

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

Injury No.: 06-126761

Employee: Samuel Watson
Employer: City of Kirkwood (Settled)
Insurer: Self-Insured – Corporate Claims Management, Inc. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 14, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued August 14, 2009, is attached and incorporated by this reference.

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

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Samuel Watson	Injury No.:	06-126761
Dependents:	N/A		Before the
Employer:	City of Kirkwood (Settled)		Division of Workers'
			Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	Self-Insured- Corporate Claims Management Inc. (Settled)		
Hearing Date:	May 21, 2009	Checked by:	SC

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: December 22, 2006
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant fell and injured his left thumb while working.
12. Did accident or occupational disease cause death? No
13. Part of body injured by accident or occupational disease: Left thumb
14. Nature and extent of any permanent disability: 25% PPD of the left thumb
15. Compensation paid to-date for temporary disability: \$32,408.68
16. Value necessary medical aid paid to date by employer/insurer? \$10,419.10
17. Value necessary medical aid not furnished by employer/insurer? N/A

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Samuel Watson

Injury Number: 06-126761

18. Employee's average weekly wages: \$1,297.00

19. Weekly compensation rate: \$718.87/\$376.55

20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

15 weeks of permanent partial disability from Employer

(Previously paid)

22. Second Injury Fund liability: No

TOTAL:

None

23. Future requirements awarded: N/A

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Samuel Watson	Injury No.: 06-126761
Dependents:	N/A	Before the
Employer:	City of Kirkwood (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Self-insured Corporate Claims Management Inc. (Settled)	Checked by: SC

STATEMENT OF THE CASE

A hearing for a final award was held at the Missouri Division of Workers' Compensation (DWC) St. Louis office at the request of Samuel Watson, (Claimant), on May 21, 2009, 2009, pursuant to Section 287.450 RSMo (2005).¹ Attorney Cynthia Hennessey represented Claimant. Assistant Attorney General Toni Camp represented the Second Injury Fund (SIF). The record closed after presentation of evidence. Jurisdiction properly lies with DWC.

Prior to the start of the hearing, the City of Kirkwood, a self-insured Employer, settled with Claimant for 25% of the thumb on December 10, 2007.

Claimant submitted three claims for disposition: 06-099389, 06-126761, and 07-078535. Although some evidence overlaps in each case, separate awards will be issued.

Claimant's Exhibits A through R were admitted without objection. SIF offered no exhibits. Any notations contained in the records were present when admitted. Any objections not addressed in the award are overruled.

The parties stipulated that on or about December 22, 2006, Employee was employed by Employer in St. Louis County;² Employer and Claimant operated under the Missouri Workers' Compensation Law; Employer's liability was fully self-insured; a Claim for Compensation was timely filed; Claimant's average weekly wage was \$1,297.00; the rates were \$718.87 for Temporary Total Disability (TTD) and Permanent Total Disability (PTD) and \$376.55 for Permanent Partial Disability (PPD); Employer paid \$32,408.68 in medical benefits and \$10,419.10 in TTD benefits; and Claimant achieved maximum medical improvement (MMI) on July 21, 2007.

The parties presented the following issue for disposition: What is the nature and extent of SIF liability, if any, for PPD or PTD benefits?

¹ All references are to the 2005 Revised Statutes of Missouri unless otherwise stated.

² References to the Employer also include the Insurer.

FINDINGS OF FACT

Claimant is 63 years old and lives with his sister. In 1963, Claimant graduated from Kirkwood High School. Employer hired him in 1964. Claimant left work to serve in the U.S. Air Force refueling aircraft from 1965 until 1969, when he received an honorable discharge.

After discharge, Claimant returned to work for the Employer in the Forestry Division, where he planted and cut trees, drove a truck, operated noisy equipment, and placed logs in a chipper.

Claimant transferred to the Street Department, where he shoveled asphalt, repaired streets, operated heavy equipment, drove trucks, and lifted up to 90 pounds. Duties required Claimant to bend, squat, crawl, pull weeds, and supervise a helper during street cleaning.

On December 22, 2006, while on light duty for an earlier back injury, Claimant tripped and fell at work, and injured his left thumb and right knee. Two surgeries were performed to repair Claimant's thumb.

Claimant is left handed and has difficulty writing since the accident. He uses his right hand to support large items because of decreased grip strength. It feels like he is about to drop small items such as pens, screwdrivers and bolts.

