

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

Injury No.: 00-130594

Employee: Richard Walters
Employer: City of St. Louis (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: October 27, 2000
Place and County of Accident: St. Louis City

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 September 11, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued September 11, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29th day of May 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Richard Walters Injury No.: 00-130594
Dependents: N/A Before the
Employer: City of St. Louis (settled) **Division of Workers'**
Compensation
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Self-Insured
Hearing Date: June 8, 2007 Checked by: KOB:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
 - 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.
 - Date of accident or onset of occupational disease: October 27, 2000
 - State location where accident occurred or occupational disease was contracted: St. Louis City.
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.
 - 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: Claimant fell into a wall after walking up steps.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: N/A

- Nature and extent of any permanent disability: N/A

15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? \$3,212.83
17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: \$812.00

19. Weekly compensation rate: \$541.33 / \$314.26
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Prior Settlement
22. Second Injury Fund liability: No

Total: 0.00

23. Future requirements awarded: None

Said payments to begin 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 -- of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Richard Walters	Injury No.:	00-130594
Dependents:	N/A	Before the	Division of Workers' Compensation
Employer:	City of St. Louis (settled)	Department of Labor and Industrial	Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri	
Insurer:	Self-Insured	Checked by:	KOB:tr

PRELIMINARIES

The matter of Richard Walters ("Claimant") proceeded to hearing to determine the nature and extent of Claimant's disability and the liability of the Second Injury Fund. Attorney Ray Marglous represented Claimant. Assistant Attorney General Eileen Krispin represented the Second Injury Fund. The City of St. Louis ("Employer") previously settled its risk of liability. Two cases were tried concurrently, Injury No 00-130594 and Injury No. 01-166881.

With respect to Injury Number 00-130594, the parties agreed that on or about October 27, 2000, Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury. Based on an average weekly wage of \$812.00, Claimant is entitled to rates of compensation of \$541.33 for total disability benefits and \$314.26 for permanent partial disability benefits. Employment, venue, notice, and timeliness of the claim were not at issue. The parties agreed that Employer paid \$3,212.83 in medical benefits. There is no indication that any temporary total disability benefits were paid, and the Compromised Lump Sum Settlement entered into with Employer indicates the letters "CLSS" with respect to the payment of temporary total disability benefits on that claim.

The issues to be determined are: 1) what is the nature and extent of the disability attributable to Claimant's primary injury; and 2) what is the liability of the Second Injury Fund? Claimant is seeking permanent total disability benefits, or in the alternative, permanent partial disability award.

Claimant submitted the following Exhibits, which were admitted without objection:

Exhibit A	Deposition of James England dated 11/17/2004
Exhibit B	Deposition of Dr. Wayne Stillings dated 4/23/2007
Exhibit C	Deposition of Dr. Jerome Levy dated 5/15/2007
Exhibit D	Southside Family Practice dated 8/2000 to 3/2003
Exhibit E	HealthSouth dated 10/2001 to 1/2002
Exhibit F	Concentra dated 10/2000 to 11/2000
Exhibit G	Workers' Compensation Compromise Settlements

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FINDINGS OF FACT

Claimant's Testimony

Claimant is a 60 year old man who is a long-term employee of Employer. Claimant attended high school, but left in his senior year for financial reasons. He did not obtain a GED, but did attend a technical school to learn how to drive tractors.

Claimant enlisted in the military and saw over one year of combat service in Vietnam, where he earned a Bronze Star, a Silver Star, and several Purple Hearts. Claimant sustained a bullet wound to his left wrist which required surgery. A second wrist surgery was required when he fell, breaking his wrist and injuring tendons. As a result of his left wrist injuries in the service, Claimant finds it hard to move his hand. He has poor circulation and, on occasion, experiences cramps and clawing of the left hand. He can only lift a limited amount of weight and often found it hard to grasp certain items while working. Claimant was also shot in separate occasions in the chest and the buttocks, but other than an itchy scar, there was no long term impact from these wounds that posed a hindrance or obstacle to employment.

Upon returning home from Vietnam in 1969, Claimant was depressed. He suffered from nightmares, and for several years was unable to do anything productive. His parents attempted to get him psychiatric treatment, and he receives a federal disability due to his Vietnam experience.

In 1972, Claimant got a maintenance job in the St. Louis Parks Department. One year later, he transferred to the City of St. Louis Street Department, where he worked the rest of his career. Although the retirement age is generally 65, pursuant to the "Rule of 85," he earned enough time to retire at age 55, so he chose to retire in May 2002.

Claimant had injuries in addition to his war wounds. In 1985, he slipped on the ice, landing on his neck and shoulder. He had right rotator cuff surgery with a very poor outcome. Claimant demonstrated that he cannot lift his arm above a 90 degree angle away from his body. The shoulder injury affected his work. For example, he has trouble using a trowel to finish concrete and has difficulty working overhead. Following his shoulder injury, Claimant was promoted to a Foreman II that required less labor work.

During his earlier years with Employer, Claimant's depression continued to affect him. He isolated himself, became quiet, and did not want to work. Claimant testified he discussed his depression with his primary care physicians, but refused to see a psychiatrist as recommended by his doctors. However, he did take prescription medication to address his depression.

In the summer of 2000, Claimant underwent open heart surgery. Leading up to surgery, Claimant had trouble, felt dazed, and was unable to lift and move as he usually did at work. Following surgery, Claimant testified his depression got worse, he felt useless, and he still had trouble breathing.

On October 27, 2000, Claimant was walking up steps when his foot caught and he tripped, jamming his neck into a concrete pillar. He received authorized treatment and physical therapy through Concentra and at the workplace. He missed three days of work and then returned to light duty, focusing on supervisory work instead of physical work. He said his neck and right shoulder were sore all the time, he had trouble turning his head, and his arm and hands got tired and stiff.

Claimant was still on light duty when, on April 27, 2001, he stopped to move a large boulder out of the road by himself, and in doing so felt a sensation in his back. He said he received physical therapy at the workplace, but there are no such records in evidence. As a result of this pushing incident, Claimant testified that his lower back on the right side felt painful. He said that the symptoms he associated with the boulder incident lasted a couple of months until he started getting pain pills. The affects of the injury were that his walking ability was limited. Claimant asked Employer to remove the light duty restrictions so he could return to work at the labor level. Beginning in October 2001, he received mildly helpful physical therapy at HealthSouth and treatment through his primary care physician. However, his depression got worse as of the fall of 2001. He returned to work, but decided to retired, and last worked in May 2002.

Claimant testified he decided to retire, even though he enjoyed work, because he felt he could not perform his duties wholly, and would be unable to get the promotions he wanted to go up the ladder with Employer's organization. He felt as if he had physical and mental limitations, and he was a hindrance to his bosses and fellow employees.

Since he stopped working, Claimant has not sought any additional work because it hurts. He occasionally fishes, and draws Social Security disability. Because Claimant has a place at Table Rock Lake, a friend who owns a boat company occasionally paid Claimant to transport boats back and forth when Claimant was otherwise traveling to the lake. This job had no physical requirements other than driving. Claimant testified that he can not work because he was told he could not work again.

Medical Records and Other Documents

Claimant submitted a limited number of medical records. Only two entries in the Southside family practice medical records pre-date the October 2000 accident. In August and September 2000, Claimant was recovering from cardiac surgery and had some depression, but wanted to return to work. By October 27th, after returning to work, his family doctor noted he had a blackout and fall at work that led to a bruised shoulder and chest. This is the event that is the subject of Injury No. 00-130594. Over the next month, Claimant went to Concentra for treatment of cervical, lumbar and shoulder strains. The Southside records for

the same period indicate Claimant was being treated for dizziness and ear complaints, which ultimately lead to ear surgery in late 2000. He denied further syncope, but his low back pain did not get better and may have worsened. It appears Claimant was off work for no more than three days, and had only a month of treatment.

There are no medical records associated with the April 27, 2001 accident that is the subject of Injury No. 01-166881. Claimant had been to his family doctor three months before the date of accident, and three months after, for chronic health issues such as hypertension and GERD, but there are no office visits near the alleged April incident. On August 8, 2001, Claimant's family doctor at Southside noted Claimant was having an adjustment crisis, with symptoms of depression, insomnia, low energy and irritability. There was no indication pain was a problem. The family doctor asked him to take a four week leave of absence from work since it is very stressful for him. At a follow up visit a month later, the symptoms of Claimant's adjustment crisis had improved, and the doctor expected him to return to work in a week.

From October 22, 2001 to April 11, 2002, Claimant treated with HealthSouth and Southside Family Practice for low back and various other symptoms. The diagnosis in the HealthSouth file was bilateral spine-nerve injury/sciatic nerve traced back to a fall at work in October 1999. Claimant reported the pain had gotten much worse in the past couple of months. Although Claimant attended several therapy visits at HealthSouth through January 2002, he was limited by pain in the shoulder, neck and back and his prognosis was poor. From November 2001 to March 2003, Claimant had monthly visits to Southside Family Practice, primarily for follow up visits and treatment of low back pain, although he had PTSD complaints in November 2002, and was suicidal in March 2003. MRIs of the neck and back taken in mid-2003 showed early degenerative disk disease, subtle diffuse protrusions and early stenosis of the back, and subtle defects and early spondylosis throughout the neck.

Claimant submitted copies of three stipulations. Claimant settled his October 27, 2000 claim with Employer for 12 ½ % of the cervical spine. Nature and extent of disability, medical causation and temporary total disability were identified as disputes. Claimant settled the April 27, 2001 claim with Employer for 12 ½ % of the low back. The stipulation identified nature and extent of disability, medical causation, liability for medical expenses and temporary total disability as disputes. Finally, the stipulation in Injury No. 91-072364 reflects Claimant settled a January 7, 1991 accidental injury with Employer for 38 ½ % of the right shoulder and 3% of the low back. The Second Injury Fund paid for the synergistic combination of the right shoulder with an alleged 20% of the left wrist.

Expert Testimony

Dr. Jerome Levy examined Claimant on November 11, 2003, reviewed records, generated a report and testified by deposition. The history he considered was consistent with the evidence at hearing. On exam, Dr. Levy noted no obvious deformity, and range of motion and curvature of the neck and back were normal. The only positive findings noted were tenderness and discomfort. In the upper extremities, Dr. Levy noted scaring and decreased range of motion in the left wrist and right shoulder, in addition to tenderness and discomfort. No instability, grating, atrophy or weakness was present.

Dr. Levy provided rating for all the injuries claimed by Claimant, although he admitted the ratings were based on subjective complaints as opposed to objective findings. For the October 27, 2000 injury, Dr. Levy provided a permanent partial disability rating of 10% of the back, 15% of the neck, and 10% of the right shoulder. For the April 27, 2001 injury, Dr. Levy provided a permanent partial disability rating of 15% of the low back, 5% of the neck and 5% of the right shoulder. While he did not rate the heart condition or consider the preexisting psychological condition, Dr. Levy suggested ratings for the preexisting disabilities of 38 ½% of the right shoulder and 20% of the left wrist. All conditions he rated, plus the heart condition, posed a hindrance and obstacle to employment, and the combination of the injuries created disability greater than the

simple sum. From an orthopedic standpoint, considering the shoulders, neck, back and wrist, Dr. Levy felt Claimant was permanently and totally disabled.

While he concluded Claimant was unable to work, Dr. Levy provided restrictions if he did return to work. In the opinion of Dr. Levy, Claimant should limit lifting over 15 pounds to an occasional or less basis. He should avoid overhead work, awkward positions, bending or walking. He can only do hand intensive work with the right hand, and should limit his standing or sitting at any one time. Most of these restrictions are due to Claimant's subjective complaints of back pain.

I do not find the opinions of Dr. Levy to be particularly credible. As was highlighted in cross examination, Dr. Levy's physical findings all subjective. He appeared to reach his conclusion regarding preexisting disability based on prior compromise lump sum settlements without benefit of any medical records. I found his description of the records as "voluminous" to be disingenuous as there are few records associated with this case. I do not find his conclusory opinion that the physical injuries alone render Claimant totally disabled to be supported by the evidence. In reaching his conclusion, Dr. Levy had to rely on Claimant's descriptions of injury and disability, which I do not find credible. In sum, Dr. Levy's opinion is not credible.

According to Dr. Levy's summary of the medical records he reviewed, Claimant saw Dr. Cantrell on three occasions: November 22, 2000, July 18, 2001 and September 5, 2001. At the first visit, x-rays were negative for acute trauma. Dr. Cantrell's clinical exam revealed exaggerated subjective complaints without objective pathology. He found Claimant could return to regular duty. At the July 2001 reevaluation, Claimant had new complaints, but additional testing was negative. Dr. Cantrell felt his symptoms came from the parascapular musculature and he recommended therapy. On September 5, 2001, Claimant complained of increased symptoms. Dr. Cantrell concluded the lumbar back pain was not related to the work injury, and Claimant's subjective complaints were lacking in objective pathology on exam.

Psychiatrist Wayne Stillings examined Claimant on March 23, 2004 at the request of Claimant's attorney. The records Dr. Stillings reviewed were more extensive than those submitted at hearing. The history Dr. Stillings recorded focused on Claimant's psychiatric history, and therefore was much more detailed than the evidence at hearing. The mental status exam was abnormal and marked by many different depressive symptoms.

Based on all the information at his disposal, Dr. Stillings diagnosed: 1) Vietnam- related PTSD; 2) Mood disorder due to a general medical condition (right cervical, lumbar and right shoulder problems), chronic; and 3) Pain disorder associated with both psychological factors and a general medical condition (same), chronic. Dr. Stillings testified without further elaboration the 10/27/2000 and 4/27/2001 work injuries are substantial factors in Claimant's mood and pain disorders. The mood and pain disorders, as well as the Vietnam-related psychological disability, each resulted in 20% permanent partial psychiatric disability. Dr. Stillings opined the preexisting psychological problems were a hindrance and obstacle to employment. Finally, it was Dr. Stillings' opinion Claimant may benefit from further treatment for the mood and pain disorders, as well as his PTSD. Although he did not reach the opinion in his report or on direct examination, on cross-examination, Dr. Stillings stated his conclusion was, from a psychiatric standpoint, Claimant cannot work with the primary work injury, the depression, the pain disorder and his PTSD.

On direct examination, Dr. Stillings testified extensively about Claimant's PTSD, and how it has plagued him in various ways since his return from Vietnam. He described how the effects of the disorder have constituted a hindrance or obstacle to employment, despite Claimant's consistent employment history. On cross examination, Dr. Stillings established that patients with PTSD lose their ability to cope with their illness as they age, stating, "people are like watches...they wear down all the time." Although his report indicated Claimant needed treatment for his mood and pain disorders, Dr. Stillings' testimony focused on the

benefit to Claimant for attending therapy with fellow veterans for his PTSD.

I find Dr. Stillings to have provided a credible explanation of Claimant's prior psychological disabilities, particularly his PTSD. However, Dr. Stillings' conclusion that the October 27, 2000 and the April 27, 2001 injuries are substantial factors Claimant's developing a mood disorder and a pain disorder is tenuous, and does not appear to be supported by the evidence, particularly regarding the last injury, as there are no contemporaneous treatment records for that accident, and no record of back (neck or shoulder) complaints until six months after the accident.

Mr. James England, a vocational expert, testified by deposition that Claimant could not successfully compete for employment in the open labor market, or sustain employment on a daily bases, considering the combination of physical and emotional problems. This opinion was based in large part on Dr. Levy's conclusion regarding Claimant's restrictions, particularly his limited hand usage and poor social skills, along with his psychological problems.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented in this hearing, and the applicable law of the State of Missouri, I find Claimant had not met his burden in either of the cases at issue. In particular, I find:

- The Second Injury Fund has no liability for Permanent Partial Disability in Injury No. 00-130594 or 01-166881.

Claimant's evidence does not support a permanent partial award. In a workers' compensation case, 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 Co.*, 503 S.W.2d 697, 703 (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. *Id.* "Failure to offer expert testimony regarding the percentage of disability derived from the compensable injury bars the claimant from recovering permanent partial disability benefits." *Miller v. Wefelmeyer*, 890 S.W.2d 372, 376 (Mo.App. E.D.1994) (overruled in part by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. 2003)); *Moriarty v. Treasurer of State of Missouri*, 141 S.W.3d 69, 73 (Mo.App. E.D. 2004).

Because Claimant's disability in this case has psychological elements, it is not as simple as a physical injury only matter. Dr. Levy, whose opinion I have previously questioned, provides distinct ratings for the alleged orthopedic injuries in the 2000 case as well as the 2001 case. However, he does not consider any psychological disability. Dr. Stillings rates the psychological disabilities. Rather than attributing disability to each work injury, Dr. Stillings rates the separate psychological conditions (PTSD, mood disorder, and pain disorder) at 20% each. He finds the work injuries of 2000 and 2001 are each substantial factors in the mood disorder and the pain disorder. Thus, Dr. Stillings, the only expert to address psychological disability, does not establish the nature and extent of each separate pending disability claim.

The evidence in this case is similar to that of *Moriarty v. Treasurer of State of Missouri*, 141 S.W.3d 69 (Mo.App. E.D.2004). In *Moriarty*, the employee had two pending 2001 claims to the same body part, and his expert testified, "the overall fifty percent disability rating ... is due to the combination of those two [exposures]," and that it is "impossible to break those [two exposures] out." As such, *Moriarty* failed to prove the nature and extent of each separate pending disability claim, and he failed to meet his burden on his permanent partial disability claim. Likewise, Claimant failed to establish the disability associated with the 2000 injury, and thus failed to meet his burden of proof for recovery of permanent partial disability.

Even if the 2000 claim were considered a physical injury only, Claimant would still fail to recover permanent partial benefits because the physical disability from the primary injury does not meet the statutory threshold. If there are preexisting injuries which combine with the primary injury to result in PPD, statutory thresholds require that the primary injury result in minimum requirements of fifty weeks for injuries to the body as a whole or fifteen percent for major extremities. § 287.220.1 RSMo; *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. E.D.1999). I find there is insufficient evidence to establish the injuries associated with the 2000 accident resulted in permanent partial disability that meets the threshold. The accident was minor, the sparse medical treatment was conservative, and the injury was to the soft tissues only of multiple body parts. There is evidence Claimant's subjective complaints are exaggerated, and are inconsistent with the objective findings. The compromise lump sum settlement (Exhibit G) is not probative. The Fund is not bound by the settlement agreement entered into by a claimant and his employer. *Totten v. Treasurer of State*, 116 S.W.3d 624, 629 (Mo.App. E.D. 2003). I find Claimant's physical disability from the October 27, 2000 accident does not meet the statutory threshold.

Finally, Claimant failed to provide substantial and competent evidence of the alleged preexisting physical disabilities. While it is unreasonable to expect Claimant to produce Vietnam-era records to document his wrist injuries, Claimant also failed to provide any documentation of his more recent shoulder injury. The compromise lump sum settlement again is not probative. There is a failure of proof as to the permanent partial disability associated with the preexisting physical injuries.

For the aforementioned reasons, the Second Injury Fund has no liability for permanent partial disability in Injury No. 00-130594.

- The Second Injury Fund is no liable for permanent total disability benefits in Injury No. 00-130594.

Claimant seeks to recover permanent total disability benefits from the Second Injury Fund. In deciding whether the Second Injury Fund has liability for PTD benefits, the first determination is the degree of disability from the last injury. See *Vaught v. Vaughts, Inc./Southern Mo. Constr.*, 938 S.W.2d 931, 939 (Mo. App. S.D. 1997). In the facts presented, the "last injury" is the alleged bolder-moving incident of April 27, 2001. Furthermore, Claimant continued to work until May 2002, 17 months after the 2000 accident. The issue of permanent total disability is addressed in the Award for the companion case, Injury No. 01-166881.

CONCLUSION

Claimant had not met his burden of proof for permanent partial disability benefits. The claims against the Second Injury Fund are denied.

Date: _____

Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 01-166881

Employee: Richard Walters
Employer: City of St. Louis (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 27, 2001
Place and County of Accident: St. Louis City

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 September 11, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla Ogradnik Boresi, issued September 11, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29th day of May 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest:

Secretary

AWARD

Employee:	Richard Walters	Injury No.:	01-166881
Dependents:	N/A	Before the	
Employer:	City of St. Louis (settled)	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Self-Insured	Department of Labor and Industrial	
Hearing Date:	June 8, 2007	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	KOB:tr

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3. Was there an accident or incident of occupational disease under the Law? Yes.
 - Date of accident or onset of occupational disease: April 27, 2001
 - State location where accident occurred or occupational disease was contracted: St. Louis City
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.
 - Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? N/A.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant pushed a rock and felt pain.
12. Did accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: N/A
- Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? Not determined.
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Total: 0.00

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The compensation awarded to the claimant shall be subject to a lien in the amount of -- of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

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Employee:	Richard Walters	Injury No.: 01-166881
Dependents:	N/A	Before the Division of Workers' Compensation
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Claimant had injuries in addition to his war wounds. In 1985, he slipped on the ice, landing on his neck and shoulder. He had right rotator cuff surgery with a very poor outcome. Claimant demonstrated that he cannot lift his arm above a 90 degree angle away from his body. The shoulder injury affected his work. For example, he has trouble using a trowel to finish concrete and has difficulty working overhead. Following his shoulder injury, Claimant was promoted to a Foreman II that required less labor work.

During his earlier years with Employer, Claimant's depression continued to affect him. He isolated himself, became quiet, and did not want to work. Claimant testified he discussed his depression with his primary care physicians, but refused to see a psychiatrist as recommended by his doctors. However, he did take prescription medication to address his depression.

In the summer of 2000, Claimant underwent open heart surgery. Leading up to surgery, Claimant had trouble, felt dazed, and was unable to lift and move as he usually did at work. Following surgery, Claimant testified his depression got worse, he felt useless, and he still had trouble breathing.

On October 27, 2000, Claimant was walking up steps when his foot caught and he tripped, jamming his neck into a concrete pillar. He received authorized treatment and physical therapy through Concentra and at the workplace. He missed three days of work and then returned to light duty, focusing on supervisory work instead of physical work. He said his neck and right shoulder were sore all the time, he had trouble turning his head, and his arm and hands got tired and stiff.

Claimant was still on light duty when, on April 27, 2001, he stopped to move a large boulder out of the road by himself, and in doing so felt a sensation in his back. He said he received physical therapy at the workplace, but there are no such records in evidence. As a result of this pushing incident, Claimant testified that his lower back on the right side felt painful. He said that the symptoms he associated with the boulder incident lasted a couple of months until he started getting pain pills. The affects of the injury were that his walking ability was limited. Claimant asked Employer to remove the light duty restrictions so he could return to work at the labor level. Beginning in October 2001, he received mildly helpful physical therapy at HealthSouth and treatment through his primary care physician. However, his depression got worse as of the fall of 2001. He returned to work, but decided to retire, and last worked in May 2002.

Claimant testified he decided to retire, even though he enjoyed work, because he felt he could not perform his duties wholly, and would be unable to get the promotions he wanted to go up the ladder with Employer's organization. He felt as if he had physical and mental limitations, and he was a hindrance to his bosses and fellow employees.

Since he stopped working, Claimant has not sought any additional work because it hurts. He occasionally fishes, and draws Social Security disability. Because Claimant has a place at Table Rock Lake, a friend who owns a boat company occasionally paid Claimant to transport boats back and forth when Claimant was otherwise traveling to the lake. This job had no physical requirements other than driving. Claimant testified that he can not work because he was told he could not work again.

Medical Records and Other Documents

Claimant submitted a limited number of medical records. Only two entries in the Southside family practice medical records pre-date the October 2000 accident. In August and September 2000, Claimant was recovering from cardiac surgery and had some depression, but wanted to return to work. By October 27th, after returning to work, his family doctor noted he had a blackout and fall at work that led to a bruised

shoulder and chest. This is the event that is the subject of Injury No. 00-130594. Over the next month, Claimant went to Concentra for treatment of cervical, lumbar and shoulder strains. The Southside records for the same period indicate Claimant was being treated for dizziness and ear complaints, which ultimately lead to ear surgery in late 2000. He denied further syncope, but his low back pain did not get better and may have worsened. It appears Claimant was off work for no more than three days, and had only a month of treatment.

There are no medical records associated with the April 27, 2001 accident that is the subject of Injury No. 01-166881. Claimant had been to his family doctor three months before the date of accident, and three months after, for chronic health issues such as hypertension and GERD, but there are no office visits near the alleged April incident. On August 8, 2001, Claimant's family doctor at Southside noted Claimant was having an adjustment crisis, with symptoms of depression, insomnia, low energy and irritability. There was no indication pain was a problem. The family doctor asked him to take a four week leave of absence from work since it is very stressful for him. At a follow up visit a month later, the symptoms of Claimant's adjustment crisis had improved, and the doctor expected him to return to work in a week.

From October 22, 2001 to April 11, 2002, Claimant treated with HealthSouth and Southside Family Practice for low back and various other symptoms. The diagnosis in the HealthSouth file was bilateral spine-nerve injury/sciatic nerve traced back to a fall at work in October 1999. Claimant reported the pain had gotten much worse in the past couple of months. Although Claimant attended several therapy visits at HealthSouth through January 2002, he was limited by pain in the shoulder, neck and back and his prognosis was poor. From November 2001 to March 2003, Claimant had monthly visits to Southside Family Practice, primarily for follow up visits and treatment of low back pain, although he had PTSD complaints in November 2002, and was suicidal in March 2003. MRIs of the neck and back taken in mid-2003 showed early degenerative disk disease, subtle diffuse protrusions and early stenosis of the back, and subtle defects and early spondylosis throughout the neck.

Claimant submitted copies of three stipulations. Claimant settled his October 27, 2000 claim with Employer for 12 ½ % of the cervical spine. Nature and extent of disability, medical causation and temporary total disability were identified as disputes. Claimant settled the April 27, 2001 claim with Employer for 12 ½ % of the low back. The stipulation identified nature and extent of disability, medical causation, liability for medical expenses and temporary total disability as disputes. Finally, the stipulation in Injury No. 91-072364 reflects Claimant settled a January 7, 1991 accidental injury with Employer for 38 ½ % of the right shoulder and 3% of the low back. The Second Injury Fund paid for the synergistic combination of the right shoulder with an alleged 20% of the left wrist.

Expert Testimony

Dr. Jerome Levy examined Claimant on November 11, 2003, reviewed records, generated a report and testified by deposition. The history he considered was consistent with the evidence at hearing. On exam, Dr. Levy noted no obvious deformity, and range of motion and curvature of the neck and back were normal. The only positive findings noted were tenderness and discomfort. In the upper extremities, Dr. Levy noted scaring and decreased range of motion in the left wrist and right shoulder, in addition to tenderness and discomfort. No instability, grating, atrophy or weakness was present.

Dr. Levy provided rating for all the injuries claimed by Claimant, although he admitted the ratings were based on subjective complaints as opposed to objective findings. For the October 27, 2000 injury, Dr. Levy provided a permanent partial disability rating of 10% of the back, 15% of the neck, and 10% of the right shoulder. For the April 27, 2001 injury, Dr. Levy provided a permanent partial disability rating of 15% of the low back, 5% of the neck and 5% of the right shoulder. While he did not rate the heart condition or consider the preexisting psychological condition, Dr. Levy suggested ratings for the preexisting disabilities of 38 ½%

of the right shoulder and 20% of the left wrist. All conditions he rated, plus the heart condition, posed a hindrance and obstacle to employment, and the combination of the injuries created disability greater than the simple sum. From an orthopedic standpoint, considering the shoulders, neck, back and wrist, Dr. Levy felt Claimant was permanently and totally disabled.

While he concluded Claimant was unable to work, Dr. Levy provided restrictions if he did return to work. In the opinion of Dr. Levy, Claimant should limit lifting over 15 pounds to an occasional or less basis. He should avoid overhead work, awkward positions, bending or walking. He can only do hand intensive work with the right hand, and should limit his standing or sitting at any one time. Most of these restrictions are due to Claimant's subjective complaints of back pain.

I do not find the opinions of Dr. Levy to be particularly credible. As was highlighted in cross examination, Dr. Levy's physical findings all subjective. He appeared to reach his conclusion regarding preexisting disability based on prior compromise lump sum settlements without benefit of any medical records. I found his description of the records as "voluminous" to be disingenuous as there are few records associated with this case. I do not find his conclusory opinion that the physical injuries alone render Claimant totally disabled to be supported by the evidence. In reaching his conclusion, Dr. Levy had to rely on Claimant's descriptions of injury and disability, which I do not find credible. In sum, Dr. Levy's opinion is not credible.

According to Dr. Levy's summary of the medical records he reviewed, Claimant saw Dr. Cantrell on three occasions: November 22, 2000, July 18, 2001 and September 5, 2001. At the first visit, x-rays were negative for acute trauma. Dr. Cantrell's clinical exam revealed exaggerated subjective complaints without objective pathology. He found Claimant could return to regular duty. At the July 2001 reevaluation, Claimant had new complaints, but additional testing was negative. Dr. Cantrell felt his symptoms came from the parascapular musculature and he recommended therapy. On September 5, 2001, Claimant complained of increased symptoms. Dr. Cantrell concluded the lumbar back pain was not related to the work injury, and that Claimant's subjective complaints were lacking in objective pathology on exam.

Psychiatrist Wayne Stillings examined Claimant on March 23, 2004 at the request of Claimant's attorney. The records Dr. Stillings reviewed were more extensive than those submitted at hearing. The history Dr. Stillings recorded focused on Claimant's psychiatric history, and therefore was much more detailed than the evidence at hearing. The mental status exam was abnormal and marked by many different depressive symptoms.

Based on all the information at his disposal, Dr. Stillings diagnosed: 1) Vietnam- related PTSD; 2) Mood disorder due to a general medical condition (right cervical, lumbar and right shoulder problems), chronic; and 3) Pain disorder associated with both psychological factors and a general medical condition (same), chronic. Dr. Stillings testified without further elaboration the 10/27/2000 and 4/27/2001 work injuries are substantial factors in Claimant's mood and pain disorders. The mood and pain disorders, as well as the Vietnam-related psychological disability, each resulted in 20% permanent partial psychiatric disability. Dr. Stillings opined the preexisting psychological problems were a hindrance and obstacle to employment. Finally, it was Dr. Stillings' opinion Claimant may benefit from further treatment for the mood and pain disorders, as well as his PTSD. Although he did not reach the opinion in his report or on direct examination, on cross-examination, Dr. Stillings stated his conclusion was, from a psychiatric standpoint, Claimant cannot work with the primary work injury, the depression, the pain disorder and his PTSD.

On direct examination, Dr. Stillings testified extensively about Claimant's PTSD, and how it has plagued him in various ways since his return from Vietnam. He described how the effects of the disorder have constituted a hindrance or obstacle to employment, despite Claimant's consistent employment history. On cross examination, Dr. Stillings established that patients with PTSD lose their ability to cope with their

illness as they age, stating, "people are like watches...they wear down all the time." Although his report indicated Claimant needed treatment for his mood and pain disorders, Dr. Stillings' testimony focused on the benefit to Claimant for attending therapy with fellow veterans for his PTSD.

I find Dr. Stillings to have provided a credible explanation of Claimant's prior psychological disabilities, particularly his PTSD. However, Dr. Stillings' conclusion that the October 27, 2000 and the April 27, 2001 injuries are substantial factors Claimant's developing a mood disorder and a pain disorder is tenuous, and does not appear to be supported by the evidence, particularly regarding the last injury, as there are no contemporaneous treatment records for that accident, and no record of back (neck or shoulder) complaints until six months after the accident.

Mr. James England, a vocational expert, testified by deposition that Claimant could not successfully compete for employment in the open labor market, or sustain employment on a daily bases, considering the combination of physical and emotional problems. This opinion was based in large part on Dr. Levy's conclusion regarding Claimant's restrictions, particularly his limited hand usage and poor social skills, along with his psychological problems.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented in this hearing, and the applicable law of the State of Missouri, I find Claimant had not met his burden in either of the cases at issue. In particular, I find:

- The Second Injury Fund has no liability for Permanent Partial Disability in Injury No. 00-130594 or 01-166881.

Claimant's evidence does not support a permanent partial award. In a workers' compensation case, 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 Co.*, 503 S.W.2d 697, 703 (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. *Id.* "Failure to offer expert testimony regarding the percentage of disability derived from the compensable injury bars the claimant from recovering permanent partial disability benefits." *Miller v. Wefelmeyer*, 890 S.W.2d 372, 376 (Mo.App. E.D.1994) (overruled in part by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. 2003)); *Moriarty v. Treasurer of State of Missouri*, 141 S.W.3d 69, 73 (Mo.App. E.D. 2004).

Because Claimant's disability in this case has psychological elements, it is not as simple as a physical injury only matter. Dr. Levy, whose opinion I have previously questioned, provides distinct ratings for the alleged orthopedic injuries in the 2000 case as well as the 2001 case. However, he does not consider any psychological disability. Dr. Stillings rates the psychological disabilities. Rather than attributing disability to each work injury, Dr. Stillings rates the separate psychological conditions (PTSD, mood disorder, and pain disorder) at 20% each. He finds the work injuries of 2000 and 2001 are each substantial factors in the mood disorder and the pain disorder. Thus, Dr. Stillings, the only expert to address psychological disability, does not establish the nature and extent of each separate pending disability claim.

The evidence in this case is similar to that of *Moriarty v. Treasurer of State of Missouri*, 141 S.W.3d 69 (Mo.App. E.D.2004). In *Moriarty*, the employee had two pending 2001 claims to the same body part, and his expert testified, "the overall fifty percent disability rating ... is due to the combination of those two [exposures]," and that it is "impossible to break those [two exposures] out." As such, *Moriarty* failed to prove the nature and extent of each separate pending disability claim, and he failed to meet his burden on his

permanent partial disability claim. Likewise, Claimant has failed to establish the disability associated with the 2001 injury, and thus has failed to meet his burden of proof for recovery of permanent partial disability in the 2001 case.

Even if the 2001 claim were considered a physical injury only, Claimant would still fail to recover permanent partial benefits because the physical disability from the primary injury does not meet the statutory threshold. If there are preexisting injuries which combine with the primary injury to result in PPD, statutory thresholds require that the primary injury result in minimum requirements of fifty weeks for injuries to the body as a whole or fifteen percent for major extremities. § 287.220.1 RSMo; *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. E.D.1999). I find there is insufficient evidence to establish the injuries associated with the 2001 accident resulted in permanent partial disability that meets the threshold. The accident was minor, the sparse medical treatment was conservative, and the injury was to the soft tissues only of multiple body parts. There is evidence Claimant's subjective complaints are exaggerated, and are inconsistent with the objective findings. The compromise lump sum settlement (Exhibit G) is not probative. The Fund is not bound by the settlement agreement entered into by a claimant and his employer. *Totten v. Treasurer of State*, 116 S.W.3d 624, 629 (Mo.App. E.D. 2003). I find Claimant's physical disability from the October 27, 2000 accident does not meet the statutory threshold.

Finally, Claimant failed to provide substantial and competent evidence of the alleged preexisting physical disabilities. While it is unreasonable to expect Claimant to produce Vietnam-era records to document his wrist injuries, Claimant also failed to provide any documentation of his more recent shoulder injury. The compromise lump sum settlement again is not probative. There is a failure of proof as to the permanent partial disability associated with the preexisting physical injuries.

For the aforementioned reasons, the Second Injury Fund has no liability for permanent partial disability in Injury No. 01-166881.

- The Second Injury Fund is no liable for permanent total disability benefits in Injury No. 01-166881.

Claimant seeks to recover permanent total disability benefits from the Second Injury Fund. Total disability is defined as the inability to return to any employment and not merely the employment in which the employee was engaged at the time of the accident. §287.020.7. 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. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The critical question then becomes whether any employer in the usual course of employment would reasonably be expected to hire this employee in his or her present physical condition. *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo.App. W.D.1997); *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. E.D.1999).

In deciding whether the Second Injury Fund has liability for PTD benefits, the first determination is the degree of disability from the last injury. See *Vaught v. Vaughns, Inc./Southern Mo. Constr.*, 938 S.W.2d 931, 939 (Mo. App. S.D. 1997). Unlike a PPD case, where the preexisting disability must combine with a disability from a subsequent injury in a synergistic manner, in a permanent total case, the preexisting disability must simply combine with the disability from the subsequent injury to create permanent total disability. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App.1999); see § 287.220.1. In a permanent total disability case, the minimum standards or thresholds do not apply. §287.220.1; *Culp v. Lohr Distributing Co.*, 898 S.W.2d 613, 614 (Mo.App. E.D. 1995).

In the facts presented, the "last injury" is the alleged bolder-moving incident of April 27, 2001. I find there is simply insufficient credible evidence to establish there is any permanent partial disability associated with that

event. First, there are no records whatsoever to document an injury on or around April 27, 2001. When Claimant went to his family doctor almost three months later, there was no mention of the accident or complaints of pain. Although Claimant missed a month of work due to an adjustment crisis in August 2001, there is no evidence it was related to the work injury in particular, or pain in general. It is not until October 22, 2001, that Claimant undertook medical treatment for his back, and at that time he associated his symptoms with the earlier fall into the wall in October 2000. No mention is made of an April 2001 event. Also, Claimant testified that the pain he associated with the April event only lasted a "couple of months." He even had the prior light duty restrictions lifted, and returned to heavier labor work after the April injury. Claimant retired one year after the accident, in May 2002.

To the extent Claimant testified, or told the rating doctors, that he had permanently disabling symptoms as a result of the April 2001 boulder incident, I find such statements inconsistent with the credible evidence. Because there are no contemporaneous medical records available, Dr. Levy and Dr. Stillings had to rely Claimant's history, which is not dependable on this issue. Therefore the opinions of Dr. Levy and Dr. Stillings, on the respective issues of the physical and psychological disability from the last injury, are not supported by substantial and credible evidence. As discussed above, Dr. Stillings did not provide specific ratings for the psychological disability resulting from the April 27, 2001 injury, but instead concluded the mood and pain disorders, rated at 20% each, were associated with a generalized medical condition due to right shoulder, cervical and lumbar problems. There is no credible evidence any of Claimant's shoulder, cervical and lumbar problems result in whole or in part from the April 27, 2001 accident.

With such insufficient evidence of disability from the last injury, it is impossible to find that the last injury of April 27, 2001, combined with the prior disabilities to result in permanent total disability. Section 287.200.1 requires a claimant to establish the extent, or percentage, of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo.App. E.D. 2007). Without evidence of disability from the last injury, there is no evidence of a combination, and the permanent total disability against the Second Injury Fund fails.

CONCLUSION

The facts and issues in this case have presented significant challenge. I do not doubt Claimant has lived with a disabling psychological condition for decades, and I admire how despite it he has lived a productive life. Although this award does not address the issue of total disability, it may well be true that Claimant no longer has the ability to cope with his psychological challenges. However, the credible evidence simply does not support the necessary finding that the last injury combines with Claimant prior disabilities to render him totally disabled. The claims against the Second Injury Fund are denied.

Date: _____

Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

This appears to be a reference to the October 27, 2000 fall at work.

Where the only documentary evidence of prior disability is a copy of the settlement stipulation, and where the rating doctor relies on the stipulated settlement for his rating on the prior disability, the evidence is not probative. See *Tidwell v. Kloster Co.*, 8 S.W.3d 585, 589 (Mo.App. E.D.1999) (where, ironically, Dr. Levy's rating was deficient because it was based solely on an acceptance of the percentages of disability accorded the preexisting injuries in the settlement agreement)

Mr. England's report contained a similar summary of Dr. Cantrell's records.

Dr. Stillings also had the records of Metro Heart Group from 1988 to 2001, Dr. Berkin from 1993, St. Mary's Health Center from May and June 2000, and Dr. Russel Cantrell from 11/22/2000 to 9/5/2001.

Several of the cases that were overruled in part by *Hampton* are cited herein in support of other principles of law not affected by the *Hampton* ruling. For the sake of simplicity, no further acknowledgment of *Hampton's* effect on those cases is noted.

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In either a PPD or a PTD case, the preexisting permanent partial disability must be shown to have been a hindrance or obstacle to employment or reemployment in order for there to be Second Injury Fund liability.