Employer was ordered to pay benefits from June 6, 2000 to December 27, 2000. On December 28, 2000, Dr. Benz released Claimant from care. Dr. Schlafly examined Claimant on February 6, 2001, and suggested surgery, which was ordered in the Temporary Award, and performed by him on October 8, 2001. Dr. Schlafly found Claimant at MMI on February 1, 2002, and Employer, through Amerisure, paid TTD from the date of surgery to February 3, 2002. Since February 2002, Claimant has not received any workers' compensation benefits, nor has he had further treatment to his right upper extremity.

Since his last surgery, Claimant reports improvement in that his fingers open a bit more and his elbow is O.K., but he still has problems with his right upper extremity, including pain and tingling in his hand, sharp pain when turning the wrist, decreased strength, and painful swelling with use. He can lift no more than 10 pounds with his right hand, and finds it hurts to make a fist. He has a 4½-inch scar on the hand, and a 3½-inch scar on his elbow. Claimant had bypass surgery in his leg since he stopped working.

On a typical day, Claimant requires help from his wife to get dressed and put on his shoes. He walks every day, lies on the couch, watches television, tends to small tasks the garden, and sleeps. He cannot garden or cut grass like he used to. Standing is not a problem, but sitting for long periods of time is problematic because he gets bored. He cannot do the job or an ironworker, or any other job he has done in the past.

Claimant's medical treatment to the right upper extremity can be summarized as follows: Dr. Hawatmeh diagnosed right CTS in October 1999; Dr. Kostman performed a CTS release by on January 7, 2000; Dr. Brown diagnosed post-surgical CTS and cubital tunnel syndrome on April 7, 2000, and provided conservative treatment through May; in June 2000, Dr. Benz diagnosed work-related CTS and ulnar problems, and performed a carpal tunnel release with exploration of the ulnar nerve at the Guyon's canal; Claimant returned to Dr. Brown in Fall 2000 for physical therapy; on December 28, 2000, Dr. Benz released Claimant with restrictions, and felt he would not benefit from more surgery; on October 8, 2001, Dr. Schlafly performed a decompression of the median and ulnar nerves with flexor tenosynovectomy, and on February 1, 2002, declared him to be at maximum medical improvement.

Opinion Evidence

Dr. Schlafly and **Dr. Brown**, who each examined and treated Claimant on several occasions, gave opinions regarding the degree of disability suffered by Claimant as a result of his repetitive work, with Dr. Schlafly stating he had disability equal to 50% of the right wrist and 25% of the right elbow, and Dr. Brown suggesting the disability was 17% of the wrist and 5% of the elbow. Both doctors felt that an ironworker is exposed to the risk of developing CTS and cubital tunnel syndrome by virtue of the job duties, that Claimant could no longer perform ironwork, and that Claimant's work was a substantial factor in causing his diseases. Both doctors found limited range of motion and grip strength, and both suggested restrictions, although Dr. Schlafly's suggestions of 5 pounds lifting, no vibratory tools, no heavy lifting, and no repetitive gripping, were more restrictive than Dr. Brown's no more than 20 pounds lifting with no overtime restrictions.

Vocational experts **Samuel Bernstein PhD.** and **Donna Kissinger Abram** testified by deposition for the Claimant and Second Injury Fund respectively. Based on his interview of Claimant, review of records, and medical limitations, Dr. Bernstein concluded Claimant is not able to compete in the open labor market based on the combination of his age, limited education, limited ability to communicate in and understand English, limited vocational experience and the severe limitations he has to his dominant upper extremity. At the time he issued his report, Dr. Bernstein was unaware Claimant's learning disability and ADHD diagnoses, but agrees that subsequent testing undertaken with the help of a translator shows low IQ and learning disabilities. Ms. Abram reviewed records, but did not meet with Claimant. She felt the tests that revealed learning disabilities were accurate, and that the learning disabilities would rule out certain jobs. But despite his physical and learning disabilities, Ms. Abram felt could place Claimant in an open labor market job such as a outside deliverer, cart vender, coin machine operator or gate guard.

On the issue of Claimant's alleged preexisting cognitive disabilities, two experts offered guidance: **James Herbert Russell, PhD.**, for the Claimant, and **Michael Scott, PhD.** for the Second Injury Fund. Dr. Russell is a licensed professional counselor who specializes in learning disability evaluation and training. With the aid of an independent translator, Dr. Russell administered a standard battery of tests for evaluating learning problems, and made a special effort to check for internal validity to account for the translation. The test results showed depression, ADHD – inattentive type, low IQ, learning disabilities in reading, writing and math, and low verbal and non-verbal cognitive abilities. Claimant's learning disabilities stem from childhood, will last his lifetime, and limit or interfere with his ability to become employed. In Dr. Russell's opinion, Claimant is unable to learn and speak English because of his learning disabilities. Dr. Scott, a psychologist, opined that Dr. Russell did not have sufficient data to make a diagnosis of a learning disability and ADHD.

FINDINGS OF FACT AND RULINGS OF LAW

Based on a comprehensive review of the evidence, the testimony of Claimant, which I find credible, and the expert opinions I find most convincing, along with the application of the Workers' Compensation Law of Missouri, I find:

1. Fairmont Insurance Co /TIG, the company on the risk when Claimant last was employed as an ironworker before the date of the claim, is responsible for providing benefits.

A temporary award ordering Employer and Amerisure has previously been entered in this matter, and made part of the record herein. However, the issue of which insurance company is liable has not been raised until now. The Division of Workers' Compensation has subject-matter jurisdiction to determine which of two insurers is liable to an injured worker. *Mikel v. Pott Industries/St. Louis Ship*, 896 S.W.2d 624, 626 (Mo.banc 1995). Temporary or partial awards are not subject to principals of either claim or issue preclusion. They are not final judgments on the merits but are subject to modification. *Korte v. Fry-Wagner Moving & Storage Company*, 922 S.W.2d 395, 397-98 (Mo.App. 1996). Section 287.510 R.S.Mo. 1994 provides that a temporary or partial award "may be modified from time to time to meet the needs of the case and the same may be kept open until a final award can be made . . ."

I find the following facts with respect to the insurance issue: 1) Claimant was employed by Employer as an ironworker; 2) Claimant sustained an occupational disease of his right upper extremity, namely severe CTS (diagnosed prior to April 1, 2000) and cubital tunnel syndrome/ ulnar neuropathy (diagnosed after April 1, 2001), due to the repetitive motion of ironwork; 3) Ironworkers in general, and Claimant in particular, are employed in an occupational process in which they are exposed to the hazards of carpal and cubital tunnel syndromes; 4) Claimant was last exposed to the hazards of the occupational disease on or about his last day of work, May 24, 2000; 5) Fairmont provided coverage for Employer beginning April 1, 2000, Amerisure's coverage having ended March 31, 2000; 6) The claim was filed on June 15, 2000; 7) Although St. Paul provided some coverage for Employer on specific BJC jobs, Claimant did not work at BJC on his last day of work, and other than this specific finding, there is insufficient evidence concerning the jobs St. Paul may have covered. St. Paul is not responsible for any benefits.

Section 287.063 R.S.Mo. 1993, also known as "the last exposure" provision of the Workers' Compensation

Act, addresses employer liability in occupational disease cases:

1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 7 of section 287.067, RSMo.
2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure.

The interpretation and application of this last exposure rule, as it relates to occupational disease due to repetitive motion, has been recently addressed by our Supreme Court. In *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612, 615 (Mo.banc 2002). The court stated the last exposure rule is not a rule of causation. It held that, "as the starting point, the last employer *before the date of claim* is liable if that employer exposed the employee to the hazard of the occupational disease." *Id.* (emphasis added) (citing *Johnson v. Denton*, 911 S.W.2d 286 (Mo.banc 1995); *Maxon v. Leggett & Platt*, 9 S.W.3d 725 (Mo.App. 2000)(overruled on other grounds)). This analysis must be applied in assessing liability involving successive employers and insurers.

The issue in this case does not involve successive employers but successive insurers. As such, the 90 day rule of §287.060.7 does not apply. *Smith v. Tiger Coaches, Inc.*, 73 S.W.2d 756 (Mo.App. E.D.2002)(overruled on other grounds). There are no other exceptions to the last exposure rule. *Walker v. Klaric Masonry, Inc.*, 937 S.W.2d 219 (Mo.App. E.D.1996). The court noted in *Walker* that a bright line conclusive presumption is to be utilized in establishing liability for occupational diseases. The fairness of an approach is not determinative. *Id.* at 220.

Claimant returned to work after April 7, 2000, and worked for approximately 30 days for Employer under the coverage of Fairmont. There is no requirement in § 287.063 that the work activity constituting the last exposure be the same repetitive motion activities that existed with a prior insurer. *Mayfield v. Brown Shoe Company*, 941 S.W.2d 31 (Mo.App. S.D.1997). However, there is ample evidence Claimant performed the regular, although sometimes modified duties of an ironworker in April and May 2000, which work caused an increase in painful symptoms. The medical evidence is consistent that ironwork exposes the worker to the hazards of the disease from which Claimant suffers.

Relying on the last exposure rule, a rule of convenience under Missouri Workers' Compensation Law, and the facts found above, I find that liability for Claimant's occupational disease of repetitive motion is with Fairmont Insurance Company / TIG.

2. The Division of Workers' Compensation lacks the jurisdiction to order Fairmont to reimburse Amerisure.

The benefits paid herein of medical expenses of \$35,774.72 and compensation of \$34,583.00 were paid by insurer Amerisure/Michigan Mutual Insurance Company. Request has been made to order reimbursement of Amerisure by the insurer determined to be liable.

The decision of *Harris v. Pine Cleaners, Inc.*, 296 S.W.2d 27, 30 (Mo.banc 1956) holds that while the Division of Workers' Compensation can determine which of two insurance companies is liable to an employee, it does not have jurisdiction or authority to order one company to reimburse another for payments mistakenly made by the latter to the employee. Amerisure has paid benefits to Claimant for which Fairmont is liable pursuant to this award. Amerisure cannot receive reimbursement pursuant to this award, but may seek relief in other legal forums as the law may allow.

3. Employer and Fairmont shall provide Claimant with temporary total disability benefits from December 28, 2000 to February 2, 2002.

Whether Claimant is entitled to temporary total disability benefits after December 27, 2000 is an issue identified and deferred in the temporary award. Benefits for temporary total disability are paid during the "healing period." *See, e.g., Vinson v. Curators of Univ. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. E.D.1991). Temporary total disability compensation is paid until the employee can return to work, his condition stabilizes, or he has reached a point where further

progress is not expected. *Id.* at 508.

I find that Claimant was temporarily and totally disabled from December 28, 2000 to February 2, 2002, the day before TTD payments resumed. His condition had not stabilized or reached a point where he could return to work. Based on his testimony, his physical condition and the realistic limitations which Dr. Schlafly placed on him, it would be unreasonable to expect Claimant to compete for employment in the open labor market. Employer, through Fairmont, shall provide Claimant with 57 2/7-weeks of temporary total disability compensation.

4. Employer and Fairmont shall compensate Claimant for his permanent partial disability.

As to Claimant's right upper extremity injury itself, the sole dispute is the nature and extent of the disability. The experts have a 100-week difference of opinion on this critical issue, with one expert assigning 140 weeks of disability, and the other suggesting 40.25 weeks. The finder of fact can consider all of the evidence in arriving at a percentage and is not bound by the percentage estimates of medical experts. *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. W.D.1989)(overruled on other grounds).

I find that Claimant testified credibly with respect to the limitations and ongoing symptoms he experiences as a result of his occupational disease. He underwent three separate surgeries to his wrist and elbow, and has pain, swelling, weakness and limitation of motion. He needs assistance with basic life functions such as getting dressed. He can no longer be an ironworker, his life's career, because of his hand and arm disability. He has 8 inches of scarring on his right arm. Based on all the credible evidence, I find that Claimant has permanent partial disability equivalent to 40% of the right upper extremity at the wrist and 17 ½ % of the right upper extremity at the elbow. Employer shall not receive a credit for multiple injuries to the same extremity, nor shall Employer be responsible for a loading factor for multiplicity. Employer shall provide Claimant with an additional 8 weeks of disability benefits for disfigurement.

5. Claimant is permanently and totally disabled on account of a combination of disabilities.

Claimant seeks permanent total disability benefits from the Second Injury Fund. In analyzing an alleged total disability case, "the first determination is the degree of disability from the last injury considered alone." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003). If the employee's last injury in and of itself rendered him permanently and totally disabled, the Fund has no liability; the employer is responsible for the entire amount of compensation. *Id.*; *Birdsong v. Waste Management*, 147 S.W.3d 132, 138 (Mo.App. S.D.2004).

Fund liability may be triggered if the employer is not responsible. In order to recover from the Fund, a claimant must first prove a pre-existing permanent partial disability whether from compensable injury or otherwise, pursuant to § 287.220.1. The permanent disability pre-dating the injury in question must "exist at the time the work-related injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed." *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App.1999), cited in *Karoutzos v. Treasurer*, 55 S.W.3d 493, 498 (Mo.App. W.D.2001).

"Total disability is defined as the inability to return to any employment and not merely the employment in which the [Claimant] was engaged at the time of the accident....The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment....The critical question then becomes whether any employer in the usual course of employment would reasonably be expected to hire this [Claimant] in his or her present physical condition." *Lorentz v. Missouri State Treasurer*, 72 S.W.3d 315, 319 (Mo.App. S.D.2002)(overruled on other grounds) citing *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. 1999).

Employer's liability is for partial disability, as outlined above. While the evidence establishes conclusively that Claimant's upper extremity injuries prevent him from performing ironwork, the evidence does not suggest the right arm injuries alone prevent Claimant from competing in the open labor market.

As to the evidence of total disability, I find the overwhelming credible evidence establishes Claimant is permanently and totally disabled. He is a 61-year old man who has little formal education, cannot understand, speak, or write in English, and has engaged in the heavy labor of iron working and other physical jobs his entire life. Otherwise healthy, he sustained a

severe case of right carpal and cubital tunnel syndromes, underwent multiple surgeries, and lost a great deal of the use and function of his limb. There is a general consensus that Claimant cannot work as an ironworker, and has significant restrictions on the use of her upper extremity.

The expert evidence supports Claimant's total disability claim. Dr. Bernstein's opinion is more credible and consistent with the record as a whole than is Ms. Abram's opinion to the contrary. I find, as he concluded, that Claimant is not able to compete in the open labor market based on the combination of his age, limited education, limited ability to communicate in and understand English, limited vocational experience and the severe limitations he has to his dominant upper extremity.

Normally, illiteracy or the inability to communicate in English cannot be considered a disability, and therefore cannot be held against the Second Injury Fund. *See, i.e., Karoutzos v. Treasurer*, 55 S.W.3d 493, 498 (Mo.App. W.D.2001). However, where illiteracy is due to inability to learn, and not to lack of education, it is a permanent partial disability for Second Injury Fund purposes. *See, Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 866 (Mo. App. S.D. 1997). In this case, Claimant has presented credible evidence establishing that his inability to communicate in English is due to longstanding learning disabilities. Dr. Russell's testing and testimony established Claimant's preexisting learning disabilities have prevented him from learning English, and constitute a hindrance and obstacle to employment. Because Claimant's language difficulties and near illiteracy are due to a disability, and not to lack of education or effort, they are preexisting disabilities for which the Second Injury Fund is liable.

CONCLUSION

Claimant has met his burden of establishing he is unable to compete in the open labor market due to a combination of disabilities for which the Second Injury Fund is liable. Employer, by Fairmont, shall compensate Claimant for his upper extremity disability, and the Second Injury Fund shall pay the remainder of Claimant's permanent total disability, as provided by law.

Date: _____ Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[1] In addition to the issues identified by the parties at the start of the final hearing, the issue of certain temporary total disability benefits remains from the temporary award and is addressed in this award. The temporary award reads, in part: "Claimant may well qualify for temporary total disability benefits after December 27, 2000, but to so find at this time would require some degree of speculation. Therefore, I defer any finding as to whether Claimant is entitled to temporary total disability after December 28, 2000 until a final award is issued in this case." Thus, the issue of temporary total disability is properly addressed in this final award.

[2] The testimony of Mike Auch at hearing confirmed Claimant worked at least 29 days at full duty after April 11, 2000, 1/3rd of the time as the only ironworker working without assistance. Although Claimant worked at BJC in late May, his very last job location was at the Home Depot site on May 23, 2000. Claimant was not last exposed to the hazards of ironwork at BJC. See Exhibit 2F.