Preexisting Medical Conditions

Diabetes: Claimant has taken insulin since he was diagnosed with diabetes in 1970. Claimant gained weight and missed time from work because of diabetes. In the mid-1990's Claimant developed bilateral foot neuropathy, which caused him to lose sleep and develop foot blisters. He was hospitalized at least 5 times and missed 2 weeks from work due to foot blisters. Claimant can stand up to 2 hours before getting leg cramps. Claimant has cataracts in both eyes. His right eye hemorrhaged from diabetic retinopathy. On March 1, 1991, a right eye implant was performed to improve vision.

Right Shoulder: In 1999, Claimant injured his shoulder, but did not receive immediate treatment. Symptoms included inability to lift his arm overhead. On March 25, 1999, **Richard Lehman, M.D.**, diagnosed a frozen right shoulder. X-rays revealed spurring and degenerative changes. An MRI dated April 1, 1999, revealed a rotator cuff tear. Dr. Lehman recommended surgery, which was not performed.

On April 27, 2006, Claimant fell and reinjured his shoulder. A May 2006 MRI showed tears of the supraspinatus and infraspinatus, cystic degenerative change in the humeral head and inferior glenoid, subacromial/subdeltoid fluid and advanced degenerative changes with spurring in the acromioclavicular joint. **Dr. Haupt** diagnosed a chronic and preexisting rotator cuff tear, aggravated by an April 2006 injury.

On July 19, 2006, Dr. Haupt found Claimant had made "impressive improvement" after physical therapy and work hardening and released him to full duty. Complaints included shoulder pain, decreased range of motion, and inability to lay on his right side. However, the day Claimant returned to work, he developed a foot blister and missed work until October 4, 2006.

In October 2007, Dr. Cantrell restricted Claimant's lifting to 20 pounds because of shoulder limitations.

Right Achilles tendon: On August 2, 2005, **Andrew M. Rouse, M.D.**, repaired Claimant's ruptured Achilles tendon. Claimant missed work from June 2005 until February 2006.

Low Back: Two days after Claimant returned to work from the foot blister, he injured his back while working. BarnesCare treated Claimant's low back with physical therapy and medication, imposed sedentary restrictions, a 10-pound weight limit and frequent changes in position. An MRI dated November 20, 2006, revealed degenerative changes and a small disc protrusion, at L3-4.

Medical Evidence

St. Joseph's Emergency Room provided initial treatment and referred Claimant to **BarnesCare**, where he was diagnosed with a strained left thumb, possible Gamekeeper's thumb, mild contusion of the right elbow, abrasion to the right knee, and a right knee contusion. Conservative treatment was provided. The therapist recommended a hand evaluation due to significant problems.

Richard F. Howard, D.O., diagnosed an ulnar collateral ligament rupture of the left thumb and repaired the ligament on January 10, 2007. After surgery, physical therapy was prescribed. On April 23, 2007, Dr. Howard concluded the ulnar collateral ligament repair failed. On May 16, 2007, Dr. Howard performed reconstructive thumb surgery using a tendon graft.

Medical Opinions

On July 24, 2007, **Dr. Howard** opined Claimant reached MMI and released him to full duty, no restrictions. Residual complaints included thumb tenderness.

On May 30, 2008, **David Volarich, M.D.** examined Claimant at the request of his attorney and rated 30% PPD of the left hand as a result of the December 2006 work accident. Dr. Volarich recommended Claimant avoid awkward use of the left hand, wrist and elbow, limit repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotation, avoid vibration, and lifting more than 3 pounds away from the body or more than 15 pounds close to the body.

For preexisting injuries; Dr. Volarich rated 50% PPD of the body for insulin-dependent diabetes, 15% of the right shoulder, 35% PPD of the right ankle, and 20% PPD of the body as a whole for the low back. Dr. Volarich opined the preexisting disabilities were a hindrance or obstacle to employment or reemployment. He further opined Claimant's multiple disabilities created "substantially greater disability than the simple sum or total of each separate injury/illness and a loading factor should be added."

RULINGS OF LAW

After giving careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant did not meet his burden to show SIF liability for PPD for the reasons stated below.

Claimant seeks either PPD or PTD benefits from SIF. SIF contends Claimant is not entitled to receive either PPD or PTD benefits because the primary injury settled below the threshold. An employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury Fund Liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968).

Permanent Total Disability

I find Claimant is not permanently totally disabled as a result of the December 2006 work accident. Section 287.020.6 RSMo defines total disability as the “inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident.” Here, Claimant returned to work after Dr. Howard released him in July 2007 and he worked until Employer terminated him in August 2007. Furthermore, Dr. Volarich and Mr. England found Claimant to be permanently totally disabled due to a combination of injuries that occurred before and after December 2006.

Permanent Partial Disability

In the alternative, Claimant seeks PPD benefits. SIF contends Claimant’s settlement of the primary case for 25% of the thumb is below the threshold for SIF liability. Admission of the settlement agreement as evidence does not bind SIF to the terms of the agreement when it was not a party. *Totten v. Treasurer of State* 116 S.W.3d 624, 628 (Mo.App. 2003).

However, Section 287.220.1 provides for SIF liability in all cases of permanent partial disability where previous disability created a hindrance or obstacle to employment or reemployment, and the primary injury and preexisting disability reach a threshold of 50 weeks (12.5%) for the body as a whole injury or 15% of a major extremity, and the disabilities combine to produce greater disability than the last injury alone.

In this case, Dr. Volarich rated 30% PPD of the left hand; however, his findings were related to the left thumb. He noted thenar atrophy, loss of extension and flexion of the metacarpal phalangeal joint, swelling, 15 degrees of radial deviation, deformity, and pain with pressure. Mixed results were noted on grip and pinch strength. The distal joint demonstrated normal flexion and extension. Dr. Howard, the treating physician, only treated and evaluated the left thumb for range of motion and pinch strength.

I find Claimant’s testimony credible that he is left handed and has difficulty writing and uses his right hand to support large items in his left hand, and feels like he is going to drop small items such as pens, screwdrivers and bolts.

Furthermore, a settlement approved by the ALJ is conclusive and irrevocable and, when approved, a settlement of a workers' compensation claim is the basis of *res judicata* and estoppel

by judgment. Any relief from a settlement approved by the ALJ under section 287.390 can be had only in a court of equity on proof of fraud or mistake. *Conley v. Treasurer of Missouri*, 999 S.W.2d 269, 274 (Mo.App. 1999) (Citations omitted).³

In *Conley*, the employee settled the case with employer for 14% PPD of the left upper extremity, prior to the hearing. After the hearing with SIF, the ALJ found the primary injury did not meet the threshold required in Section 287.220.1, despite Dr. Berkin's rating of 35% PPD of the left elbow. Further, to relitigate the employee's disability from his last injury as determined by the ALJ, would violate Section 287.390. *Id* at 275. Here, to relitigate Claimant's disability from the last injury would also violate Section 287.390.

Based upon Dr. Volarich's credible evaluation, Dr. Howard's treatment records, Claimant's credible testimony, and the Compromise Lump Sum Settlement, I find the primary injury did not satisfy the threshold requirements provided in Section 287.220.1.

CONCLUSION

The Second Injury Fund is not liable for permanent partial or permanent total disability benefits.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

³ Several cases herein were overruled by *Hampton* on grounds other than those for which the cases are cited. No further reference will be made to *Hampton*.

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

Injury No.: 07-078535

Employee: Samuel Watson
Employer: City of Kirkwood (Settled)
Insurer: Self- Insured – Corporate Claims Management, Inc. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 14, 2009. The award and decision of Administrative Law Judge Suzette Carlisle, issued August 14, 2009, 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 4th day of February 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Samuel Watson	Injury No.: 07-078535
Dependents:	N/A	Before the
Employer:	City of Kirkwood (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Self-Insured - Corporate Claims Management Inc. (Settled)	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Hearing Date:	May 21, 2009	Checked by: SC

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: August 3, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant developed tinnitus while operating loud equipment during his employment with Employer.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Ears
14. Nature and extent of any permanent disability: 5% PPD of the body as a whole against the Employer for
tinnitus and Permanent Total Disability against the Second Injury Fund
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$735.00

Employee: Samuel Watson

Injury No.:07-078535

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1,297.00
- 19. Weekly compensation rate: \$742.72/\$389.04
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

20 weeks of permanent partial disability from Employer (PreviouslyPaid)

- 22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$353.68) payable by SIF for 20 weeks beginning
October 15, 2007 and, thereafter, for Claimant's lifetime

TOTAL:

**INDETERMINATE
\$7,780.80- EMPLOYER
INDETERMINATE-SIF**

- 23. Future requirements awarded: N/A

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Cynthia Hennessey

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Samuel Watson	Injury No.: 07-078535
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	City of Kirkwood (Settled)	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Self-insured Corporate Claims Management (Settled)	Checked by: SC

STATEMENT OF THE CASE

A hearing for a final award was held at the Missouri Division of Workers' Compensation (DWC) St. Louis office at the request of Samuel Watson, (Claimant), on May 21, 2009, pursuant to Section 287.450 RSMo (2005).¹ Attorney Cynthia Hennessey represented Claimant. Assistant Attorney General Toni Camp represented the Second Injury Fund (SIF). The record closed after presentation of evidence. Jurisdiction properly lies with DWC.

Prior to the start of the hearing, the City of Kirkwood, a self-insured Employer, settled with Claimant for 5% PPD of the body as a whole for tinnitus on December 10, 2007.

Claimant submitted three injury numbers for disposition: 06-099389, 06-126761, and 07-078535. Although some evidence overlaps, separate awards were issued for each case.

Claimant's Exhibits A through R were admitted without objection. SIF offered no exhibits. Any notations contained in the records were present when admitted. Any objections contained in the depositions but not addressed in the award are overruled.

The parties stipulated that on or about August 3, 2007, Employee was employed by Employer in St. Louis County;² Employer and Claimant operated under the Missouri Workers' Compensation Law; Employer's liability was self-insured; a Claim for Compensation was timely filed; Claimant's average weekly wage was \$1,297.00; the rates were \$742.72 for Temporary Total Disability (TTD) and Permanent Total Disability (PTD) and \$389.04 for Permanent Partial Disability (PPD); Employer paid \$735.00 in medical benefits; \$0 in TTD benefits; and Claimant achieved maximum medical improvement (MMI) on October 15, 2007.

The parties presented the following issues for disposition:

1. Did Claimant sustain an occupational disease?
2. If so, did it arise out of and in the course of Claimant's employment?
3. Is Claimant's tinnitus medically causally related to Claimant's work activities?
4. Did Employer receive proper notice?
5. What is the nature and extent of SIF liability, if any, for PTD benefits?

¹ All references are to the 2005 Revised Statutes of Missouri unless otherwise stated.

² References in this award to the Employer also include the Insurer.

6. What is the nature and extent of SIF liability, if any, for PPD benefits?

FINDINGS OF FACT

Claimant was 62 years old in 2007 when he last worked for Employer. Claimant lives with his sister. In 1963, Claimant graduated from Kirkwood High School. Employer hired Claimant in 1964. Claimant left work to serve in the U.S. Air Force refueling aircraft from 1965 until 1969, when he received an honorable discharge.

After discharge, Claimant returned to work for Employer in the Forestry Division, where he cut and planted trees, drove a truck, operated noisy equipment, and placed logs in a chipper.

Later, Claimant transferred to the Street Department, where he shoveled asphalt, repaired streets, operated heavy equipment, drove trucks, and lifted up to 90 pounds. Claimant drove a loud street sweeper and ran a chipper. The street sweeper made a whining sound. About 20 years ago, Claimant began to experience ringing in his ears, although he covered them with safety equipment.

Claimant was exposed to loud noise until his termination in August 2007. Claimant worked light duty the last eight months of his employment. While on light duty, Claimant sat and shredded paper, and walked outside picking up trash near noisy equipment, including bobcats, trash trucks, and high lift equipment. Claimant worked over 40 years for Employer.

Expert Opinion Evidence

On October 9, 12, and 15, 2007, **John W. McKinney, M.D.**, tested Claimant for hearing loss but found none. Regarding tinnitus, Dr. McKinney noted the cause of tinnitus is not known, but is reported in cases of industrial noise exposure although not everyone exposed to industrial noise develops tinnitus. Dr. McKinney concluded “the presence or absence of tinnitus is generally based on patient history taken at face value.” Dr. McKinney rated .5% PPD of each ear for tinnitus. Constant ringing in Claimant’s ears makes it difficult to understand soft speakers on the telephone, including his attorney.

On May 30, 2008, **David Volarich, M.D.**, opined Claimant sustained 5% PPD from tinnitus due to his work activities for Employer. Further, Dr. Volarich found Claimant to be “permanently and totally disabled as a result of work injuries on April 27, 2006, October 6, 2006, December 22, 2006, and August 3, 2007, in combination with each other, as well as in combination with all of his pre-existing medical conditions.

Dr. Volarich identified the following conditions leading up to and including August 2007: diabetes, right ankle, right shoulder, low back, left thumb, and tinnitus. He opined the following conditions create a hindrance or obstacle to employment or reemployment: diabetes, right shoulder, right ankle, low back, left hand, bilateral knees, and tinnitus.

He noted Claimant “is 63 years old (advanced age), has an education that includes graduation from high school and some college, and has been unable to get back to work since August 6, 2007....”

James M. England, a rehabilitation counselor, interviewed Claimant on August 5, 2008, at the request of his attorney. Based on Dr. Volarich's restrictions and Claimant's complaints, Mr. England concluded Claimant was permanently and totally disabled due to a combination of all his medical conditions.

Mr. England noted Claimant cannot perform sedentary-to-light work if he is unable to remain alert during the workday, which is required on a daily basis. Furthermore, Mr. England found Claimant had no transferable skills as an equipment operator with over 40 years experience. Furthermore, Mr. England found each pre-existing condition was a hindrance or obstacle to Claimant's employment or reemployment. He predicted ringing in Claimant's ears could also be a hindrance or obstacle to employ or re-employment if he used the telephone.³

Preexisting Medical Conditions

Diabetes: Claimant has taken insulin since he was diagnosed with diabetes in 1970. Claimant gained weight and missed time from work because of diabetes. In the mid-1990s Claimant developed bilateral foot neuropathy, which caused him to lose sleep and develop foot blisters. Claimant was hospitalized at least 5 times and 2 weeks were missed from work because of foot blisters. Claimant can stand up to 2 hours before getting leg cramps. Claimant has cataracts in both eyes. The right eye hemorrhaged from diabetic retinopathy. On March 1, 1991, a right eye implant was performed to improve vision.

Right Shoulder: In 1999, Claimant injured his shoulder, but did not receive immediate treatment. Symptoms included inability to lift his arm overhead. On March 25, 1999, **Richard Lehman, M.D.**, diagnosed a frozen right shoulder. X-rays revealed spurring and degenerative changes. An MRI dated April 1, 1999 revealed a rotator cuff tear. Dr. Lehman recommended surgery, which was not performed.

On April 27, 2006, Claimant fell and reinjured his shoulder. A May 2006 MRI showed tears of the supraspinatus and infraspinatus, cystic degenerative change in the humeral head and inferior glenoid, subacromial/subdeltoid fluid, and advanced degenerative changes with spurring in the acromioclavicular joint.

In May 2006, **Dr. Haupt** diagnosed a chronic and preexisting rotator cuff tear, aggravated by an April 2006 injury. On July 19, 2006, Dr. Haupt found Claimant had made "impressive improvement" after physical therapy and work hardening and released him to full duty. Complaints include an inability to lift above waist level, overhead, lay on his right side or back. However, the day Claimant returned to work, he developed a foot blister and missed work until October 4, 2006.

In October 2007, Dr. Cantrell restricted Claimant's lifting to 20 pounds because of shoulder limitations and pain complaints.

Right Achilles tendon: On August 2, 2005, **Andrew M. Rouse, M.D.**, repaired Claimant's Achilles tendon. Claimant missed work from June 2005 until February 2006.

³ Mr. England's deposition testimony references the report he prepared after he interviewed Claimant (Employee's Exhibit 2). However the report is not in evidence.

Low back: On October 6, 2006, Claimant injured his back lifting a log at work. He treated at BarnesCare where lifting was restricted to 20 pounds. Claimant cannot bend, squat, or lift more than 20 pounds. Back pain interferes with his ability to sleep or lie on his back.

Left thumb: On December 22, 2006, while on light duty for the back injury, Claimant tripped and fell at work, and injured his left thumb and right knee. Two surgeries were performed to repair Claimant's thumb. During the fall, Claimant injured his right knee. Dr. Haupt diagnosed a small abrasion.

Left knee: While leaving physical therapy in March 2007, Claimant hit his left knee on a car door, causing his knee to swell. Dr. Volarich diagnosed gout flare-ups, which caused deformity. No physical therapy or surgery was recommended. Occasionally, Claimant has problems walking or bending.

RULINGS OF LAW

After giving careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant developed tinnitus that arose out of and in the course of his work activities.

Claimant asserts he sustained tinnitus from his work activities. SIF alleged the tinnitus is not work related. The claimant bears the burden of proving a direct causal relationship between the conditions of his employment and the occupational disease. *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 (Mo.App. 1999).

Claimant sustained an occupational disease that arose out of and in the course of employment and is medically causally related to his work

Section 287.067.1-2 defines an occupational disease as an identifiable disease arising with or without human fault out of and in the course of employment. An occupational disease is only compensable if the occupational exposure was the prevailing factor that caused the resulting medical condition and disability. The prevailing factor is defined as the primary factor, in relation to any other factor, causing both the medical condition and disability.

Generally, a claimant's medical expert in an occupational disease case must establish within a "reasonable probability" that the disease was caused by conditions in the work place. *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 902 (Mo.App. 1999). (*Abrogated by Washington v. Barnes Hosp.*, 897 S.W.2d 611 (Mo. 1995). 'Probable' means founded in reason and experience which inclines the mind to believe, but leaves room for doubt." *Id.* However, the ultimate importance of expert testimony is determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102, 105 (Mo.App.1991) (*Citations omitted*) (*Overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121, S.W.3d 220, 223 (Mo. banc 2003)).⁴

Both doctors agree there is no way to prove or disprove tinnitus, but they do not dispute that the condition exists. I find Dr. McKinney's opinion credible that the "exact cause of tinnitus is

⁴ Several cases herein were overruled by *Hampton* on grounds other than those for which the cases are cited. No further reference will be made to *Hampton*.

unknown.” But, it has been reported by persons exposed to industrial noise, although not everyone exposed to industrial noise reports it. Dr. McKinney accepts the “presence or absence of tinnitus based on the patient’s history taken at face value.” I find Dr. Volarich’s opinion credible that Claimant developed tinnitus from noise exposure at work. Dr. Volarich noted Claimant drove a street sweeper for 23 years that exposed his right ear “to a loud whining, shrieking noise from the machine,” despite wearing ear protection.

I find Claimant’s testimony credible that he continued to work around noisy equipment until he was terminated in August 2007. Claimant testified that despite ear coverings, the chipper and sweeper that he operated were loud. Further, Claimant testified he has difficulty understanding people who speak softly on the telephone, including his attorney.

Based on credible opinions of Drs. McKinney and Volarich, Claimant’s credible testimony, medical opinions and reports, I find Claimant developed tinnitus, an occupational disease, as a result of his exposure to noisy equipment while working for Employer for more than 40 years. I find Claimant’s work activities to be the prevailing factor that caused tinnitus. I find tinnitus arose out of and in the course of Claimant’s employment, and is medically causally related to Claimant’s work for Employer.

Employer received Proper Notice

At the hearing, the parties stipulated that notice was an issue; however, it was not addressed in post-trial briefs.

Section 287.420. RSMo provides: No proceedings for compensation for any occupational disease. . .under this chapter, shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.

Claimant’s testimony is credible that he worked for Employer until August 2007, and Employer knew he had ringing in his ears. Dr. McKinney tested Claimant’s hearing on October 9, 12, and 15, 2007 and rated .5% PPD of each ear for tinnitus. Dr. McKinney addressed his findings to Ms. Debra Petty, an employee of the Insurer, about 9 weeks after Claimant’s termination. Based upon Dr. McKinney’s report and Claimant’s credible testimony, I find Employer received proper notice.

Claimant sustained injury from the last injury alone

I find Claimant sustained PPD from the last injury alone. For tinnitus, Dr. McKinney rated .5% PPD of each ear and Dr. Volarich rated 5% PPD of the body as a whole. Claimant's testimony is credible that constant ringing in his ears makes it difficult to hear some telephone conversations. Based on the credible opinions of Drs. McKinney and Volarich, Claimant's credible testimony and medical reports, I find Claimant sustained 5% PPD of the body as a whole for tinnitus.

Claimant is permanently and totally disabled due to a combination of disability from the tinnitus and preexisting disability

Claimant asserts he is PTD as a result of tinnitus and pre-existing disability. SIF contends even if Claimant has tinnitus, it does not combine with the pre-existing condition to cause PTD. Also, if Claimant is PTD, it is due to subsequent deterioration of preexisting diabetes.

Claimant has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury Fund Liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). "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. 1999). The words "inability to return to any employment" mean that "the employee is unable to perform the usual duties of 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 Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1982).

I find Dr. Volarich's opinion credible that Claimant is PTD due to a combination of the primary injury and pre-existing disabilities. Dr. Volarich concluded Claimant could not continue to work as a maintenance worker/equipment operator for Employer or in a similar position. Further, Dr. Volarich did not believe Claimant could "perform on an ongoing basis 8 hours per day, 5 days a week throughout the work year." Claimant is considered advanced age at 63. Also, Claimant was unable to return to work after August 6, 2007.

Mr. England's testimony is credible that Claimant is PTD based on Dr. Volarich's restrictions and Claimant's symptoms. Claimant may be awake for days before his body shuts down from fatigue. When he sleeps it is not longer than 4 hours due to pain in his right shoulder, back, and feet. He falls asleep during the day. Mr. England concluded Claimant would need to be awake and alert to even perform sedentary or light work. Also, Mr. England found Claimant's skills as an equipment operator were not transferable. In addition, Claimant's use of the telephone could be a hindrance or obstacle to employment or re-employment based on tinnitus.

Both Dr. Volarich and Mr. England found Claimant's tinnitus, diabetes, right shoulder, left hand, low back, left knee, and right ankle were a hindrance or obstacle to his employment or re-employment.

Claimant's testimony is credible that he is unable to work. In addition to ringing in his ears, Claimant has difficulty sleeping due to pain in his low back, feet and right shoulder. After being awake for days, he falls asleep from fatigue. Claimant testified that Dr. Lehman was reluctant to perform surgery on his shoulder because of the diabetes. Claimant has significant right shoulder limitations and use of his left hand is limited because of the thumb injury. His right ankle has been repaired and he experiences swelling and gout flare-ups in the left knee. His vision is

impaired and he develops recurrent foot blisters that require him to be off work for periods of time.

Dr. Cantrell's restrictions are not dispositive because he only addressed shoulder problems. Although Claimant's right shoulder improved after the April 2006 injury, he continued to have significant problems with range of motion. Dr. Volarich is the only doctor that examined all of Claimant's medical conditions and rendered an opinion. Dr. Volarich's opinion is credible that Claimant's diabetes and low back were stable in August 2007, noting Claimant's medication remained unchanged and no intervening eye surgeries were performed.

Based on credible testimony by Dr. Volarich, Mr. England, and Claimant, medical reports and opinions, disability from the primary and pre-existing injuries, Claimant's age, education and employment history, I find an employer in the ordinary course of business would not hire Claimant because he could not perform the work in his present physical condition. I find Claimant is not employable in the open labor market due to a combination of his primary and pre-existing medical conditions. I find SIF liability for PTD benefits.

Commencement Date for Permanent Total Disability Payments

The obligation to pay permanent disability compensation commences under Section 287.160.2 RSMo on the date claimant's permanent disability begins. *Kramer v. Labor & Indus. Rel. Com'n*, 799 S.W.2d 142, 145 (Mo. App. 1990). The parties stipulated that Claimant reached MMI on October 15, 2007. Therefore, I find Claimant reached MMI on October 15, 2007. I previously found Claimant sustained 5% PPD from the primary injury. I find Employer liable for 20 weeks of compensation at the stipulated rate of \$389.04 per week, beginning retroactively on October 15, 2007. Employer has paid the stipulated PPD benefit.

Where, as in the instant case, the rates of compensation for PPD and PTD are different, SIF is liable for the difference between what should be paid by the Employer for PPD under Section 287.190, and what Claimant should receive for PTD under Section 287.200. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 923 (Mo.App. 1982). I find Employer's liability for PPD should have commenced October 15, 2007, and will conclude on March 3, 2008. I find SIF liable to pay Claimant the sum of \$353.68 per week for 20 weeks, and thereafter beginning March 4, 2008, the sum of \$742.72 per week for the remainder of Claimant's life. *Laterno v. Carnahan*, 640 S.W.2d 470, 471 (Mo. App. 1982).⁵

⁵ \$742.72 (PTD rate) -\$389.04 (PPD rate) = \$353.68 SIF differential rate to be paid for 20 weeks.

CONCLUSION

Claimant is permanently and totally disabled as of October 15, 2007. Employer is responsible for 20 weeks of permanent partial disability, which has been paid. Second Injury Fund is to pay a weekly differential of \$353.68 per week from October 15, 2007 through March 3, 2008, and thereafter, \$742.72 per week for Claimant's lifetime. The issue of permanent partial disability against the Second Injury Fund is moot. Claimant's attorney is entitled to a 25% lien for legal services provided.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation