

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

Injury No. 00-177324

Employee: James Wickam
Employer: Republic Services (Settled)
Insurer: Liberty Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) whether employee suffered any disability, and if so, the nature and extent of employee's disability; and (2) whether the Second Injury Fund is liable to the employee for permanent total or permanent partial disability benefits.

The administrative law judge rendered the following findings and conclusions: (1) for purposes of assessing Second Injury Fund liability, employee's injury date for the primary injury was November 6, 2000; (2) employee failed to carry his burden of proving he was permanently and totally disabled based on a combination of his primary injury and his preexisting disabilities considered as of November 6, 2000; (3) employee suffered a preexisting 10% permanent partial psychological disability; and (4) the Second Injury Fund is not liable for any benefits in this matter.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred because the appropriate date of injury for his primary occupational disease was September 12, 2003, and employee established he is permanently and totally disabled based on a combination of his multiple disabling conditions as of that date.

Findings of Fact

Primary injury

Since the 1970s, employee has worked for various construction employers operating heavy equipment or driving trucks. This work required repetitive motions of the upper extremities to continuously manipulate levers, gear shifts, and steering wheels. Employee obtained these jobs, which often were short-term in nature, from his local union hall. The record is insufficient to permit us to determine for how long employee worked for the employer named in this claim, Republic Services, or when his last assignment for that entity ended. It does appear that after employee stopped working for Republic Services, he obtained work with a different construction employer, identified variously in the record

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as List & Clark or Liston & Clark. Employee worked for this employer until he was laid off on April 18, 2003, owing to a lack of work. Employee did not work thereafter.

On October 30, 2000, employee saw Dr. Craig Satterlee for treatment in connection with a right shoulder injury (discussed more fully below) that he suffered at work on August 17, 1999. Dr. Satterlee noted employee's complaints of numbness in the right hand and ordered an EMG to rule out a possible brachial plexus injury. On November 6, 2000, that EMG revealed moderate to severe carpal tunnel syndrome in employee's right upper extremity.

Employee's medical expert, Dr. P. Brent Koprivica, evaluated employee on November 1, 2001, for the 1999 right shoulder injury. In addition, Dr. Koprivica examined employee's bilateral upper extremities and noted the November 2000 EMG, and opined that employee was suffering from bilateral carpal tunnel syndrome, that employee's activities as a heavy equipment operator were a substantial factor in causing this condition to develop, and that employee was in need of further electrodiagnostic studies and treatment in the form of surgical decompression of both upper extremities.

On September 12, 2003, Dr. Leslie Thomas performed a right carpal tunnel release surgery. On September 24, 2003, an EMG revealed moderately severe left carpal tunnel syndrome. On December 22, 2003, Dr. Thomas performed a left carpal tunnel release surgery. On September 29, 2004, Dr. Thomas determined that employee was at maximum medical improvement, and rendered a generalized 5% residual deficit rating of each upper extremity. Employee settled his claim against employer for the primary carpal tunnel syndrome consistent with a rating of 18% permanent partial disability affecting the body as a whole.

In a report issued October 12, 2004, Dr. Koprivica reiterated his opinion that employee suffered at least moderately severe bilateral carpal tunnel syndrome as a result of his work activities performing heavy equipment operation and truck driving. Dr. Koprivica confirmed his opinion that these activities were a substantial factor in causing the bilateral carpal tunnel syndrome, which he rated at an overall 20% permanent partial disability to the body as a whole. Dr. Koprivica's rating correlates to employee's ongoing complaints of lost strength, hand cramps, and dropping objects.

Dr. Koprivica's causation opinion with regard to employee's carpal tunnel syndrome injury is not contradicted by any other expert medical opinion evidence on this record, and is not inherently incredible. Accordingly, we credit Dr. Koprivica's opinion with regard to this issue, although we deem the 18% rating reflected in employee's settlement with employer to be more appropriate. We find employee suffered an 18% permanent partial disability of the body as a whole in connection with his bilateral carpal tunnel syndrome.

Preexisting conditions of ill-being

Employee suffered an injury to his right shoulder at work on August 17, 1999. From August to October 1999, employee received treatment from Dr. Bruce Scully, who diagnosed bursitis of the right shoulder, restricted employee from any work over shoulder

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height, prescribed medications and physical therapy, injected the right shoulder, and recommended employee perform range of motion and strengthening exercises.

Later, as noted above, employee sought additional treatment with Dr. Satterlee, who diagnosed a rotator cuff tear, recommended surgery, and ultimately performed a right total shoulder replacement on December 6, 2000. Dr. Satterlee released employee at maximum medical improvement with regard to the right shoulder on June 7, 2001, with a permanent lifting restriction of 50 pounds. Employee settled his claim against employer for the August 17, 2000, injury for 50% permanent partial disability of the right shoulder at the 232-week level. We deem the settlement to be persuasive evidence of the extent of employee's disability referable to the right shoulder. We find that employee suffered a 50% permanent partial disability of the right shoulder as of June 7, 2001.

Employee claims preexisting psychological disability. He advances the testimony of Dr. Allan Schmidt, a PhD psychologist, who believes employee suffers from a preexisting 20% permanent partial psychological disability referable to attention deficit hyperactivity disorder (impulsive type) and a personality disorder (not otherwise specified and with obsessive-compulsive features). Dr. Schmidt explained that employee talks incessantly, is unable to focus on particular topics, and would have been very limited in what he could do vocationally from a psychological perspective.

Interestingly, in his testimony, Dr. Schmidt indicated that attention deficit hyperactivity disorder is not a psychological condition at all, but more in the nature of a neurological disorder. Given this testimony, we have some doubts about relying solely on Dr. Schmidt's psychological opinion diagnosing attention deficit hyperactivity disorder. On the other hand, our review of employee's rather disorganized and discursive testimony at the hearing, as well as his similar presentation when evaluated by his vocational expert, Mary Titterington, do lend significant support to Dr. Schmidt's diagnoses, as these seem consistent with the symptoms Dr. Schmidt identified as resulting from these conditions. We note also that there is no other expert psychological opinion evidence on record to rebut Dr. Schmidt's findings and opinions. Given these circumstances, we deem appropriate the administrative law judge's finding that employee suffered a preexisting psychological disability of 10% of the body as a whole. Because Dr. Schmidt credibly testified that employee's psychological diagnoses would have been present from birth or early childhood, we find that employee was suffering from this disability at the time of the primary injury.

Employee claims preexisting disability referable to sleep apnea. On April 5, 1999, employee saw Dr. Raghavendra Adiga for complaints of excessive fatigue and weight gain. Dr. Adiga suspected employee was suffering from sleep apnea and ordered a sleep study and additional tests to rule out diabetes and hypothyroidism. Employee apparently underwent the sleep study, but did not immediately follow-up for additional treatment.

Employee testified that his sleep apnea was bothering him at work by April 2003, and that he dealt with his severe fatigue by sleeping during his lunch breaks and by stopping on his commute to take naps. On May 1, 2003, employee saw Dr. Lisa Mansur for complaints of severe sleepiness. Dr. Mansur recommended employee lose weight and undergo another sleep study. On May 13, 2003, employee underwent a polysomnography which revealed

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extremely severe obstructive sleep apnea not adequately treated by CPAP or BiPAP. Based on the severity of employee's sleep apnea as demonstrated by the study, Dr. Mansur recommended the extraordinary step of a tracheotomy. Dr. Sidney Christiansen performed that procedure on June 3, 2003. On January 5, 2004, employee underwent a stoma revision for excessive granulation tissue that was preventing employee from breathing whenever the tracheostomy tube was removed.

Employee believes no employer would hire him to perform his previous work on construction sites, owing to the risk that dust and debris would enter his tracheostomy tube. Employee hopes to eventually lose enough weight so that his sleep apnea will improve sufficiently that the tracheostomy tube may eventually be removed. We find that employee's sleep apnea was disabling as of April 2003.

Employee claims preexisting disability referable to his bilateral knees. Employee provided some generalized testimony suggesting he suffered knee problems for 20 or 30 years. He also testified that at a certain point he had to use a milk crate to climb up into his machine at work, and that he felt he had to hide this circumstance from his employers, as they would have frowned upon it. However, employee did not specify when this (or any other particular impairment referable to the knees) began.

The medical records suggest employee first sought treatment for this condition on July 21, 2003, when he saw Dr. Leslie Thomas complaining of aches and pains in his knees. Dr. Thomas determined that an x-ray showed mild degenerative changes, and ordered an MRI to rule out a meniscal tear. On July 29, 2003, Dr. Thomas reviewed the MRI results and opined that they revealed a meniscal tear in employee's right knee. Dr. Thomas recommended arthroscopic surgery to correct this condition, and performed that surgery on August 13, 2003.

On January 19, 2004, Dr. Thomas identified retropatellar crepitus and a torn medial meniscus in employee's left knee, and recommended a left knee arthroscopy. Employee underwent a left knee arthroscopy with medial meniscectomy and debridement performed by Dr. Thomas on February 5, 2004. Given employee's failure, in his testimony, to identify when his knees first started causing specific impairments in his activities, we find insufficient evidence to support a finding of disability referable to employee's bilateral knees prior to July 2003, when employee first sought treatment with Dr. Thomas.

In his October 2004 report, Dr. Koprivica addressed the bilateral knee and sleep apnea conditions, and registered his opinion that they "preexisted" employee's primary carpal tunnel syndrome injury. But in rendering those opinions, Dr. Koprivica assumed the appropriate date of injury for purposes of assessing employee's preexisting disabling conditions was "April of 2003," when employee last worked. For reasons explained immediately below, we find the appropriate date of injury herein was November 1, 2001, not April of 2003. Accordingly, we are not persuaded by Dr. Koprivica's opinion that employee's disabling bilateral knee and sleep apnea conditions preexisted employee's primary carpal tunnel syndrome injury.

For similar reasons, we are not persuaded by the opinions from Dr. Koprivica or Ms. Titterington that employee is permanently and totally disabled based on a

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combination of the primary carpal tunnel syndrome injury and employee's preexisting disabling conditions. This is because both Dr. Koprivica and Ms. Titterington include the subsequent disability referable to employee's bilateral knees and sleep apnea in rendering their ultimate opinions regarding permanent total disability. We are, however, persuaded by Dr. Koprivica's uncontested opinion that there is a synergistic interaction between employee's preexisting disability and the primary injury. We find that the synergistic interaction of these disabilities produces greater disability than the simple sum of disability referable to these conditions.

Conclusions of Law

Date of injury by occupational disease for purposes of § 287.220 RSMo

The primary question in this case is whether employee's carpal tunnel syndrome injury is appropriately characterized as occurring after employee's other claimed disabling conditions, such that they may be included as preexisting disabilities for purposes of assessing any Second Injury Fund liability. See § 287.220.1 RSMo. Accordingly, we must determine the appropriate "date of injury" to assign to employee's carpal tunnel syndrome.

It is well-settled in Missouri that the appropriate date of injury in an occupational disease case is when the disease first becomes "compensable": "[a]n employee with an occupational disease is not considered 'injured' until the time when the disease causes a *compensable injury*." *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 228 (Mo. App. 1988)(emphasis added). Accordingly, we must answer the question when employee's carpal tunnel syndrome first became a compensable injury. Employee argues this occurred on September 12, 2003, the date on which he first underwent surgery in connection with his carpal tunnel syndrome. Employee cites *Garrone v. Treasurer of State*, 157 S.W.3d 237 (Mo. App. 2004), which suggests that "[a]n occupational disease does not become a compensable injury until the disease causes the employee to become disabled by affecting the employee's ability to perform his ordinary tasks and harming his earning ability." *Id.* at 242. The Second Injury Fund, on the other hand, argues employee's carpal tunnel syndrome first became compensable on November 6, 2000, when the need for surgery was first manifested by electromyogram, citing *Hale v. Treasurer of Mo.*, 164 S.W.3d 184 (Mo. App. 2005), which suggests that "[i]n cases involving an occupational disease caused by repetitive motion, an employee is disabled and unable to work when the need for surgery is manifested." *Id.* at 187.

Both parties assume that the "compensability" of employee's occupational disease was triggered on the first occasion that employee experienced some "disability," or loss of earning capacity, related to the disease. But Chapter 287 does not merely provide compensation for disability:

Workers' compensation benefits fall into two types: payments for death and payment for disability or physical injury. Payments made for physical injury are divided into two categories: wage-loss payments based on the concept of disability; and payment of hospital and medical expenses occasioned by any work-connected injury, *regardless of wage loss or disability*.

Sheldon v. Board of Trustees, 779 S.W.2d 553, 556 (Mo. 1989)(emphasis added).

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As recognized by our Supreme Court in the above-quoted language, and as made clear in § 287.140 RSMo, an injury need not be “disabling” in order to be “compensable.” We note also the numerous Missouri decisions expressly holding that “[a]n employee may sustain a permanent partial disability and still be able to work. Further, an actual loss of earnings is not an essential element of a claim for permanent partial disability. A permanent partial disability can be awarded notwithstanding the fact the claimant returned to work if the claimant's injury impaired his efficiency in the ordinary pursuits of life.” *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 285 (Mo. App. 1997). See also *Betz v. Columbia Tel. Co.*, 224 Mo. App. 1004, 1013 (Mo. App. 1930); *Carr v. John W. Rowan Plastering Co.*, 227 Mo. App. 562, 563 (Mo. App. 1932); *Worley v. Swift & Co.*, 231 S.W.2d 828, 832 (Mo. App. 1950); *Franklin v. St. Louis Independent Packing Co.*, 360 S.W.2d 350, 355 (Mo. App. 1962); *Sapienza v. Deaconess Hospital*, 738 S.W.2d 149, 151 (Mo. App. 1987); *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 285 (Mo. App. 1997); *Rana v. Landstar TLC*, 46 S.W.3d 614, 626 (Mo. App. 2001); and *Smith v. Donco Constr.*, 182 S.W.3d 693 (Mo. App. 2006).

In other words, the very concept of “disability” (even if we assume this concept is synonymous with that of “compensability”) does not necessarily require an actual loss of earnings for purposes of the Missouri Workers’ Compensation Law. In fact, the first reported Missouri decision to consider the appropriate date of injury in an occupational disease case, *Renfro v. Pittsburgh Plate Glass Co.*, 130 S.W.2d 165 (Mo. App. 1939), makes clear that a finding of disability need not coincide with an actual interruption of an employee’s ability to work: “nor do we say or hold that the fact that an employee continued to work and receive wages conclusively shows there was no disability. We are aware that men may and do from dire necessity, by superhuman efforts, and sometimes with the assistance of others, continue to do some kind of work and receive wages when they are actually physically disabled, without being held to have changed their true *status* of disability and without imperiling their right to compensation.” *Id.* at 170 (emphasis in original). The *Renfro* court emphasized the need for a realistic appraisal of the facts at hand, as opposed to strict application of per se rules for determining the date of injury in cases of occupational disease.

The subsequent decision of *Enyard v. Consolidated Underwriters*, 390 S.W.2d 417 (Mo. App. 1965) reinforces the need for a fact-specific analysis. There, the employee’s injurious exposure to the occupational disease of silicosis occurred from 1936 to 1943, while he worked as a sandblaster for the Scullin Steel Company. *Id.* at 419. But the employee was not rendered unable to work from the effects of silicosis until 1960, while in the employ of a subsequent employer, the Millstone Construction Company, where his duties did not involve any exposure to the risk of contracting silicosis. *Id.* at 420. The Scullin Steel Company argued that the Millstone Construction Company should be liable for employee’s injury, citing the case law holding that the appropriate time of injury in an occupational disease case is the first date the employee is unable to work. *Id.* at 423. While acknowledging the cases so holding, the *Enyard* court declined to follow them, because “what was said in those cases and in the holdings that followed must be viewed and construed in the light of the facts and issues before the court in the respective cases.” *Id.* at 427. In order to avoid the “gross injustice” that would otherwise result from strictly applying rules equating “disability” with “compensability,” the *Enyard* court fashioned and applied a different rule fixing liability at the time of the employee’s last injurious exposure to the disease of silicosis. *Id.* at 430-32.

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Likewise, in holding that an employee suffered a “compensable injury” in a carpal tunnel syndrome case before missing any work, the court in *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755 (Mo. App. 1997) made clear that “an inability to work is not a prerequisite for recovery under the Worker’s Compensation Act ... while missing work suggests the requisite earning loss, other factors are considered in determining whether and at what point an employee has lost earning ability.” *Id.* at 760-61. And in *Feltrop v. Eskens Drywall & Insulation*, 957 S.W.2d 408 (Mo. App. 1997), the court specifically held that an employee need not miss work before suffering a compensable occupational disease injury in the form of carpal tunnel syndrome. *Id.* at 409. As the *Feltrop* court explained:

[A]n injury is compensable if the employee has been diagnosed with a work-related disabling occupational disease, such as carpal tunnel syndrome, which limits his earning capacity because it limits his ability to perform certain work functions. This is true even if the employee has not yet actually missed work, for an employee can be incapable of performing certain tasks but can still be able to perform other tasks.

Id. at 413.

Here, Dr. Koprivica’s report of November 1, 2001, demonstrates: (1) a diagnosis of clearly work-related repetitive trauma in the form of carpal tunnel syndrome; (2) clear clinical evidence of impairment in the form of numbness of the upper extremities; and (3) a need for medical treatment in the form of carpal tunnel release surgery. Dr. Koprivica’s opinions in this regard are uncontradicted by any other expert opinion evidence on the record, and we find them persuasive. We are of the opinion that the confluence of these facts established a “compensable injury” as of November 1, 2001.

This result is more consistent with the nature of the injury for which employee claims compensation herein. Employee’s original claim for compensation alleged an injury that occurred on November 6, 2000, while in the employ of the employer named herein, Republic Services. Although employee filed an amended claim for compensation alleging an injury sustained on April 18, 2003, while in the employ of List & Clark, employee’s counsel indicated at the hearing that “nothing happened with” that claim, and that employee ultimately abandoned it. *Transcript*, page 41. It follows, therefore, that the appropriate claim for our consideration is employee’s original claim for compensation alleging that he suffered an injury while in the employ of Republic Services. Dr. Koprivica’s report of November 1, 2001, identifies employee’s work for Republic Services as a substantial factor causing his bilateral carpal tunnel syndrome.

Additional considerations support our finding that employee suffered a compensable injury on November 1, 2001. To hold as employee suggests—that he did not suffer a compensable injury until the day he underwent surgery—would provide employers a legal basis to deny treatment for repetitive trauma work injuries until a need for surgery (or other complication requiring the employee to miss work) has been demonstrated, thus preventing employees from receiving the kind of early treatment that might otherwise prevent an emergent occupational disease injury from becoming a permanently disabling one. Likewise, to hold as employee suggests would undermine the notice protections afforded employers under the post-2005 version of § 287.420

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RSMo, as an employee would owe no duty to report or to give employer a chance to provide early treatment to minimize the employer's liability until after an occupational disease grew serious enough to separate the employee from work. The *Feltrop* court expressed similar concerns:

[T]o use the date that an employee first misses time from work as the date that he becomes disabled would create practical problems in the workplace. Such a rule would create an incentive for employees to miss work, even though they are capable of some alternative work activities, in order to trigger any claim they may have to recover workers' compensation benefits. On the other hand, diligent employees who stay at work would be punished because a court might later determine that they suffered no disability and were not entitled to workers' compensation benefits.

Feltrop, 957 S.W.2d at 413.

To hold as employee requests would also complicate issues related to the running of the statute of limitations and the application of the last exposure rule, and increase the likelihood of absurd results, such as the scenario in which an employee owes a statutory duty to notify an employer of an injury for which a subsequent employer will ultimately be deemed liable to pay compensation.

Ultimately, as seen in the *Enyard*, *Coloney*, and *Feltrop* decisions, we are not required to ignore the actual facts before us in favor of a strict application of language from the decisions equating "compensability" with "missing work." For these reasons, we find *Garrone* and similar decisions distinguishable. We conclude that the appropriate date of injury herein is November 1, 2001.

Second Injury Fund liability

Section 287.220.1 RSMo creates the Second Injury Fund and controls the assessment of Second Injury Fund liability in "all cases of permanent disability where there has been previous disability." We were not persuaded by employee's expert opinion evidence identifying Second Injury Fund liability for permanent total disability benefits, but we have credited Dr. Koprivica's uncontested opinion that there is a synergistic interaction between employee's preexisting disability and the primary injury of carpal tunnel syndrome. Section 287.220.1 provides, as follows, with respect to Second Injury Fund liability for enhanced permanent partial disability benefits:

If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal

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to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

We have found that employee suffered a 50% permanent partial disability of the right shoulder at the 232-week level referable to his preexisting right shoulder injury, and an 18% permanent partial disability of the body as a whole in connection with his primary bilateral carpal tunnel syndrome injury. Employee's preexisting right shoulder disability satisfies the applicable 15% threshold for a major extremity injury. Accordingly, employee's 10% permanent partial psychological disability is appropriately included in the calculation of Second Injury Fund liability. See *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013). We deem a 15% load factor to be appropriate to account for the synergistic interaction among the multiple injuries affecting employee's bilateral upper extremities.

Accordingly, we calculate Second Injury Fund liability for permanent partial disability benefits, as follows: 116 weeks (50% permanent partial disability of the right shoulder at the 232-week level) + 72 weeks (18% of the body as a whole referable to carpal tunnel syndrome) + 40 weeks (10% of the body as a whole referable to psychological disability) = 228 weeks x the 15% load factor = 34.2 weeks of enhanced permanent partial disability. At the stipulated permanent partial disability rate of \$314.26, the Second Injury Fund is liable for \$10,747.69 in permanent partial disability benefits.

Decision

We reverse the award of the administrative law judge.

The Second Injury Fund is liable to employee for enhanced permanent partial disability benefits in the amount of \$10,747.69.

The award and decision of Administrative Law Judge Emily S. Fowler, issued March 18, 2015, is attached solely for reference.

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For necessary legal services rendered to employee, Stephen Mayer, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 21st day of October 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

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DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe employee is entitled to permanent total disability benefits from the Second Injury Fund.

The majority's analysis is impressively researched and, at first glance, appears logical. I am not unsympathetic to their desire to provide some consistency and clarity to our use of terms such as "disability" and "compensable injury" in occupational disease cases. Unfortunately, the majority's analysis is invalid because it fails to apply the most recent and controlling Missouri case law relevant to establishing the date of injury in the context of assessing Second Injury Fund liability.

The majority provides citations to Missouri cases extending all the way back to the 1930s standing for the principle that an award of compensation against an employer need not be premised on a showing that the employee has missed work. But we are not concerned here with whether and when the employer became liable for compensation—employee has settled that claim. Instead, we are concerned with determining the appropriate date of injury to assign to employee's carpal tunnel syndrome for the very specific purpose of assessing preexisting disability in the context of employee's claim against the Second Injury Fund. Fortunately, there is a relatively recent and very clear case law answer to this sometimes difficult question.

In *Garrone v. Treasurer of State*, 157 S.W.3d 237 (Mo. App. 2004), the court held that the employee did not suffer a "compensable injury" for purposes of assessing preexisting disability until the date of the employee's carpal tunnel release surgery. *Id.* at 242. The facts of *Garrone* are nearly identical to those involved here. Although the employee had experienced some symptoms related to carpal tunnel syndrome, had been diagnosed, and had even received some treatment in the form of splints, the court rejected the Second Injury Fund's argument that these factors were sufficient to demonstrate "disability" for purposes of assigning an earlier date of injury. *Id.* at 240-41. Instead, the court held that the date employee first missed work, and was thus "unable to perform his ordinary work duties," was the appropriate date of injury "as a matter of law." *Id.* at 242. See also *Elmore v. Mo. State Treasurer*, 345 S.W.3d 361, 372 (Mo. App. 2011)(holding the employee's "compensable injury" for purposes of assessing Second Injury Fund liability coincided with her first surgery for the condition, not the date the employee first experienced symptoms).

Unfortunately, the Commission majority disregards the holding in *Garrone* in favor of a theory of their own making. The majority relies on the decision in *Feltrop v. Eskens Drywall & Insulation*, 957 S.W.2d 408 (Mo. App. 1997) for the proposition that an employee with carpal tunnel syndrome need not miss work in order to suffer a compensable injury. But the actual facts of *Feltrop* are very different from those involved here:

Here, the evidence shows that Mr. Feltrop suffered a disabling, work-related injury due to carpal tunnel syndrome and neck injury which caused him significant pain when he tried to hang or finish sheetrock or to perform similar over-the-head work activities. This disability would prevent him from

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installing and finishing sheetrock for a substantial period of time, as he had previously done. Because Mr. Feltrop was now in a position which required him to perform substantial administrative and supervisory work, however, he was already limiting the amount of his physical labor and was in a position to further limit it and to control the timing of these duties. In effect, he could put himself on "light duty" and thus avoid the need to miss work.

Id. at 413.

Here, on the other hand, there is no evidence that employee experienced any physical impairment whatsoever referable to carpal tunnel syndrome that affected his ability to perform work tasks until he was necessarily rendered unable to work during and following his first carpal tunnel release surgery on September 12, 2003. The majority points to numbness in the bilateral extremities as of November 2001. But numbness alone is not sufficient to prove disability for purposes of assigning an appropriate date of injury; instead, the cases require some evidence that the employee's work duties were affected by these symptoms: "the purpose of a Workman's Compensation Act is not indemnity for any physical ailment, but for loss of earning power, disability to work." *Renfro v. Pittsburgh Plate Glass Co.*, 130 S.W.2d 165, 171 (Mo. App. 1939).

Employee testified he worked full-time operating heavy construction machinery until he was laid off on April 18, 2003. Nothing in employee's direct examination suggests he had any trouble performing any work task (or any activity of daily living for that matter) referable to carpal tunnel syndrome before September 2003. On cross-examination, counsel for the Second Injury Fund did not inquire as to whether and to what extent employee's carpal tunnel syndrome affected his work or any other activities; in fact, the Second Injury Fund did not pose a single question relevant to employee's carpal tunnel syndrome at the hearing before the administrative law judge.

There is no other testimony or other evidence on this record that would support a finding that any symptoms referable to carpal tunnel syndrome caused employee any difficulty in performing his work tasks or activities of daily living before his surgery of September 2003. Absent such evidence, employee's mere complaints of numbness, as memorialized by Dr. Koprivica in his report of November 2001, are not sufficient to demonstrate disability, or to trigger the date of injury for purposes of assessing Second Injury Fund liability. As the *Garrone* court pointed out, "[a]n employee can be diagnosed with an occupational disease and experience symptoms of the disease prior to the time that it becomes disabling." 157 S.W.3d at 242. That is precisely what happened here. The majority simply cannot rely on *Feltrop* (or any of the other cases they cite) to distinguish *Garrone*.

I do not disagree with the majority's emphasis on the need for a realistic appraisal of the facts at hand, but I strongly disagree that this means we should assign November 1, 2001, as the appropriate date of injury. This date has no significance to employee's actual injury in terms of the symptoms he experienced, the treatments he underwent, the work restrictions that were imposed, or any other milestone we might identify referable to the progression of his carpal tunnel syndrome. Instead, the *only* significance of November 1, 2001, is that Dr. Koprivica issued a report on this date that includes findings the majority deems important.

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And, given that the majority is prepared to rely on Dr. Koprivica's opinions in assigning the appropriate date of injury, it strikes me as ironic that they overlook his ultimate causation opinion in this case. As Dr. Koprivica explained in his 2004 report, employee's continued work operating heavy equipment caused his carpal tunnel syndrome to progress: "As Mr. Wickam continued to work, both of his hand conditions became progressive [sic] worse. This occurred up until his last date of employment." See *Transcript*, pages 357, 364. In other words, Dr. Koprivica's causation opinion includes trauma sustained by employee through April 18, 2003, his last day of work. How then can the majority assign any earlier date of injury?

The majority's focus on employee's initial claim for compensation alleging an earlier date of injury is similarly misplaced. As the courts have recognized, the important date for purposes of filling out the claim for compensation is the date of *exposure/causation*, not necessarily the date of injury or disability for which compensation is claimed: "[t]he date of exposure is the date of causation. Thus, the critical date to be entered for an occupational disease in Box 3 on the claim form is the date of exposure." *Garrone*, 157 S.W.3d at 243 (citation omitted).

The majority frets that if it follows the factually indistinguishable and controlling decision in *Garrone*, an employer might grasp at its decision as a basis for denying an employee's repetitive trauma claim until surgery is required. I am unsure why the Commission majority discerns a need to create hypothetical legal arguments for hypothetical employers in resolving this claim against the Second Injury Fund, but anyway, the Missouri courts have already dealt with such arguments in the context of claims against an employer, and specifically rejected them. See *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755, 758-61 (Mo. App. 1997). The Commission majority also worries about the implications of equating the concepts of disability and compensability in regard to notice, statute of limitations, and other issues. Again, the majority ignores that entire bodies of case law have developed around these questions, and provide well-settled answers to the majority's concerns.¹

It is a basic reality of judicial review that parallel lines of case law authority can (and will continue to) arise when our courts are called upon to resolve disparate issues under the workers' compensation law. The terms used in resolving those issues may not always be as consistent as among various cases and factual scenarios as we would like them to be, but this is why we must apply the case law that is specifically relevant to the actual issues at hand. We are not called upon to iron out inconsistencies and refashion the law to our own liking, but rather to apply it, provide the parties with a resolution of their dispute, and move on.

Notably absent from the majority's decision is any acknowledgement of the overriding principle of Missouri Workers' Compensation Law with respect to claims (like this one) arising under the law as it existed prior to the 2005 amendments:

¹ With regard to the statute of limitations, see, e.g., *Lawrence v. Anheuser Busch Cos.*, 310 S.W.3d 248, 252 (Mo. App. 2010); *Wiele v. National Super Mkts.*, 948 S.W.2d 142, 146 (Mo. App. 1997). With regard to the last exposure rule, see, e.g., *Pierce v. BSC, Inc.*, 207 S.W.3d 619, 622 (Mo. 2006); *Lococo v. Hornberger Elec.*, 914 S.W.2d 67 (Mo. App. 1996). With regard to the post-2005 notice question, see *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 829 (Mo. App. 2009).

Employee: James Wickam

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"The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment." *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781, 783 (Mo.banc 1983). All of the provisions of the Workers' Compensation Law are to be liberally construed with a view to the public welfare. Section 287.800, RSMo. The law is intended to extend its benefits to the largest possible class, and any doubt as to the right of an employee to compensation should be resolved in favor of the injured employee. *Wolfgeher*, supra, at 783; *Greer v. Department of Liquor Control*, 592 S.W.2d 188, 193 (Mo.App. 1979). Such liberality is especially evidenced for occupational diseases ...

Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 908 (Mo. App. 1990).

Granted, the majority's treatise on the appropriate date of injury is interesting from an academic perspective. But in attempting to reconcile decades of dissimilar judicial decisions, the Commission majority has lost sight of the underlying purpose of Chapter 287. If the majority has doubts about applying *Garrone* in this case, they should err on the side of compensating this employee for his permanent total disability.

Ultimately, regardless whether I personally agree with the wisdom of equating the concepts of "disability" and "compensability" in the context of occupational disease cases, as a member of this Commission, I will apply the most recent, relevant, and controlling case law of the state of Missouri. The *Garrone* decision, as employee correctly points out in his brief, is squarely on point both as to the facts and the law, and is unquestionably controlling. Employee's occupational disease became "compensable" for purposes of his Second Injury Fund claim on September 12, 2003, the date of his first carpal tunnel release surgery. It follows that his bilateral knee and sleep apnea conditions are properly characterized as "previous disabilities" under § 287.220.1 RSMo, and should be included in any assessment of Second Injury Fund liability.

According to the only expert medical and vocational opinion evidence on record, employee is permanently and totally disabled owing to a combination of the primary injury and these previously disabling conditions. Accordingly, I would reverse the award of the administrative law judge and enter an award of permanent total disability benefits against the Second Injury Fund. Because the majority has determined otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

**FINAL AWARD
AS TO SECOND INJURY FUND ONLY**

Employee: James Wickam Injury No: 00-177324
Dependents: N/A
Employer: Republic Services (Settled)
Insurer: Liberty Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Hearing Date: February 4, 2015
Briefs Filed: February 25, 2015 Checked By: ESM/lh

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: 11/06/2000
5. State location where accident occurred or occupational disease was contracted: Jackson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Repetitive injury to both upper extremities from his employment activities using his hands operating heavy equipment and truck driving.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Upper extremities
14. Nature and extent of any permanent disability: 18% permanent partial disability to the body as a whole as previously settled with the employer
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? \$10,067.83
17. Value necessary medical aid not furnished by employer/insurer? Unknown
18. Employee's average weekly wages: \$800.00
19. Weekly compensation rate: \$533.33/\$314.26
20. Method wages computation: Stipulation
21. Amount of compensation payable: 18% permanent partial disability to the body as a whole as previously settled with the employer.
22. Second Injury Fund liability: None
23. Future requirements awarded: N/A

FINDINGS OF FACT AND RULINGS OF LAW

Employee: James Wickam Injury No: 00-177324
Dependents: N/A
Employer: Republic Services (Settled)
Insurer: Liberty Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Hearing Date: February 4, 2015
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FINDINGS

On February 4, 2015, the parties appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110. The Employee, James Wickam, appeared in person and with counsel, Stephen Mayer. The Second Injury Fund appeared through Assistant Attorney General, David Zugelter. There was no appearance on behalf of the Employer and Insurer as the claim between the Employer and the Employee has previously been settled.

STIPULATIONS

The parties stipulated to the following:

- (1) That the Employer, Republic Services, was an employer operating and subject to the provisions of the Missouri Compensation Law on November 6, 2000 and was fully insured by Liberty Mutual Insurance, Co.;
- (2) That James Wickam was its Employee and working subject to the law in Kansas City, Jackson County, Missouri;
- (3) That Employee sustained an accident or occupational disease arising out of and in the course and scope of his employment on November 6, 2000;
- (4) That Employee notified the Employer of his injuries as required by law and his claim was filed within the time allowed by law;

- (5) That Employee's average weekly wage was \$800.00 resulting in a compensation rate of \$533.33 for temporary total and permanent total disability and \$314.26 for permanent partial disability compensation;
- (6) That the Employer has paid temporary total disability compensation in the amount of zero and medical care costs of \$10,067.83;
- (7) That the Employer and the Employee settled the primary claim for 18% permanent partial disability to the body as a whole.

ISSUES

The issues to be resolved by this hearing are as follows:

- (1) Whether the Employee suffered any disability from the last accident and if so the nature and extent of such disability, and
- (2) Whether the Second Injury Fund is liable to Employee for any disability compensation.

The Employee, James Wickam, testified in person and offered the following exhibits, all of which were admitted into evidence without objection:

- A – Dr. Koprivica Independent Medical Exam report dated 11/1/01
- B – Occupational Health Services
- C – Health South Rehabilitation
- D – Dr. Thomas McCormack
- E – Dr. C. Daniel Smith
- F – Dr. C. Craig Satterlee
- G – Trinity Lutheran – Dr. Ahmed EMG
- H – Dr. Satterlee Operative Report
- I – North Kansas City Hospital
- J – Health South Rehabilitation
- K – Health South Rehabilitation – FCE report
- L – Dr. Koprivica Independent Medical Exam report dated 10/12/04
- M – Northland Bone & Joint
- N – North Kansas City Hospital
- O – Health South FCE report
- P – Marry Titterington, vocational consultant report dated 9/8/07
- Q – Dr. Koprivica Addendum dated 4/16/09
- R – Dr. Koprivica Addendum dated 10/25/09
- S – Dr. Raghavendra Adiga
- T – Dr. Sidney Christiansen
- U – Heartland Health

V – KU Medical Center
W – Mid America Cardiology
X – Dr. Koprivica 4/15/10 deposition with exhibits
Y – Mary Titterington 7/27/10 deposition with exhibits
Z – Dr. Allan Schmidt Psych Evaluation report dated 3/30/11
AA – Dr. Koprivica Addendum dated 12/26/11
BB – Dr. Koprivica 10/18/12 deposition with exhibits
CC – Dr. Schmidt 3/7/13 deposition with exhibits

The Second Injury Fund did not call any witnesses and offered the following exhibits which were admitted into evidence without objection:

1 – Claim for Compensation
2 – Stipulation

Claimant (James Wickam) is a 72 year old male. He completed high school in 1960 with above average grades. Through his life he has had a variety of jobs such as butcher, police officer, tractor trailer operator, and heavy equipment operator.

Mr. Wickam reported several injuries and problems prior to his November 6, 2000, occupational disease. In 1961, he suffered a right hand injury which led to the amputation of his distal right index and middle finger. On August 17, 1999, he sustained an injury to his right shoulder, for which he underwent a right shoulder replacement on December 6, 2000. Claimant also testified regarding some personality traits which have hindered him during his lifetime.

Mr. Wickam's November 6, 2000, occupational disease symptoms initially appeared following the 1999 right shoulder injury. Following this shoulder injury, Mr. Wickam complained of numbness in his right hand, leading his physician, Dr. Ahmed, to perform electrodiagnostic studies on his right upper extremity on November 6, 2000. This test revealed moderate to severe carpal tunnel syndrome on the right along with mild ulnar neuropathy at the wrist.

Following this diagnosis, Mr. Wickam filed his claim for compensation with the Division of Workers' Compensation alleging these symptoms were work related and indicated an injury or occupational disease date of November 6, 2000. Claimant eventually underwent a right carpal tunnel release on September 12, 2003, and a left carpal tunnel release on December 22, 2003. Mr. Wickam subsequently filed an amended claim for compensation for the 2000 occupational disease in November 2004, alleging an injury date of April 18, 2003, the approximate last day he worked. He also named an additional employer List and Clark for whom he was working on April 18, 2003. He had not worked for Republic Services since 2000.

Subsequent to the November 6, 2000, occupational disease, Claimant underwent significant treatment to both knees, his shoulder and for sleep apnea. He has undergone arthroscopies to both knees for debridement purposes and has received a recommendation for a

total knee arthroplasty to the left knee. For his sleep apnea condition he underwent a tracheotomy on June 3, 2003. He has undergone two unsuccessful attempts at tracheal debridement surgically since. He has also undergone a shoulder replacement.

Employee testified that he lost the tips of his fingers on his right hand in 1961. He stated it was just the tips and over the last 50 years he has learned to work around them. He was initially diagnosed in April 1999 after a sleep test, with sleep apnea. He stated that he had hurt his shoulder and was off work and gained a great deal of weight. This weight gained was the catalyst to his sleep apnea. However it is noted that his shoulder injury was in August of 1999 some 4 months after the initial sleep test. He also stated that he did not feel his sleep apnea was "that big enough of a deal" to worry about. He stated it was bothering him in 2003 and that he would sleep in his truck prior to starting jobs, he would also sleep in the cab of his machine during breaks as well as nap on the way home if necessary. However there is no testimony about how it affected him prior to his 2000 injury other than the fact there was a sleep test done which was never followed up with any treatment or care. Finally Employee also testified that due to his knee problems he would use a milk crate to climb into his machines. However again there is no timeline or dates to show whether this was before or after his 2000 injury.

Claimant retained several medical and vocational experts to evaluate his claim. Dr. Koprivica, retained by Mr. Wickam, issued five reports, although he evaluated Mr. Wickam on two occasions: November 1, 2001, and October 12, 2004. In his November 1, 2001, report, Dr. Koprivica diagnosed Claimant with bilateral carpal tunnel syndrome and opined his employment as a heavy equipment operator was the substantial factor in the development of his symptoms. He recommended further treatment, including surgical decompression, to treat the bilateral carpal tunnel syndrome. He also recommended filing a separate injury claim for the diagnosis.

Dr. Koprivica made no mention of sleep apnea or knee complaints in his 2001 report. It is not until the 2004 report when he notes these complaints and provides ratings for these conditions. He further opined in his 2004 report that Mr. Wickam is permanently and totally disabled from the primary occupational disease combined with his pre-existing disability. He deemed the sleep apnea and bilateral knee problems and his right shoulder replacement as pre-existing conditions. Dr. Koprivica did not provide a rating or opine Claimant's 1961 injury to his fingers to be a pre-existing hindrance or obstacle to employment.

On April 13, 2011, Dr. Allan Schmidt, a psychologist, evaluated Claimant at his request. The evaluation, completed over ten years after the primary injury, led to the diagnoses of attention deficit hyperactivity disorder and a personality disorder. At the time of the evaluation, Mr. Wickam denied any prior history of previous mental health treatment or use of psychotropic medications. After interviewing Employee and testing his Dr. Schmidt noted in his report that the degree of disability of Employee's psychological impairment in his activities of daily living prior to his accident was no impairment but mild after his accident, his social functioning was a mild impairment pre and post accident, his concentration was a moderate impairment before and after his accident and his adaptation was mild impairment pre and post accident. Dr. Schmidt rated this diagnoses, which he deemed to be pre-existing the 2003 occupational disease, as a 20% body as a whole psychological impairment.

Finally, Mr. Wickam hired Mary Titterington to perform a vocational evaluation, which was completed on August 29, 2007. She too opined Claimant to be permanently and totally disabled in light of his primary occupational disease when combined with his pre-existing disabilities. Ms. Titterington included Claimant's sleep apnea, right shoulder replacement and knee issues in her employment analysis and final conclusions. She also included low back impairments in her analysis, which no physician or rating doctor opined to be a hindrance or obstacle to employment.

A dispositive issue that must first be addressed in this case is whether Mr. Wickam's bilateral knee complaints and treatment, shoulder replacement, ADHD, as well as his sleep apnea and its resulting treatment and limitations, are considered pre-existing disabilities or subsequent deterioration. Mr. Wickam is claiming he is permanently and totally disabled under the Missouri Workers' Compensation Law and further that his permanent and total disability results from the combination of the disability resulting from the 2000 workplace occupational disease combining with permanent disability from prior injuries, including the bilateral knees, right shoulder and sleep apnea. Section 287.020.7 RSMo. 2000 defines total disability as an "inability to return to any employment and not merely...inability to return to the employment in which the employee was engaged at the time of the accident."

In order for there to be Fund liability for permanent partial or permanent total disability benefits, an employee must have:

a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed . . .

§287.220.1 RSMo.¹

When an employee has a qualifying preexisting disability and receives a subsequent compensable work injury such that the combination results in permanent total disability, the Fund is liable for the employee's permanent total disability benefits. § 287.220.1 RSMo; Brown v. Treasurer, 795 S.W.2d 479, 482 (Mo. App. E.D. 1990).

When the Commission analyzes a preexisting disability for Fund purposes, it looks to see whether measurable disability existed "at the time the work injury [was] sustained." Portwood v. Treasurer, 219 S.W.3d 289, 292 (Mo. App. W.D. 2007) (internal citation omitted). That is, the Commission assesses preexisting disability at the time of the compensable work injury. Gassen v. Lienbengood, 134 S.W.3d 75, 80 (Mo. App. W.D. 2004). "The Second Injury Fund is not responsible for progression of preexisting conditions or new conditions that develop after and unrelated to the work injury." Lammert v. Vess Beverages, Inc., 968 S.W.2d 720, 725 (Mo. App. E.D. 1998), *overruled on other grounds by* Hampton v. Big Boy Steel Erection, 121 S.W.3d 220

¹ All references to RSMo are to RSMo 2000 unless otherwise noted.

(Mo. 2003). Put more simply, the Fund is not responsible for subsequent deterioration. Lewis v. Kansas Univ. Med. Ctr., 356 S.W.3d 796, 803-04 (Mo. App. W.D. 2011).

Mr. Wickam argues the proper date of injury, or occupational disease for the purposes of this claim, is April 18, 2003. Such an argument would allow Claimant's bilateral knee symptoms and treatment, as well as those of his sleep apnea and shoulder injury, to be considered in the evaluation of the Second Injury Fund's liability for permanent total disability benefits. Employee amended his claim on December 12, 2004 to an injury date of April 18, 2003. In that amended claim he also added the employer List and Clark, which was the employer he was working for on April 18, 2003. Employee settled his claim with Republic Services on March 6, 2006 for the injury date of November 6, 2000.

At hearing the Court inquired as to the status of the claim against List and Clark:

“THE COURT: I did have one question, Mr. Mayer. You have a settlement -- let me put it this way. You amended your claim to include List & Clark for an injury date of April 18, 2003 on November 14, 2004, correct?”

“MR. MAYER: Yes.

“THE COURT: That's what I'm looking at --

“MR. MAYER: Yes.

“THE COURT: -- in the computer.

“MR. MAYER: Yes. Yeah.

“THE COURT: I see that there is a settlement stipulation with Republic Services who is the original employer that you filed the first claim for. What happened with the claim with regard to the other employer that you amended the claim for, List & Clark?”

“MR. MAYER: Nothing. And they never responded so I presumed that -- obviously, it's been settled with Republic. It's the same. It is -- that is the injury part.

“THE COURT: Is List & Clark the same company as Republic Services?”

“MR. MAYER: No.

“THE COURT: Okay. So it's a separate --

“MR. MAYER: It is separate, yes.

“THE COURT: And they never filed an answer?”

“MR. MAYER: That's correct.

“THE COURT: Okay. But you never pursued the claim against them in any way other than filing --

“MR. MAYER: Other than filing the amended claim, that's correct. ”

It appears that Employee has never pursued the claim against List and Clark for the injury date of April 18, 2003. There is no settlement or award in the records or introduced into evidence. It appears that the claim against List and Clark has been all but abandoned. There are no documents confirming either a settlement or a dismissal of List and Clark. Therefore this Court may only consider the injury date of November 6, 2000 with regard to the Second Injury Fund liability in the case at hand.

Mr. Wickam first complained of numbness in his upper extremities shortly after his 1999 shoulder injury, leading to his diagnosis of moderate to severe carpal tunnel syndrome with mild ulnar neuropathy at the wrist in November 6, 2000. As this was the date his symptoms were diagnosed by a medical physician, I conclude the proper injury date for this claim to be November 6, 2000. Further supporting this finding is the fact Claimant initially filed a Claim for Compensation with the Missouri Division of Workers' Compensation with this date listed as the date of injury. Also, Dr. Koprivica, in his 2001 report, noted the treatment Claimant had received to his upper extremities and opined it was work related and that further treatment was necessary. To find that Claimant's actual occupational disease was not present until after these events occurred would be incorrect. Employee may have suffered additional injury to his upper extremities over time but it was with a different employer. He did include that employer in his amended claim but never pursued that claim against that employer (List and Clark). Hence the Court may only look to the November 6, 2000 injury settled with Republic Services as an injury date for purposes of permanent total disability against the Second Injury Fund, herein.

The next issue to be determined is whether the Claimant has suffered any disability from his last accident, in this case his November 6, 2000 injury date. Claimant, while being treated for his 1999 shoulder injury complained of right hand numbness and tingling. His treating physician ran an EMG test and found that he suffered from mild to moderate carpal tunnel syndrome and suggested treatment. Claimant then filed his claim for the occupational disease caused by the repetitive trauma to his upper extremities from his job related duties. Claimant underwent medical care and was ultimately evaluated and determined to have suffered disability to his upper extremities for which he settled his claim with his employer for 18% permanent partial disability to the body as a whole as related to his bilateral wrists. The second injury Fund offered no evidence to counter this disability. Employee testified that his wrists bothered him and his hands were weaker and would become numb. The Court finds that Claimant did suffer an 18% permanent partial disability to the body as a whole related to his bilateral wrists.

The next issue to be determined is whether the Second Injury Fund is liable to the Employee for any disability, either permanent partial or permanent total disability. In this case

the Employee has alleged that he is permanently and totally disabled. There is no credible evidence that the Employee was rendered permanently and totally disabled as a result of the injury caused by his November 6, 2000 accident considered alone and without regard to his alleged preexisting disability. An employer is liable for permanent total disability compensation under §287.220 RSMo 1994 only where it is found that the primary accident alone caused the employee to be permanently and totally disabled. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271,276 (Mo. App. 1996); Feldman v. Sterling Properties, 910 S.W.2d 808 (Mo. App. 1995); Moorehead v. Lismark Distributing Company, 884 S.W.2d 416, 419 (Mo. App. 1994); Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987). Compensation cases in which there has been a previous disability are to be determined under §287.220.1 RSMo (1994). In partial disability cases, the Employer is liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. In total disability cases, the Employer is liable only for the disability resulting from the last injury considered alone and of itself. The Employer's liability for permanent partial disability compensation is determined under §287.190; Stewart v. Johnson, 398 S.W.2d 850 (Mo.App. 1996).

In order to determine whether an individual is permanently and totally disabled under the Missouri Workers' Compensation Law it is necessary to consider the Claimant's age, education, occupational history and job skills, as well as his physical condition in determining his ability to compete in the open labor market.

The terms "any employment" means "any reasonable or normal employment or occupation." Brown vs. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo App. 1990). The Missouri Courts have repeatedly held that the test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the employer in the usual course of business would reasonably be expected to employ the Employee in his present physical condition. See e.g. Faubion v. Swift Adhesives Co., 869 S.W.2d 839 (Mo App. 1994); Hines v. Conston of Missouri #852, 857 S.W.2d 546 (Mo App 1993); Lawrence v. R-VIII School District, 834 S.W.2d 789 (Mo app 1992); Carron v. St. Genevieve School District, 800 S.W.2d 64 (Mo App. 1991); Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195 (Mo App. 1990). The critical question is whether Employer could reasonably be expected to hire the Claimant, considering her present physical condition, and reasonably expect her to successfully perform the work. Forshee v. Landmark Excavating and Equipment, et al, No.85582 (Mo app. E.D. 2005); Sutton v. Vee Jay Cement Contracting Company, 37 S.W.3rd 803, 811 (Mo App. 2000). Total disability means the inability to return to any reasonable or normal employment. It does not require that the employee be completely inactive or inert. Isaac v. Atlas Plastic Corporation, 793 S.W.2d 165 (Mo app. 1990); Kowalski v. M.G. Metals and Sales, Inc., 631 S.W.2d 919 (Mo App. 1982). The following factors are to be considered in determining whether an individual is permanently and totally disabled: the Claimant's physical condition, including his limitations and capabilities, his age, education and occupational background and skills. See generally Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo App. 1990); Issac, 793 S.W.2d 165 (MO App. 1990); Reve v. Kindell's Mercantile Company, Inc., 793 S.W.2d 917 (Mo App. 1990).

The last factor in determining whether a person is permanently and totally disabled under the Missouri Workers' Compensation Law is the Claimant's physical condition. The initial

relevant issue is the Claimant's disability caused by the injury in the work-related accident. The credible testimony of a claimant concerning work-related functioning can constitute competent and substantial evidence. See Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223-224 (Mo. Banc 2003).

Three medical and vocational experts testified in this case. The two that rendered opinions regarding Mr. Wickam's ability to work in the open labor market, Dr. Koprivica and Mary Titterington, both relied on the diagnoses, symptoms, and limitations of Claimant's bilateral knee, right shoulder and sleep apnea problems. These conditions were discussed by both experts in regard to the April 2003 injury date. Neither expert discussed these conditions as they affected the Employee prior to his November 6, 2000 injury. There is no evidence of how Employee's knees, shoulder or his sleep apnea may have affected his ability to work prior to his November 6, 2000 injury. The only evidence the Court finds regarding his sleep apnea is the April 1999 diagnosis of such. However there is very little information in those records other than that he was fatigued to aid this court in determining the effect of the sleep apnea on Employee prior to the 2000 injury. Also the first medical record to be found in the evidence regarding his knees is the one from Dr. Thomas in July 21, 2003. In fact the FCE dated June 5, 2001, shows that Employee was capable of kneeling, standing, sitting, stooping, squatting, and crawling on a frequent basis. All these activities affect his knees. It appears to indicate that his knees were not affecting him to such a degree that they would be a hindrance or obstacle to his employment even after his 2000 injury. As stated before he did testify to using a milk crate to aid himself with climbing into his machine but again there is no timeframe within which to determine if it was before or after his 2000 injury. As a result, I find that Dr. Koprivica and Mary Titterington's opinions are not relevant to the injury date of November 6, 2000 in that they do not discuss Employee's disabilities prior to the 2000 injury date. Further it is evident that Claimant continued to work after his November 6, 2000 injury in the same type of employment, albeit with different employers. This work included operating earth moving equipment for List and Clark as well as operating a water truck for I Decker. Both jobs were considered medium and semi-skilled work. Claimant was able to obtain these jobs in the open labor market and there was no evidence of extreme accommodation. Both of these jobs were performed between September 2002 and April 2003, well after his November 6, 2000 injury date. The Employee has failed to carry his burden of proof that he was permanently totally disabled when considering his 2000 occupational disease injury and his pre-existing disabilities considered as of November 6, 2000.

As I find that Mr. Wickam is not permanently and totally disabled, regarding his November 6, 2000 injury, the next issue to evaluate is the liability of the Second Injury Fund for permanent partial disability benefits.

In order for the Fund to be liable for permanent disability benefits, the worker must have "a preexisting permanent partial disability whether from compensable injury or otherwise . . ." §287.220.1, RSMo. As stated earlier the effect of Claimant's knee problems and his sleep apnea are not considered pre-existing for purposes of the 2000 injury date. The knees were not diagnosed until after that injury date and there was no clear evidence that they affected him prior to the 2000 injury date. The sleep apnea was diagnosed in mid 1999 but again the claimant failed

to provide evidence that it affected him prior to the 2000 date such that it would be considered a hindrance or obstacle to his employment.

Claimants 1999 shoulder injury occurred prior to his 2000 injury date. However he continued to treat for that injury after the 2000 injury and there was no final determination of any disability to his shoulder until well after the 2000 injury date. Where a claimant's injury has not reached MMI, permanent partial disability cannot be determined for that injury and it cannot be considered for Fund liability. Hoven v. Treasurer, 414 S.W.3d 676, 678, 681 (Mo. App. E.D. 2013). Where doctors had indicated that a worker might benefit from or might need further treatment, including possibly surgery, the injury was not considered to be at MMI and thus not permanent for Fund liability consideration. Hoven, 414 S.W.3d at 679. An issue in Hoven was whether the claimant's 2004 injury could be considered for Fund liability for his primary injury in 2007. *Id.* at 681. The claimant's testimony, as well as evidence from treating doctors, indicated he remained in need of further treatment at the time of the primary injury. *See id.* at 679. It did not matter that one doctor had issued a letter indicating the claimant was at MMI for his prior 2004 injury because subsequent to the issuance of that MMI opinion and the primary injury, the claimant had surgery for the prior injury. *Id.* at 679-80. The fact that the prior disability settled with the employer prior to his primary 2007 injury also did not change the conclusion that the claimant's prior injury was not at MMI for Fund liability determination. *Id.* at 680-81. The conclusive presumption of §287.190.6(1) does not apply to the Fund, nor is the Fund bound by or collaterally estopped by a settlement to which it is not a party. *Id.*

Where an employee suffered a neck injury in 2006, elected not to undergo surgery at that time, suffered a later work injury in 2007, and then elected to have the neck surgery in 2008, the 2006 neck injury could not be considered a permanent partial disability for Fund liability for the 2007 work injury because it did not reach MMI until after his primary 2007 injury. Miller v. Treasurer, 2014 WL 1225214 at *1-2 (Mo. App. E.D. March 25, 2014).

At the time of the onset of the 2000 primary occupational disease claim, Claimant was still receiving treatment for his prior right shoulder injury, and in fact would not undergo surgery to repair the injury until exactly one month later. As a result, it is not possible to evaluate the permanent partial disability that existed in the right shoulder as of November 6, 2000, and it cannot be considered for Fund liability.

With the elimination of the pre-existing right shoulder, there are two other alleged pre-existing disabilities to evaluate. In regards to the finger amputations, no physician provided testimony that this injury was a hindrance or obstacle to employment or even provided a rating of disability. Further there has been no testimony from Employee regarding how his injury affected his ability to work or on his daily functioning as a result. In fact the Employee stated that over the 50 years with his fingers in the condition they were in he basically became used to them and was able to work fine with them. Therefore I cannot factor it into an analysis of the Fund's liability.

The sole remaining pre-existing disability is the psychological disability outlined by Dr. Schmidt. Dr. Schmidt opined a pre-existing psychological disability of 20% body as a whole. It

is not clear which injury date Dr. Schmidt is referring to in his report but in his deposition he referred to the 2003 injury date, which again this court finds is not the date to be considered herein. Further I find this rating to be high in light of the very minimal impact Employee's conditions had on his work and personal life as outlined in Dr. Schmidt's report. I find his pre-existing psychological disability to be 10% of the body as a whole. As this does not meet the statutory threshold that triggers Fund liability, the Second Injury Fund is not liable for any permanent partial disability benefits.

Therefore, the Second Injury fund is not liable for any benefits in this matter.

Made by: _____
Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation