

FINAL AWARD ALLOWING COMPENSATION

(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 02-122940

Employee: Richard Wooley, deceased
Claimant: Pamela Michele Wooley, widow
Employer: Belo Corporation (Settled)
Insurer: Lumbermen's Mutual Casualty 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, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Discussion

Strict construction is not retroactive

The parties correctly note that the administrative law judge applied the 2005 amendments to the Missouri Workers' Compensation Law to this claim involving a work injury sustained in 2002. Specifically, the administrative law judge relied upon the rule of strict construction contained in the post-2005 version of § 287.800 RSMo in reading the provisions of § 287.220.1 RSMo to authorize his method of calculating Second Injury Fund liability for permanent partial disability benefits. We must disclaim the administrative law judge's application of the 2005 amendments, because the Missouri courts have made clear that the amendment requiring strict construction of Chapter 287 is not retroactive. See, e.g., *Eason v. Treasurer of State*, 371 S.W.3d 886, 889 (Mo. App. 2012)(holding that "because strict construction of the workers' compensation statutes could change, redefine, or regulate rights in a manner differently than with a liberal construction, we cannot retrospectively apply strict construction to the workers' compensation statutes").

We acknowledge the administrative law judge's effort to give effect to the plain language of the statute in starting with a "body as a whole" rating for the employee and deducting weeks of disability attributable to preexisting conditions and the primary injury. With that said, we will continue the well-established practice among workers' compensation practitioners, attorneys, administrative law judges, and the Commission of using a "loading factor" to account for the synergistic effect between preexisting and primary disabilities. The use of a loading factor removes the guesswork of attempting to start with a global "body as a whole" rating that includes preexisting and primary disabilities as well as the synergy between them. It also avoids the absurdity that results where the simple sum of an employee's preexisting and primary disabilities exceeds 400 weeks, or where, as here, an employee has several claims for permanent partial disability benefits pending against the Second Injury Fund. As seen in the administrative law judge's award in this case, the administrative law judge was required to disregard his own earlier findings regarding employee's preexisting and primary disabilities in order to avoid the absurd result of employee "running out of weeks" based

Employee: Richard Wooley, deceased

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upon the apparent and (we believe) erroneous assumption that 400 weeks of disability necessarily means a totally disabled employee. In our view, the use of a loading factor avoids these difficulties and provides an efficient and transparent method of carrying out the statutory calculation, and we believe it is authorized both under the law as it existed before 2005 as well as under a strict construction of § 287.220.1.

We calculate Second Injury Fund liability as follows. We find that, as a result of the primary injury, employee suffered 15% permanent partial disability of the right shoulder (34.8 weeks), as well as 12.5% permanent partial disability of the body as a whole referable to the low back (50 weeks). We find that, at the time he sustained the primary injury, employee suffered from the following preexisting permanent partially disabling conditions: 30% of the left knee (48 weeks), 15% of the right knee (24 weeks), 15% of the body as a whole referable to the low back (60 weeks), 10% of the body as a whole referable to obesity (40 weeks), 20% of each wrist (70 weeks), and 24.2 weeks referable to permanent partial disability enhancement as reflected in our award in Injury No. 02-136578. The sum of employee's preexisting and primary disabilities is 351 weeks. Applying a 10% loading factor to account for the synergistic interaction between employee's preexisting and primary disabilities, we conclude that the Second Injury Fund is liable for 35.1 weeks of enhanced permanent partial disability.

Conclusion

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

The Second Injury Fund is liable for \$11,938.21 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 3, 2013, is attached and incorporated by this reference to the extent not inconsistent with our award and decision herein.

The Commission approves and affirms the administrative law judge's allowance of an 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 18th day of April 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee:	Richard Wooley (deceased)	Injury No.: 02-122940
Dependent:	Pamela Michelle Wooley (spouse)	Before the
Employer:	Belo Corp./KMOV (settled)	Division of Workers'
Additional Party:	The Treasurer of State of Missouri as Custodian for Second Injury Fund	Compensation Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Lumberman's Mutual Casualty Co. (settled)	
Hearing Date:	February 4, 2013	Checked by:

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: November 7, 2002
5. State location where accident occurred or occupational disease was contracted:
City of St. Louis, 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: Bilateral carpal tunnel syndrome
12. Did accident or occupational disease cause death? No Date of death? 5/20/07
13. Part(s) of body injured by accident or occupational disease: Right shoulder, right elbow and low back
14. Nature and extent of any permanent disability: Permanent partial disability against Employer settled for 15% of the right shoulder and 12.5% of the body as a whole (low back)

- 15. Compensation paid to-date for temporary disability: N/A
- 16. Value necessary medical aid paid to date by employer/insurer? \$2,836.01
- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1,050.00
- 19. Weekly compensation rate: \$340.12
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable: Settled against Employer
- 22. Second Injury Fund liability:
 - 70.96 weeks @ \$340.12/week
 - TOTAL: \$24,134.92
- 23. Future requirements awarded: N/A

Said payments to begin immediately and be subject to modification and review as provided by law.

The compensation awarded to the Employee/Spouse shall be subject to an attorney's lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Employee/Spouse: Charles W. Bobinette

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Richard Wooley (deceased) Injury No.: 02-122940
Dependent: Pamela Michelle Wooley (spouse) Before the
Employer: Belo Corp./KMOV (settled) Division of Workers'
Additional Party: The Treasurer of State of Missouri Compensation
as Custodian for Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Lumberman's Mutual Casualty Co. (settled)
Hearing Date: February 4, 2013 Checked by:

FINAL AWARD

PRELIMINARIES

The parties appeared before the undersigned Administrative Law Judge for a hearing to determine the liability of the Second Injury Fund ("Fund") in the above-referenced workers' compensation claim. The primary injury was settled with the Employer, Belo Corp./KMOV, and its insurer, Lumberman's Mutual Casualty Co. (collectively, "Employer"). Pamela Michelle Wooley ("Spouse") appeared in the stead of her deceased husband, Richard Wooley ("Claimant"). Attorney Charles W. Bobinette represented Claimant/Spouse. Assistant Attorney General, Kevin Nelson, represented the Treasurer of the State of Missouri as Custodian for the Fund. The claim was heard with companion Injury Nos. 02-136578 (D/I: 8/12/02) and 03-072601 (D/I: 7/10/03).

SUGGESTION OF CLAIMANT'S DEATH AND MOTION TO SUBSTITUTE SPOUSE AS PARTY

On September 18, 2007, Spouse filed her suggestion of Claimant's death and motion to substitute her as a party. Spouse's motion was granted without objection.

STIPULATIONS

The parties stipulated:

1. Claimant sustained an accidental injury arising out of and in the course of his employment on or about 11/7/02.
2. The average weekly wage is \$1,050.00. Applicable rates for compensation are \$659.32 for temporary total disability ("TTD") and \$340.12 for permanent partial disability ("PPD").
3. Employer paid \$2,836.01 in medical expenses and \$0.00 in TTD benefits.

ISSUES

1. The liability of the Fund (all statutory elements); and
2. Spouse's entitlement to Claimant's accrued and unpaid PPD benefits under §287.230.1 RSMo. (2000) and PTD benefits under §287.230.2 RSMo. (2000) and ***Schoemehl v. Treasurer of State***, 217 S.W.3d 900 (Mo.banc. 2007).

EXHIBITS

1. Claimant/Spouse's Exhibits A-A - A-S were admitted into evidence without objection.
2. The Fund's combined Exhibit 1 was admitted into evidence without objection.

FINDINGS OF FACT

1. Claimant was born on April 7, 1952. He died on May 20, 2007 from causes unrelated to his diagnosed work-related occupational disease [Injury No. 02-136578 (D/I: 8/12/02)] and two accidental injuries: Injury No. 02-122940 (D/I: 11/7/02) and Injury No. 03-072601 (D/I: 7/10/03) [Ex. A-Q-2 (Certificate of Death)].
2. Claimant and Spouse were lawfully married on January 9, 1975 [Ex. A-Q-1 (Marriage Certificate)]. Since then, they resided together as husband and wife and Spouse remained dependant on Claimant until his death.
3. Three children were born of the marriage: Cody Megan Wooley (D/O/B: 7/17/78), Sara Michelle Wooley (D/O/B: 7/29/81) and Zachary Michael Wooley (D/O/B: 11/8/82). Claimant sired no other children. At the time of Claimant's death, the children were emancipated.
4. Between 1975 and 1980, Claimant was self-employed, rehabbing and repairing houses. Claimant also drove a truck for a contractor who did work for Granite City Steel. The work was unstable and Claimant quit after Employer offered him a full-time staff position in December 1982.
5. In 1982, Claimant graduated with a B.S. degree in Mass Communications from Southern Illinois University of Edwardsville.
6. Claimant worked for Employer from September 1981 to July 2003 as a writer/producer – reading, writing and editing news copy and editing videotapes [Ex. A-R].
7. On November 7, 2002, Claimant stepped into the stairwell at work and tripped on a bolt sticking out of the floor causing him to fall three feet, striking his head, right shoulder, right elbow and wrenching his low back [Ex. A-R; Tr. 19:15-20:12].
8. Employer referred Claimant to Barnes Care. X-rays of the right shoulder and elbow were negative for fractures. Claimant's lumbar range of motion was limited to 40 degrees flexion, 10 degrees of extension, 10 degrees of right and left side bending and 20 degrees with pain on right and left rotation. He was diagnosed with a strain of the low back, right elbow and right shoulder. He was given work restrictions of no pushing or pulling with his shoulder, no overhead use of the shoulder and to limit his lifting to 10 pounds and limit climbing ladders and use of stairs to limit repetitive bending, twisting of the back and to limit repetitive bending and twisting of the elbow. He was prescribed medications and physical therapy [Ex. A-E].
9. Claimant took physical therapy between November 26, 2002 and December 13, 2002. Claimant reported that he had back pain for a number of years and since his November 2002 fall, he had increased referred pain symptoms. Active range of motion of his right shoulder was limited with end-range pain. Bilateral hand strength was limited by approximately 20% [Ex. A-G].
10. On December 23, 2002, Claimant was seen by Dr. Merkin for persistent pain in his back and

reported that therapy had not helped him. Dr. Merkin noted that Claimant's range of motion on the lumbar spine was slightly limited and that straight leg raises elicited some buttocks pain at 90 degrees. Because of Claimant's size (over 500 pounds), Dr. Merkin did not believe that diagnostic studies were possible [Ex. A-F].

11. Following the November 7, 2002 work injury, he had continuous pain in his low back and right leg. Claimant had back pain and sciatica in the morning. He got in the hot tub so he could make it to work. His back problems never improved [Tr. 37:24-38:14].
12. If Claimant turned the wrong way in bed, his shoulder pain would awaken him. His shoulder motion was diminished. He could not do overhead activities and needed help putting on a shirt or coat. Forceful maneuvers, such as starting a lawnmower, were painful. After about six months, his elbow pain substantially improved but shoulder problems remained the same.
13. Claimant followed up with his private physician in 2003 for persistent problems with his right shoulder and low back.
14. Claimant was examined by Dr. David Volarich on October 1, 2004. Dr. Volarich testified by deposition on October 30, 2009. His reports dated October 1, 2004 and August 20, 2009 and his deposition were admitted into evidence without objection [Ex. A-S]. Prior to November 7, 2002, Claimant had no problems with his right shoulder or right elbow except swelling from an episode of gout. As a result of the November 7, 2002 accident, he is unable to perform overhead activities or forceful push/pull maneuvers. His range of motion in his right shoulder was limited and he could not throw or bowl. Physical examination of the right shoulder showed that there was a 30% loss in motion as evaluated by the Apley Scratch Test. Impingement test was strongly positive. His weakness was consistent with at least a partial rotator cuff tear. There was 2+ crepitus in his shoulder with range of motion and boney hypertrophy at the AC joint. There was a 1-2+ atrophy of the deltoid and rotator cuff. Also, a loss of range of motion in the right shoulder compared to the left on flexion and extension. In the right elbow, there was pain to palpation of the radial tunnel and the radial head. 1+ crepitus was noted in the elbow with flexion and extension. There was a 10% loss of motion supination at the right and left elbows. The left elbow was otherwise normal [Ex. A-S].
15. Prior to November 2002, Claimant had a stiffness and aching in his low back and could only walk short distances (200-300 feet before he had to sit and rest). He complained of a pressure sensation in his back and he was careful when he lifted. Claimant told Dr. Volarich that he had to watch what he did and how he lifted. In 2004, Dr. Volarich found Claimant's lumbar motion was restricted in all planes. The worst low back pain occurred with side bending bilaterally. Palpation of the low back elicited pain in the sacroiliac. A low grade trigger point was found on the right sacroiliac joint. Straight leg raise was accomplished 70 degrees on the right and 80 degrees on the left, at which point Claimant stopped because of low back pain and right leg pain which radiated into the calf. According to Claimant, the back pain slowed him down leading up to his November 7, 2002 accident [Ex. A-S].
16. Dr. Volarich opined that the November 7, 2002 accident was the substantial contributing factor causing his lumbar strain and aggravation of his pre-existing lumbar syndrome, as well as the right shoulder impingement and partial rotator cuff tear, as well as his right elbow contusion and aggravation of degenerative arthritis.
17. As a direct result of the November 7, 2002 work accident, it was Dr. Volarich's opinion that the following industrial disabilities existed that were a hindrance to his employment or re-

employment:

- (a) There is a 12.5% permanent partial disability of the body as a whole rated at the lumbar spine due to the lumbar strain injury and aggravation of his pre-existing lumbar syndrome. The rating accounted for the injury's contribution to back and lost range of motion and slightly increased radiating pain in his left lower extremity.
 - (b) There is a 25% permanent partial disability of the right upper extremity rated at the shoulder due to the impingement and partial rotator cuff tear that was not surgically repaired. The rating took into account the pain, lost motion, weakness, crepitus and atrophy in Claimant's dominant arm.
 - (c) There is a 20% permanent partial disability of the right upper extremity rated at the elbow due to the contusion and aggravation of the degenerative arthritis that was not surgically repaired. The rating took into account the pain, lost motion and weakness in Claimant's dominant arm [Ex. A-S].
18. Claimant was examined by Dr. Russell Cantrell on February 26, 2007. Dr. Cantrell testified by deposition, and his reports dated February 26 and March 26, 2007, were admitted into evidence without objection [Ex. 1]. Dr. Cantrell did not examine Claimant's wrists, shoulder or right elbow [Tr. 23:12-17]. Based upon his review of the treatment records, Dr. Cantrell concluded that Claimant had a zero percentage of PPD referable to the right elbow and 5% permanent partial disability of the right arm at the shoulder level, half of which was attributable to his work injury and half to his pre-existing degenerative changes. Dr. Cantrell did not provide a disability rating for Claimant's wrists [Tr. 21:3-23]. Dr. Cantrell reviewed the available treatment records and took a history of Claimant's back problems leading up to Claimant's November 2002 and July 2003 work injuries and subsequent falls in the summer of 2006 and November 2006. Dr. Cantrell did not have the December 2002 physical treatment records when he evaluated Claimant [Tr. 28:3-6]. After examining the lumbar spine, Dr. Cantrell assigned a 2% PPD of the body as a whole as a result of the November 2002 injury. As a result of Claimant's chronic history of back pain leading up to his November 2002 work injury, and subsequent non-work-related injuries in July 2006 and November 2006, Dr. Cantrell assigned a 7% PPD of the body as a whole [Tr. 20:9-21:2].
19. On June 30, 2011, Spouse settled Claimant's November 7, 2002 claim for 15% of the right shoulder and 12.5% of the body as a whole [Ex. A-H].
20. Leading up to and continuing beyond November 2002, Claimant continued to suffer from bilateral carpal tunnel syndrome, which interfered with writing and typing accuracy and speed. He had diminished grip strength and dropped things. Claimant also battled chronic obesity and suffered shortness of breath, painful episodes of gout, back pain and bilateral knee pain. These disabling conditions were a hindrance to his ability to work, slowing him down and causing him to be careful when lifting and interfering with his ability to kneel and stand for prolonged periods of time and walk distances greater than 150 feet. In or about the late 1990s or early 2000s, he was prescribed a handicap parking space. Employer accommodated Claimant by giving him a closer parking space on or around November 2002 [Ex. A-R; Tr. 25:4-5].
21. In 1986, Claimant injured both knees when he jumped from a burning elevator. Claimant underwent arthroscopies due to medical meniscal tears in both knees. The left knee arthroscopy was performed in 1986 and the right in 1997. The left knee ACL was not fixed. Claimant was diagnosed with arthritis in both knees. Claimant avoided any type of impact

activities such as running and jumping and was careful when navigating uneven surfaces, such as suddenly stepping off a curb. When he attempted to walk down a ramp, his left knee would buckle [Ex. A-S].

22. Mr. Wooley was 6'6" and in high school, weighed 300 lbs. The medical records show that prior to August 2002, he weighed in excess of 450 pounds. Pulmonary function tests performed in 1997 showed mild obstructive ventilating defect. A CT scan of the chest performed on February 18, 1997 showed a 2 centimeter right upper lobe nodule with calcified and mediastinal nodule consistent with old granulomatosis disease [Ex. A-S].
23. In 1995, while lifting tapes at work, Claimant felt something rip in his low back. Claimant was treated for low back and left leg pain and missed about 5 weeks of work. After a period of recovery, he had to watch what and how he lifted. If he overdid it, he would pay for it the next day [Ex. A-R; Tr, 42:11-24]. Because of Claimant's obesity, his doctors recommended against a CT scan due to lack of adequate resolution. In 1998, Claimant was involved in a motor vehicle accident causing injuries to his neck and low back. The most severe pain was on the left side with radiation down the leg. He was diagnosed with sciatica and paracervical spasms. Claimant was prescribed physical therapy for his low back pain. He was started on Naprosyn and ordered to take bed rest. He was using crutches to decrease the stress over the left [Ex. A-J].
24. Dr. Volarich's 2004 exam revealed Claimant's range of motion of the wrists were limited on flexion and extension. Examination of the knees revealed that flexion was 105 degrees on the right and 95 degrees on the left, compared to normal at 140 degrees. Extension was -20 on the right and 25 on the left, compared to a normal extension of 0. In the right knee, there was 1+ swelling prepatellar bursa and 1+ crepitus of the patellofemoral articulation. On the left knee, there was 3+ swelling of the prepatellar bursa and 4+ crepitus at the patellofemoral articulation and in the medial compartment. Claimant's diagnosed pre-existing conditions were: (1) chronic lumbar syndrome with intermittent left leg paresthesias; (2) internal derangement of the right knee – S/P arthroscopy and medial meniscectomy; (3) internal derangement of the left knee in the form of medial meniscus tear and partial ALC tear – S/P partial medial Meniscectomy without repair of the ACL and morbid obesity (maximum weight approximately 400 lbs., at the time of examination, weighing 438 lbs.).
25. Dr. Volarich opined that Claimant had the following pre-existing and permanent industrial disabilities that were a hindrance to his employment or re-employment:
 - (1) 15% permanent partial disability of the body as a whole rated at the lumbar sacral spine due to his chronic lumbar syndrome causing intermittent left leg radicular symptoms prior to November 7, 2002.
 - (2) 20% permanent partial disability of the right lower extremity rated at the knee due to a torn medial meniscus that required arthroscopy, accounting for pain, lost motion, weakness and crepitus in the knee leading up to November 7, 2002.
 - (3) 35% permanent partial disability of the left lower extremity rated at the knee due to the torn medial meniscus and partial tear of the ACL. The rating accounted for arthroscopic repair of the medial meniscus and unoperated ACL attributing to lost motion, pain, swelling, crepitus, atrophy and difficulties with deceleration maneuvers leading up to November 7, 2002.
 - (4) 15% permanent partial disability of the body as a whole due to his chronic morbid obesity contributing to back and lower extremity pain as well as limiting his

endurance and mobility prior to November 7, 2002. Dr. Volarich also opined that Claimant's pre-existing conditions and disabilities that were the result of the November 7, 2002 accident combined synergistically [Ex. A-S].

RULINGS OF LAW

To recover against the Fund based upon permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability pre-existing the present injury 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 1994; **Leutzinger v. Treasurer**, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).
2. The extent of the permanent partial disability existing before the compensable injury. **Kizior v. Trans World Airlines**, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
3. The extent of permanent partial disability resulting from the compensable injury. **Id.**
4. The extent of the overall permanent disability resulting from a combination of the permanent partial disabilities. **Id.**
5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. **Search v. McDonnell Douglas Aircraft**, 895 S.W.2d 173, 177 (Mo.App. E.D. 1995).
6. In cases arising after August 27, 1993, the extent of both the pre-existing permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1 RSMo. 1994; **Leutzinger, supra**.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or re-employment if the employee became unemployed. **Wuebbeling v. West County Drywall**, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1 RSMo. 1994 contains four distinct steps in calculating the compensation due an employee, and from what source:

1. The employer's liability is considered in isolation - "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 pre-existing disability;”

2. Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered;
3. The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and
4. The balance becomes the responsibility of the Second Injury Fund. **Nance v. Treasurer of Missouri**, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. **Sanders v. St. Clair Corp.**, 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is “permanent” if “shown to be of indefinite duration in recovery or substantial improvement is not expected.” **Tiller v. 166 Auto Auction**, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

The credible evidence establishes that the November 2002 work injury combined with the pre-existing permanent partial disabilities causing greater overall disability than the independent sum of the disabilities. I find that Dr. Volarich’s examination was more comprehensive and testimony more persuasive than that of Dr. Cantrell with respect to the degree of Claimant’s disability referable to his right shoulder and low back as a result of the November 2002 work injury and his pre-existing diagnosed conditions. Claimant, by deposition, and his Spouse credibly testified that Claimant had significant ongoing complaints associated with his November 2002 work-related injury and pre-existing diagnosed conditions and disabilities. Claimant changed how he performed many of his activities, both at home and work, due to a combination of his problems effecting his endurance and pace slowing him down, including with typing and writing, dressing himself, performing household chores, standing for prolonged periods and walking distances greater than a block.

Based on the entire record, Claimant sustained a compensable work injury resulting in a 15% PPD of the right shoulder and 12.5% of the low back and 22.25% PPD of the right and left wrists (77.875 weeks). At the time of his work injury, Claimant had a 15% PPD of the body as a whole referable to the lumbar spine (60 weeks); 20% PPD of the right knee (32 weeks); 35% PPD of the left knee (40 weeks); 15% PPD of the body as a whole due to his chronic morbid obesity contributing to back and lower extremity pain as well as limiting endurance and mobility. The PPD from the November 2002 injury combined with the pre-existing PPD to create an overall industrially disabling disability that exceeds the simple sum of the PPD by 20%. Therefore, the Fund bears liability for 70.96 weeks.

SURVIVOR BENEFITS

When an employee has sustained an injury and subsequently dies for reasons unrelated to the injury, any compensation accrued but unpaid at the time of the employee's death is to be paid to his dependants without administration. §287.230.1 (2000). **Henderson v. Nat’l Bearing Div. of Am. Brake Shoe Co.**, 267 S.W.2d 349 (Mo.App. E.D. 1954); **Cantrell v. Baldwin Transport, Inc.**, 296 S.W.3d 17, 20 (Mo.App. S.D. 2009).

The term “accrued” has been interpreted to mean, “to come into existence as a legally enforceable claim.” **Cantrell, Id.**, 296 S.W.3d at 20. PPD benefits are provided for in §287.190 RSMo. (2000). A PPD is permanent in nature and partial in degree. The level of PPD cannot be ascertained until the injury reaches the point it will no longer improve with medical treatment and the employee

reaches MMI. *Id.*

Claimant reached MMI as a result of his November 2002 work injury in or about December 2003. Accordingly, PPD benefits had accrued and were unpaid at the time of Claimant's death in 2007.

At the time of Claimant's November 2002 work injury, and leading up to his death, Claimant was married and legally liable for his Spouse's support. Accordingly, Spouse is entitled to recover Claimant's accrued and unpaid benefits from the Fund. ***Boone v. Daniel Hamm Drayage Co.***, 449 S.W.2d 169 (Mo. 1970) (reversed on other grounds by ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d 220 (Mo. 2003).

CONCLUSION

The Fund is liable to Spouse in the amount calculated as follows:

Primary Injury: 15% of the right shoulder = 34.8 weeks x 20% =	6.96 weeks
12.5% of the low back (body as a whole) = 50 weeks x 20% =	10 weeks
 Prior Injuries & Disabilities: 22.25% of the left wrist = 38.9375 weeks x 20% =	 7.8 weeks
22.25% of the right wrist = 38.9375 weeks x 20% =	7.8 weeks
15% of the low back (body as a whole) = 60 weeks x 20% =	12.0 weeks
20% of the right knee = 32 weeks x 20% =	6.4 weeks
35% of the left knee = 40 weeks x 20% =	8.0 weeks
15% of the body as a whole (obesity) = 60 weeks x 20% =	<u>12.0 weeks</u>
TOTAL:	70.96 weeks
@ \$340.12/week =	\$24,134.92

Attorney for Claimant/Spouse shall be entitled to attorney's fees of 25% of this award.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

John Hickey
Director
Division of Workers' Compensation

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

Injury No.: 02-136578

Employee: Richard Wooley, deceased
Claimant: Pamela Michele Wooley, widow
Employer: Belo Corporation (Settled)
Insurer: Lumbermen's Mutual Casualty 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, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Discussion

The parties correctly note that the administrative law judge applied the 2005 amendments to the Missouri Workers' Compensation Law to this claim involving a work injury sustained in 2002. Specifically, the administrative law judge relied upon the rule of strict construction contained in the post-2005 version of § 287.800 RSMo in reading the provisions of § 287.220.1 RSMo to authorize his method of calculating Second Injury Fund liability for permanent partial disability benefits. We must disclaim the administrative law judge's application of the 2005 amendments, because the Missouri courts have made clear that the amendment requiring strict construction of Chapter 287 is not retroactive. See, e.g., *Eason v. Treasurer of State*, 371 S.W.3d 886, 889 (Mo. App. 2012)(holding that "because strict construction of the workers' compensation statutes could change, redefine, or regulate rights in a manner differently than with a liberal construction, we cannot retrospectively apply strict construction to the workers' compensation statutes").

We acknowledge the administrative law judge's effort to give effect to the plain language of the statute in starting with a "body as a whole" rating for the employee and deducting weeks of disability attributable to preexisting conditions and the primary injury. With that said, we will continue the well-established practice among workers' compensation practitioners, attorneys, administrative law judges, and the Commission of using a "loading factor" to account for the synergistic effect between preexisting and primary disabilities. The use of a loading factor removes the guesswork of attempting to start with a global "body as a whole" rating that includes preexisting and primary disabilities as well as the synergy between them. It also avoids the absurdity that results where the simple sum of an employee's preexisting and primary disabilities exceeds 400 weeks, or where, as here, an employee has several claims for permanent partial disability benefits pending against the Second Injury Fund. As seen in the administrative law judge's award in the related claim designated as Injury No. 02-122940, the administrative law judge was required to disregard his own earlier findings regarding employee's preexisting and primary disabilities in order to avoid the absurd result of employee "running out of weeks" based upon the apparent and (we believe) erroneous assumption that 400 weeks of

Employee: Richard Wooley, deceased

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disability necessarily means a totally disabled employee. In our view, the use of a loading factor avoids these difficulties and provides an efficient and transparent method of carrying out the statutory calculation, and we believe it is authorized both under the law as it existed before 2005 as well as under a strict construction of § 287.220.1.

We calculate Second Injury Fund liability as follows. We find that, as a result of the primary injury, employee suffered 20% permanent partial disability of each upper extremity at the wrist (70 weeks).¹ We find that, at the time he sustained the primary injury, employee suffered from the following preexisting permanent partially disabling conditions: 30% of the left knee (48 weeks), 15% of the right knee (24 weeks), 15% of the body as a whole referable to the low back (60 weeks), and 10% of the body as a whole referable to obesity (40 weeks). The sum of employee's preexisting and primary disabilities is 242 weeks. Applying a 10% loading factor to account for the synergistic interaction between employee's preexisting and primary disabilities, we conclude that the Second Injury Fund is liable for 24.2 weeks of enhanced permanent partial disability.

Conclusion

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

The Second Injury Fund is liable for \$8,230.90 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 3, 2013, is attached and incorporated by this reference to the extent not inconsistent with our award and decision herein.

The Commission approves and affirms the administrative law judge's allowance of an 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 18th day of April 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

¹ We must disclaim the administrative law judge's finding that employee's "overall permanent partial disability" relative to bilateral carpal tunnel syndrome is in part owing to "non-work related hand trauma." See *Award*, page 7. In leaving this additional permanent partial disability out of his calculation of Second Injury Fund liability, the administrative law judge appears to have (and logically must have) believed that employee suffered post-accident worsening of his bilateral carpal tunnel syndrome to the extent of 10% permanent partial disability of each wrist. We are aware of no evidence on the record supporting such a proposition.

AWARD

Employee:	Richard Wooley (deceased)	Injury No.:	02-136578
Dependents:	N/A		Before the
Employer:	Belo Corporation (settled)		Division of Workers'
			Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial
			Relations of Missouri
Insurer:	Lumbermen's Mutual Casualty Co. (settled)		Jefferson City, Missouri
Hearing Date:	February 4, 2013	Checked by:	JED

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 12, 2002 (stipulated)
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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:
Employee sustained repetitive trauma injury to both hands while typing as a writer.
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: both hands
14. Nature and extent of any permanent disability: 15% PPD of each hand; 35.5 weeks PPD from SIF.
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$340.12 PPD
- 19. Method wages computation: Stipulation.

COMPENSATION PAYABLE

20. Amount of compensation payable:		
52.5 weeks PPD from Employer		(settled)
21. Second Injury Fund liability: Yes		
35.5 weeks PPD from the SIF		\$12,074.26
	TOTAL:	\$12,074.26
22. Future requirements awarded: None		

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the Employee 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 Employee:

Charles W. Bobinette

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Richard Wooley (deceased)	Injury No.: 02-136578
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Belo Corporation (settled)	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Lumbermen's Mutual Casualty Co. (settled)	
Hearing Date:	February 4, 2012	Checked by: JED

This case involves a bilateral repetitive trauma injury to the hands injury resulting to Employee with the reported onset date of August 12, 2002 with an allegation of synergistic disability against the Second Injury Fund ("SIF"). Employer and its insurer previously settled their risk of liability. Both parties are represented by counsel. The single issue for trial is the liability of the SIF. The claim was heard in a single trial with two companion cases and with separate Awards issuing on each of the three cases.

Employee's widow, Pamela M. Wooley, filed her Suggestion of Death on behalf of her husband and her Motion to Substitute herself as Claimant. Her motion was granted without objection.

Issues for Trial

1. Liability of the SIF(all statutory elements); and
2. Claimant's entitlement to Employee's benefits.

FINDINGS OF FACT

1. Employee was born on April 7, 1952. He died on May 20, 2007 from causes unrelated to his diagnosed work-related occupational disease [Injury No. 02-136578 (D/I: 8/12/02)] and two accidental injuries: Injury No. 02-122940 (D/I: 11/7/02) and Injury No. 03-072601 (D/I: 7/10/03) [Ex. A-Q-2 (Certificate of Death)].
2. Employee and Spouse were lawfully married on January 9, 1975 [Ex. A-Q-1 (Marriage Certificate)]. Since then, they resided together as husband and wife and Spouse remained dependant on Employee until his death.
3. Three children were born of the marriage: Cody Megan Wooley (D/O/B: 7/17/78), Sara Michelle Wooley (D/O/B: 7/29/81) and Zachary Michael Wooley (D/O/B: 11/8/82). Employee had no other children. At the time of Employee's death, the children were emancipated.

4. Between 1975 and 1980, Employee was self-employed, rehabbing and repairing houses. Employee also drove a truck for a contractor who did work for Granite City Steel. The work was unstable and Employee quit after Employer offered him a full-time staff position in December 1982.
5. In 1982, Employee graduated with a B.S. degree in Mass Communications from Southern Illinois University of Edwardsville.
6. Employee worked for Employer from September 1981 to July 2003 as a writer/producer – reading, writing and editing news copy and editing videotapes 8 hours a day. The first 8 years of his work, he typed on a manual typewriter 7 hours per day “pounding the keys” and then switched to computers and started keyboarding [Ex. A-R].
7. Employee began to develop pain, tingling and numbness in his upper extremities in January 2002. He could no longer touch-type, which slowed him down. He had trouble with typographical errors and getting his work done in a timely manner. He physically had to look at the mouse to click and to figure out which side to click on because he no longer had feeling in his hands and most of his fingers [Ex. A-R (Deposition of Employee), Tr. 18:12-19, Tr. 23:11-24:2].
8. Employer initially referred Employee to Barnes Care for treatment of his hand complaints. He was first diagnosed with possible carpal tunnel syndrome of the right and left wrists. Electrical studies were consistent with severe left median neuropathy at the right and left wrists [Ex. A-B].
9. In November 2002, Employee came under the care of Dr. David M. Brown, a hand specialist. Dr. Brown diagnosed him with severe bilateral carpal tunnel syndrome, which was caused by his work. Dr. Brown performed carpal tunnel release surgery to the right wrist on January 7, 2003 and the left wrist on January 21, 2003, followed by physical therapy. After surgery, Employee continued to suffer from ongoing symptoms and still could not touch type. Employer accommodated Employee by providing him an ergonomically correct keyboard but it did not help and slowed things even more [Ex. A-R; Tr. 25:8-20]. He also had problems writing with a pen or pencil [Id., Tr. 67:16-70:20]. A nerve conduction study and EMG performed in October 2003 showed chronic median and ulnar nerve neuropathy with no acute deviation and slowing of the median conduction across the carpal tunnel was residual. Dr. Brown suggested that additional treatment would not help [Ex. A-C].
10. Employee was examined by Dr. David Volarich on October 1, 2004. Dr. Volarich testified by deposition on October 30, 2009. His reports dated October 1, 2004 and August 20, 2009 and deposition were admitted into evidence without objection [Ex. A-S]. Regarding his hands, Employee reported difficulty opening jars and soda bottles. He frequently dropped items. His range of motion in his wrists was poor. Because of a lack of feeling in his hands, he frequently burned himself while cooking. He had difficulty with buttons, zippers and tying his shoes. He was no longer able to participate in

woodworking, coaching baseball or playing the piano. Employee complained of ongoing difficulties with both his hands and wrists. His grip strength and dexterity were diminished. Adduction and opposition of both thumbs was limited by 10% and 1+ thenatropy was noted bilaterally. Dr. Volarich opined that the repetitive nature of Employee's work and job history leading up to August 12, 2002 was the substantial contributing factor of causing the development of his bilateral carpal tunnel syndrome that it required surgery performed by Dr. Brown. Dr. Volarich felt that there was a 50% permanent partial disability of the right and left upper extremities rated at the wrist due to carpal tunnel syndrom that required open carpal tunnel repair. The majority of this rating (40%) was attributable to his work activities with Employer and the remainder (10%) was attributable to his outside extra curricular activities, including playing the piano, woodworking, his obesity and gout [Ex. A-S].

11. On June 30, 2011, Spouse settled Employee's August 12, 2002 claim for bilateral carpal tunnel syndrome for approximately 21.25% of the right and left wrists [Ex. A-D].
12. Leading up to and continuing beyond August 2002, Employee battled chronic obesity, had shortness of breath, bilateral knee pain, painful episodes of gout and low back pain. These conditions slowed him down, caused him to be careful when lifting and interfered with his ability to kneel and bend, stand and walk for prolonged periods. In or about the late 1990s or early 2000s, he was prescribed a handicap parking pass. Employer accommodated Employee by giving him a closer parking spot in or around November 2002 [Ex. A-R; Tr. 25:4-5; 74:7-75:3].
13. In 1986, Employee injured both knees when he jumped from a burning elevator. Employee underwent arthroscopies due to medical meniscal tears in both knees. The left knee arthroscopy was performed in 1986 and the right in 1997. The left knee ACL was not fixed. Employee was diagnosed with arthritis in both knees [Ex. A-R; 76:7-13; 77:7-81:4]. Employee avoided any type of impact activities such as running and jumping and was careful when navigating uneven surfaces, such as suddenly stepping off a curb. When he attempted to walk down a ramp, his left knee would buckle [Ex. A-S].
14. Mr. Wooley was 6'6" and in high school, weighed 300 lbs. The medical records show that prior to August 2002, he weighed in excess of 450 pounds. Pulmonary function tests performed in 1997 showed mild obstructive ventilating defect. A CT scan of the chest performed on February 18, 1997 showed a 2 centimeter right upper lobe nodule with calcified and mediastinal nodule consistent with old granulomatosis disease [Ex. A-S; Tr. 496:15-22; Ex. A-S].
15. In 1995, while lifting tapes at work, Employee felt something rip in his low back. Employee was treated for low back and left leg pain and missed about 5 weeks of work. After a period of recovery, he had to watch what and how he lifted. If he overdid it, he would pay for it the next day [Ex. A-R; Tr. 42:11-24]. Because of Employee's obesity, his doctors recommended against a CT scan due to lack of adequate resolution. In 1998, Employee was involved in a motor vehicle accident causing injuries to his neck and low back. The most severe pain was on the left side with radiation down the leg. He was

diagnosed with sciatica and paracervical spasms. Employee was prescribed physical therapy for his low back pain. He was started on Naprosyn and ordered to take bed rest. He was using crutches to decrease the stress over the left leg [Ex. A-J].

16. In 2004, Dr. Volarich found Employee's lumbar motion was restricted in all planes. The worst low back pain occurred with side bending bilaterally. Palpation of the low back elicited pain in the sacroiliac. A low grade trigger point was found on the right sacroiliac joint. Straight leg raise was accomplished 70 degrees on the right and 80 degrees on the left, at which point Employee stopped because of low back pain and right leg pain which radiated into the calf. Range of motion of the wrist was limited on flexion and extension. Examination of the knees revealed that flexion was 105 degrees on the right and 95 degrees on the left, compared to normal at 140 degrees. Extension was -20 on the right and 25 on the left, compared to a normal extension of 0. In the right knee, there was 1+ swelling prepatellar bursa and 1+ crepitus of the patellofemoral articulation. On the left knee, there was 3+ swelling of the prepatellar bursa and 4+ crepitus at the patellofemoral articulation and in the medial compartment. Employee's diagnosed pre-existing conditions were: (1) chronic lumbar syndrome with intermittent left leg paresthesias; (2) internal derangement of the right knee – S/P arthroscopy and medial meniscectomy; (3) internal derangement of the left knee in the form of medial meniscus tear and partial ALC tear – S/P partial medial Meniscectomy without repair of the ACL and morbid obesity (maximum weight approximately 400 lbs., at the time of examination, weighing 438 lbs.) [Ex. A-S].
17. Dr. Volarich opined that Employee had the following pre-existing and permanent industrial disabilities that were a hindrance to his employment or re-employment:
 - (1) 15% permanent partial disability of the body as a whole rated at the lumbar sacral spine due to his chronic lumbar syndrome causing intermittent left leg radicular symptoms prior to August 12, 2002.
 - (2) 20% permanent partial disability of the right lower extremity rated at the knee due to a torn medial meniscus that required arthroscopy, accounting for pain, lost motion, weakness and crepitus in the knee leading up to August 12, 2002.
 - (3) 35% permanent partial disability of the left lower extremity rated at the knee due to the torn medial meniscus and partial tear of the ACL. The rating accounted for arthroscopic repair of the medial meniscus and unoperated ACL attributing to lost motion, pain, swelling, crepitus, atrophy and difficulties with deceleration maneuvers leading up to August 12, 2002.
 - (4) 15% permanent partial disability of the body as a whole due to his chronic morbid obesity contributing to back and lower extremity pain as well as limiting his endurance and mobility prior to August 12, 2002. Dr. Volarich also opined that Employee's pre-existing conditions and disabilities were the result of the August 12, 2002 accident combined synergistically [Ex. A-S].

18. Employee was examined by Dr. Russell Cantrell on February 26, 2007. Dr. Cantrell testified by deposition, and his reports dated February 26 and March 26, 2007, were admitted into evidence without objection [Ex. 1]. Dr. Cantrell did not examine or provide a disability rating for Employee's wrists. Dr. Cantrell took a history of Employee's back problems, which predated the August 2002 work injury. He did not, however, provide a specific PPD rating for his pre-existing intermittent back pain.

RULINGS OF LAW

Nature and Extent of Permanent Disabilities

Employee offered substantial proof that the August 2002 repetitive trauma injury combined with the pre-existing permanent partial disabilities causing substantially greater overall disability than the separate disabilities considered individually. Dr. Volarich's physical examination was more comprehensive and his opinions were more persuasive than either Dr. Cantrell or Dr. Brown. However, Dr. Volarich assigned generally high ratings that seem to exceed the facts of Employee's continued employment and the treatment record. Employee's primary injury of bilateral CTS required attribution between non-work related and work related permanent partial disability (PPD). Employee's *overall* PPD relative to the bilateral CTS is found to be 25 percent PPD of each hand. The *current* disability for the reported (primary) injury is determined to be 15 percent PPD of each wrist (52.5 weeks) which amount is reconcilable with Employee's average outcome from the CTS releases and his exposure to non-work related hand trauma.

Claimant credibly testified that Employee had significant ongoing complaints associated with his work-related injury and pre-existing diagnosed conditions and disabilities. Employee changed how he performed many of his activities, both at home and at work, due to a combination of his problems effecting his endurance and pace and causing problems typing, dressing himself, performing household chores, standing for prolonged periods and walking any significant distances.

Employee's prior low back condition equates to 15 percent PPD (60 weeks). Employee's prior right knee equates to 15 percent PPD (24 weeks). Employee's prior left knee (with ACL involvement) equates to 30 percent PPD (48 weeks). Employee's prior chronic obesity equates to 10 percent PPD (40 weeks).

Liability of the SIF

Dr. Volarich stated Employee's pre-existing disability combines with the disability caused by the primary injury to form an increased overall disability that is greater than the simple sum of the disabilities. This opinion was probative and un rebutted. Employee's bilateral CTS condition is significant and may be shown to have caused Employee to sustain some diminished productivity. Employee's continued full-time work, writing and typing, limits the amount of

PPD that may be found. Employee's CTS condition may be shown to combine synergistically with the pre-existing disabilities.

The statute requires a separate determination of current PPD and pre-existing PPD and, thereafter, a determination of the existence of synergistic combination must be made. Synergy is the concept in which the current PPD and the pre-existing PPD are found, in combination, to create a "substantially greater" disability, or an increased overall disability, and for which the employer should not be held liable. The significance of PPD assignments is predicated by the statutory minimum thresholds for injuries to the extremities and injuries to the body as a whole. If it is determined that the current PPD combines with the pre-existing PPD, there results an increased overall PPD from which the current PPD and the pre-existing PPD must be deducted. Section 287.220.1 RSMo (2000). Section 287.800 RSMo (2005) requires strict construction.¹

Here, Employee's primary injury and pre-existing orthopedic disabilities constitute common *upper body-lower body* synergy. The primary combines less directly with the chronic obesity condition and is characterized by the less common *locomotion-type* synergy which limits virtually all exertion. All of Employee's curtailments, that collectively comprise his many disabilities, equate to almost two-thirds of normal activity.

Employee was ambulatory and continued to work full-time performing the same duties upon his return to work. The medical evidence and other evidence suggest Employee's combined PPD results in an increased overall PPD which, expressed as body as a whole on the 400 weeks scheme, equates to 65 percent of a body, or 260 weeks. Thus, after the pre-existing PPD plus the current PPD are deducted from the combined disability, the synergistic effect results in an additional 35.5 weeks of PPD liability against the SIF.

Survivor Benefits

When an employee has sustained an injury and subsequently dies from reasons unrelated to the injury, any compensation accrued but unpaid at the time of the employee's death is to be paid to his dependants without administration. Section 287.230.1 RSMo (2000). While the subsection references "liability of the employer," without reference to the SIF, to withhold the same protection to surviving spouses and other dependents for unpaid benefits from the SIF seems to defeat the benefit of Section 287.220.1, calculation of which depends on the expressly protected accrued employer liability. Reading both sections together permits a posthumous award of PPD benefits from the SIF.

Employee reached MMI as a result of his August 2002 work injury in 2003. Accordingly, PPD benefits had accrued and were unpaid at the time of Employee's death in 2007. At the time of Employee's August 2002 work injury, and leading up to his death, Employee was married and lived with Claimant. Accordingly, Claimant is entitled to recover Employee's accrued and unpaid benefits from the SIF.

¹ Section 287.220.1 makes no provision for calculation of a "loading factor" (i.e. percentage multiplier) in lieu of a calculation of "substantially greater" disability with required deductions.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Employee is found to have sustained an additional 35.5 weeks PPD from the SIF as a result of the combination between the primary injury and the synergistic pre-existing PPD which Claimant is awarded.

Date: _____

Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge

A true copy. Attest:

Division of Workers' Compensation

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

Injury No.: 03-072601

Employee: Richard Wooley, deceased

Dependents: Pamela Michele Wooley, widow, Zachary Wooley and Sara Wooley, dependent children

Employer: Belo Corporation (Settled)

Insurer: Lumbermen's Mutual Casualty 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, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Discussion

Schoemehl, Spradling, and dependency under § 287.240 RSMo

First, we acknowledge the Second Injury Fund's arguments herein asking us to ignore the Missouri Supreme Court's holding in *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007), because that decision was "wrongly decided," and should be overturned. *Treasurer's Brief On Appeal*, page 16. We note also that, in arguing the administrative law judge erred in awarding *Schoemehl* benefits to employee's dependent widow for her lifetime, the Second Injury Fund ignores the holding in *Spradling v. Treasurer of State*, 415 S.W.3d 126 (Mo. App. 2013), which is dispositive.

We understand that the Second Injury Fund disagrees with the *Schoemehl* and *Spradling* decisions, but it appears to us that the Second Injury Fund has abandoned these points on appeal where the extent of its argument is to ask this Commission to ignore controlling precedent from the Missouri courts. Accordingly, we decline to further consider or discuss the Second Injury Fund's arguments.

Turning to the issue of dependency, the parties correctly note that the administrative law judge analyzed dependency as of the date of employee's death, rather than the work injury on July 10, 2003. As the Missouri Supreme Court stated in *Gervich v. Condaire, Inc.*, 370 S.W.3d 617, 622 (Mo. 2012), "under workers' compensation law, when an injured worker dies, dependent status is determined at the time of the injury, not the time of death." Accordingly, we must disclaim the administrative law judge's findings and conclusions determining dependency at the time of employee's death, and apply the appropriate analysis.

Employee: Richard Wooley, deceased

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Pamela Michele Wooley testified at the hearing before the administrative law judge regarding her status as a dependent; we note that the Second Injury Fund did not cross-examine her on this topic. We find her testimony credible, and find that at the time of the work injury on July 10, 2003, Pamela Michele Wooley was married to and was living with employee and was dependent upon him for support.

Employee presented some testimony, at his deposition of November 2, 2005, suggesting his children Zachary Wooley and Sara Wooley were dependent upon him; we note that the Second Injury Fund attorney who adduced this testimony did not challenge employee on these issues. We find employee's deposition testimony credible, and we find that at the time of the work injury, Zachary Wooley was aged 20, was living at home, and was dependent upon employee, and that Sara Wooley was aged 21, was away at school, and was dependent upon employee.

Section 287.240(4) RSMo provides, in relevant part, as follows: "[t]he word 'dependent' as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury." The remainder of that section sets forth which individuals are conclusively presumed to be dependent upon an employee, and also provides a number of provisions indicating when **death** benefits may be terminated to such dependents. As the court in *Spradling* made clear, however, the divestment provisions of § 287.240(4)(a) and (b) regarding death benefits are inapplicable in the *Schoemehl* context. See *Spradling*, 415 S.W.3d at 132-33. For this reason, we find unpersuasive the Second Injury Fund's position that Zachary Wooley and Sara Wooley cannot be deemed dependents because of their age. The plain language defining dependent, as quoted above, contains no age limitation.

Applying the plain language of the definition under § 287.240(4) and crediting the essentially uncontested evidence regarding dependency, we conclude that Pamela Michele Wooley, Zachary Wooley, and Sara Wooley were employee's "dependents" on July 10, 2003, and that they are entitled to equal shares of the permanent total disability benefit under *Schoemehl* for their lifetimes.

Correction

We note that on page 3 of the administrative law judge's award, the caption under the heading "FINDINGS OF FACT and RULINGS OF LAW" incorrectly identifies the Injury Number associated with this matter as 02-122940. The correct injury number, as identified above, is 03-072601.

Conclusion

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

Employee's dependents Pamela Michele Wooley, Zachary Wooley, and Sara Wooley are entitled to, and the Second Injury Fund is hereby ordered to pay, weekly payments of permanent total disability benefits beginning October 20, 2003, for 60 weeks at the

Employee: Richard Wooley, deceased

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differential rate of \$315.50, and thereafter in the weekly amount of \$662.55, payable to the dependents in equal shares, for their lifetimes.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 3, 2013, is attached and incorporated by this reference to the extent not inconsistent with our award and decision herein.

The Commission approves and affirms the administrative law judge's allowance of an 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 18th day of April 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

CONCURRING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Richard Wooley, deceased

CONCURRING OPINION

I write separately to once again voice my agreement with the views expressed by Presiding Judge Gary W. Lynch in the *Spradling* case. Writing separately, Judge Lynch drew attention to the absurdity of providing lifetime benefits under the Missouri Workers' Compensation Law to the family of an employee whose death has nothing to do with work, where the same family would receive far less compensation if the employee had died as a result of the work injury:

One of the two rationales stated in *Schoemehl* ... was to prevent the "unreasonable result" of allowing surviving dependents to receive permanent *partial* disability benefits but not permanent *total* disability benefits. *Schoemehl v. Treasurer of State*, 217 S.W.3d 900, 903 (Mo. banc 2007). I write separately to lament that our constitutional obligation to follow *Schoemehl*, MO. CONST. art. V, § 2 (1945), now requires this Court to affirm what I consider to be the unreasonable result of awarding lifetime benefits to surviving dependents where the employee's death was *unrelated* to the work injury, when the surviving dependents would have only received benefits during the time of their dependency if the employee's death had been *caused* by the work injury.

Spradling v. Treasurer of State, 415 S.W.3d 126, 135 (Mo. App. 2013)(Lynch, P.J., concurring)(emphasis in original).

In light of the holding in *Spradling*, which I agree is dispositive of the issue whether the divestment provisions under § 287.240(4) are applicable to an award of *Schoemehl* benefits, I must reluctantly join in the decision to affirm the administrative law judge's award of lifetime permanent total disability benefits to employee's dependents.

I must also concur in the majority's determination that under the plain language of § 287.240 RSMo, the issue of dependency must be determined at the time of the employee's work injury, rather than at the time of death. While this makes good sense to me in the context of an award of death benefits, I must note that a host of absurdities results when applying the *Schoemehl* court's theory that an employee's dependents are entitled to step into the employee's shoes for purposes of an award of permanent total disability benefits. For example, consider an employee who is married and who sustains a work injury before the closing of the *Schoemehl* window. Let us imagine this employee lives twenty more years, during which time she remarries, and thereafter dies of a cause unrelated to the work injury. Under the *Schoemehl* analysis, the employee's ex-husband, rather than her current spouse, would be entitled to a lifetime award of permanent total disability benefits. Or consider the scenario in which an injured employee whose claim qualifies for application of the *Schoemehl* decision has a child who is born on the day of the work injury. This child can expect benefits for her *entire lifetime* when the employee dies. I simply cannot imagine that these results were contemplated by our legislature in drafting the Missouri Workers' Compensation Law.

Employee: Richard Wooley, deceased

- 2 -

Finally, I wish to note that the Commission retains jurisdiction under § 287.470 RSMo to consider a “change in condition” as grounds for an order ending any compensation previously awarded. See, e.g., *Pavia v. Smitty's Supermarket*, 366 S.W.3d 542, 548 (Mo. App. 2012), and *Bunker v. Rural Elec. Coop.*, 46 S.W.3d 641 (Mo. App. 2001). It appears to me that nothing would prevent any party paying an award of *Schoemehl* benefits to an employee’s dependent from filing an application for review with the Commission pursuant to § 287.470 and presenting evidence showing a change in the condition of the “employee” (e.g. pointing out that the substituted employee is *not* permanently and totally disabled) such that an award of permanent total disability benefits is no longer appropriate. In my view, the Commission would be authorized in such circumstances to terminate permanent total disability benefits to any non-disabled dependent receiving *Schoemehl* benefits.

James G. Avery, Jr., Member

AWARD

Employee:	Richard Wooley (deceased)	Injury No.:	03-072601
Dependents:	N/A		Before the
Employer:	Belo Corporation (settled)		Division of Workers'
			Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial
			Relations of Missouri
Insurer:	Lumbermen's Mutual Casualty Co. (settled)		Jefferson City, Missouri
Hearing Date:	February 4, 2013	Checked by:	JED

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: July 10, 2003 (stipulated)
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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:
Employee sustained low back injury to his back when a chair collapsed beneath him.
12. Did accident or occupational disease cause death? No Date of death? May 20, 2007 (unrelated causes)
13. Part(s) of body injured by accident or occupational disease: low back
14. Nature and extent of any permanent disability: 15% PPD low back; PTD against SIF.
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$662.55/\$3347.05 PPD
- 19. Method wages computation: Stipulation.

COMPENSATION PAYABLE

20. Amount of compensation payable:

60 weeks PPD from Employer	(settled)
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21. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: weekly differential (\$315.50) payable by SIF for 60 weeks beginning October 20, 2003 and, thereafter \$662.55, for Claimant's lifetime	Indeterminate
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TOTAL:	INDETERMINATE
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22. Future requirements awarded: None

Said payments to begin immediately and to be payable to Claimant and be subject to modification and review as provided by law.

The compensation awarded to the Employee 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 Employee and Claimant:

Charles W. Bobinette

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Richard Wooley (deceased)	Injury No.:	02-122940
Dependents:	N/A		Before the
Employer:	Belo Corporation (settled)		Division of Workers'
			Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	Lumbermen's Mutual Casualty Co. (settled)		
Hearing Date:	February 4, 2012	Checked by:	JED

This case involves injury to the low back resulting to Employee with the reported accident date of July 10, 2003 with an allegation of synergistic disability against the Second Injury Fund ("SIF"). Employer and its insurer previously settled their risk of liability. Both parties are represented by counsel. The single issue for trial is the liability of the SIF. The claim was heard in a single trial with two companion cases with separate Awards issuing on each of the three cases. Employee seeks permanent total benefits in this third case.

Employee's widow, Pamela M. Wooley, filed her Suggestion of Death on behalf of her husband and her Motion to Substitute herself as Claimant. Her motion was granted without objection.

Issues for Trial

1. Liability of the SIF(all statutory elements); and
2. Claimant's entitlement to Employee's benefits.

FINDINGS OF FACT

1. Employee was born on April 7, 1952. He died on May 20, 2007 from causes unrelated to his diagnosed work-related occupational disease [Injury No. 02-136578 (D/I: 8/12/02)] and two accidental injuries: Injury No. 02-122940 (D/I: 11/7/02) and Injury No. 03-072601 (D/I: 7/10/03) [Ex. A-Q-2 (Certificate of Death)].
2. Employee and Spouse were lawfully married on January 9, 1975 [Ex. A-Q-1 (Marriage Certificate)]. Since then, they resided together as husband and wife and Spouse remained dependant on Employee until his death.

3. Three children were born of the marriage: Cody Megan Wooley (D/O/B: 7/17/78), Sara Michelle Wooley (D/O/B: 7/29/81) and Zachary Michael Wooley (D/O/B: 11/8/82). Employee had no other children. At the time of Employee's death, the children were emancipated.
4. Between 1975 and 1980, Employee was self-employed, rehabbing and repairing houses. Employee also drove a truck for a contractor who did work for Granite City Steel. The work was unstable and Employee quit after Employer offered him a full-time staff position in December 1982.
5. In 1982, Employee graduated with a B.S. degree in Mass Communications from Southern Illinois University of Edwardsville.
6. Employee worked for Employer from September 1981 to July 2003 as a writer/producer – reading, writing and editing news copy and editing videotapes 8 hours a day [Ex. A-R].
7. On July 10, 2003, Employee stepped into the soundproof editing booth at work to view videotapes. When he sat in the chair, it suddenly collapsed. Employee fell approximately 18 inches to the floor and had to have help getting up. His spine felt like it was hit with a sledge hammer. The pain was at his buttocks, up 6 or 8 inches across the middle and sides of his back [Ex. A-R; Employee's Depo., Tr. 20:13-21:9]. Employee was unable to finish his shift and left for the day. Employee was scheduled for a two-week vacation. When he returned to work, he left because of his back and leg pain. Employee last worked on July 27, 2003.
8. Employer initially referred Employee to Barnes Care for the treatment of his low back pain on July 11, 2003. He was diagnosed with left sprain of the lumbosacral spine and returned to regular work without restrictions. Employee was prescribed 15 mg of Tramadol to be taken 3 times a day as needed and Salicylate topical cream to his low back. He was told to ice his back for the first 48 hours and then to apply heat. He reported a history of left lower back pain due to a previous injury and complained of chronic radicular problems on the left. He returned to Barnes Care on July 25, 2003 and was prescribed 10 mg of Cyclobenza after work and/or at bedtime, 4 mg of Methylprednisolone and 5/500 tabs of Hydrocodone to be taken 1 or 2 tablets at a time every 4 to 6 hours after work as needed for pain, with a maximum of 8 tablets a day. When he was seen on July 25, 2003, he was complaining of severe pain in the low back and legs, left worse than right. The doctor noted that he moved slowly, secondary to his pain, and had a lot of problems with walking and left leg limping [Ex. A-I]. On July 29, 2003, he was taken off work. Employee was again examined on August 5, 2003. He was diagnosed with left sprain lumbosacral spine and left radiculopathy lumbosacral. He was prescribed physical therapy [Id.].
9. In August 2003, Employee came under the care of Dr. Richard T. Katz, a rehabilitation specialist. Employee reported that he had fairly severe low back pain, which required some help with personal care. Employee complained that he could not lift or carry

anything, that his pain prevented him from walking more than 100 yards, sitting more than 10 minutes and standing for more than 10 minutes. Because of his pain, he had less than 4 hours of sleep. His sexual life and social life were restricted due to his pain. On physical examination, sacroiliac biomechanics were bilaterally painful and abnormal. Range of motion was reduced and flexion extension, lateral flexion and rotation. Manual examination of the lumbar paraspinal musculature was not possible. Muscle stretch reflexes were absent at the knee, ankle and hamstring. Plantar responses were down going. Faber maneuver was painful bilaterally. Dr. Katz diagnosed mechanical low back pain and a likely degree of spinal stenosis. He started Employee on a cocktail of 200 mg of Celebre, 10 mg of Lexapro and 10 mg of Amitriptylin at dinner. He also ordered Employee to continue daily physical therapy and continued Employee on off work status. Dr. Katz ordered a CT scan. Although Employee could fit in the scan, the image intensifier was insufficient to image his spine. Dr. Katz concluded that there were no further imaging options since attempts at an MRI in the past were entirely without success. In mid August, Dr. Katz discontinued physical therapy and prescribed aqua therapy and later recommended epidural injections [Ex. A-M].

10. Employee took physical therapy at Alton Physical Therapy. He described his pain as a 7 out of 10. The treatment plan consisted of electrical stimulation, pool therapy for increased range of motion and walking daily if tolerated [Ex. A-K]. Employee attended 10 physical therapy sessions. As of August 29, 2003, he reported constant low back pain which radiated into his lower extremities, right worse than left. Under the objective portion of the test, in a sitting position, Employee had radicular symptoms in the bilateral lower extremities with straight leg raising on the left and right.
11. Employee was referred to the pain clinic at Alton Memorial Hospital. Dr. Thomas Brummett recommended a CT scan of the lumbar spine and to start epidural steroid injections. Employee had his first steroid injection on September 8, 2003, which provided him good relief for 3 to 4 days but returned. He had his second steroid injection on September 17, 2003, which did not help. On October 1, 2003, Employee underwent an SI joint injection administered by Dr. Buenger [Ex. A-L].
12. Dr. Katz recommended continued pool therapy and weight loss. As of October 9, 2003, Dr. Katz indicated that Employee was not able to return to work in a sedentary position. On October 13, 2003, Dr. Katz opined that Employee was not a surgical candidate and was at maximum medical improvement. On October 20, 2003, Employer discontinued the payment of TTD benefits [Ex. A-M].
13. Employee again followed up with his primary physician (Dr. Bartley). He diagnosed Employee with degenerative joint disease, low back pain, acute muscle strain and morbid obesity. Dr. Bartley continued to prescribe medications. Employee continued to attend aquatic therapy classes and tried to lose weight on the Atkins diet. He attempted to see Dr. Joe Williams, Orthopedist, in June 2004 but was turned away because of his workers' compensation status.

14. Employee lost approximately 100 pounds but continued to have disabling back and leg pain which interfered with his ability to stand, walk and sit for prolonged periods of time. His pain limited his ability to travel, go to the grocery store, cook, climb and rest and sleep comfortably. When he was not taking aquatic classes, he was at home reclining in his chair or lying on the floor. He was unable to complete the renovations on his house, perform simple repairs or maintain the house. Following Employee's July 2003 work accident, Spouse and their son were responsible for taking care of their home.
15. Employee applied for, and was approved for, long term and short term disability benefits through Employer and Social Security disability benefits dating back to July 2003 [Ex. A-R; Tr. 61:5-9 and A-U].
16. In 1986, Employee injured both knees when he jumped from a burning elevator. Employee underwent arthroscopies due to medical meniscal tears in both knees. The left knee arthroscopy was performed in 1986 and the right in 1997. The left knee ACL was not fixed. Employee was diagnosed with arthritis in both knees. Employee avoided any type of impact activities such as running and jumping and was careful when navigating uneven surfaces, such as suddenly stepping off a curb. When he attempted to walk down a ramp, his left knee would buckle.
17. Mr. Wooley was 6'6" and in high school, weighed 300 lbs. The medical records show that prior to August 2002, he weighed in excess of 450 pounds. Pulmonary function tests performed in 1997 showed mild obstructive ventilating defect. A CT scan of the chest performed on February 18, 1997 showed a 2 centimeter right upper lobe nodule with calcified and mediastinal nodule consistent with old granulomatosis disease.
18. In 1995, while lifting tapes at work, Employee felt something rip in his low back. Employee was treated for low back and left leg pain and missed about 5 weeks of work. After a period of recovery, he had to watch what and how he lifted. If he overdid it, he would pay for it the next day [Ex, A-R; Tr, 42:11-24]. Because of Employee's obesity, his doctors recommended against a CT scan due to lack of adequate resolution. In 1998, Employee was involved in a motor vehicle accident causing injuries to his neck and low back. The most severe pain was on the left side with radiation down the leg. He was diagnosed with sciatica and paracervical spasms. Employee was prescribed physical therapy for his low back pain. He was started on Naprosyn and ordered to take bed rest. He was using crutches to decrease the stress over the left [Ex. A-J].
19. Employee was examined by Dr. Volarich on October 1, 2004. Dr. Volarich testified by deposition on October 30, 2009. His reports dated October 1, 2004 and August 20, 2009 and his deposition were admitted into evidence without objection [Ex. A-S]. Dr. Volarich took an extensive history from Employee regarding his pre-existing and post-accident back complaints and conducted a physical examination. Employee walked very slowly with a somewhat lumbering gate. He took very short steps and walked flex at the waist by about 15 degrees because of his back syndrome. The right quadriceps was weak at 4/5 (20% loss), the left was weak at 3/5 (40% loss), the hamstrings were weak on each

side at 4.5/5, his calves were weak bilaterally as well as both dorsiflexion and plantar flexion on the right and 3/5 on the left. His quadriceps weakness was, for the most part, related to his prior knee injuries. His hamstring weakness was related mostly to the back. Weakness on the left side, more than the right, was due to sciatica with more weakness because of the radiating pain from his back. His Achilles reflexes were absent bilaterally due to his back pathology. Employee was unable to toe walk, heel walk, tandem walk or stand or hop on either foot alone due to his back pain and bilateral knee pain. He was only able to squat, at best, to about 1/3 of normal, at which point he stopped because of back and knee pain. When he attempted to squat, he held onto the examination table with both hands to steady himself [Tr. 33:3-37:5]. Employee also had significant loss of range of motion. There was a 50% loss of flexion and 60% loss of extension and side bending. At least half of his loss of range of motion was due to his chronic obesity and body habitus and the other due to his back problem [Tr. 37:24-38:12]. Palpation of the back elicited pain in the sacroiliac joints bilaterally. There was a trigger point on the right side that correlated with the limp in his right leg and the problem he was having from his back. On straight leg raising, Employee was limited to 70 degrees on the right and 80 degrees on the left because of back discomfort. On the right side, he had pain radiating into the calf, which was consistent with bilateral sciatic nerve irritation [Tr. 39:22-41:18]. Dr. Volarich concluded that the July 10, 2003 work accident was the primary factor in causing Employee's lumbar radicular syndrome and an aggravation of his pre-existing back difficulties that required conservative management. The rapid deceleration of the chair caused Employee to drop approximately 18 inches, resulting in axial trauma to the spine. Dr. Volarich opined that Employee had a 25% permanent partial disability of the body as a whole rated at the lumbosacral spine due to his lumbar radicular syndrome. The rating accounted for the injury's contribution to back pain, lost motion and radiating pain to the right greater than the left leg [Tr. 49:9-51:22].

20. In 2004, Dr. Volarich found Employee's range of motion of the wrist was limited on flexion and extension. Examination of the knees revealed that flexion was 105 degrees on the right and 95 degrees on the left, compared to normal at 140 degrees. Extension was -20 on the right and 25 on the left, compared to a normal extension of 0. In the right knee, there was 1+ swelling prepatellar bursa and 1+ crepitus of the patello femoral articulation. On the left knee, there was 3+ swelling of the prepatellar bursa and 4+ crepitus at the patellofemoral articulation and in the medial compartment. Employee's diagnosed pre-existing conditions were: (1) chronic lumbar syndrome with intermittent left leg paresthesias; (2) internal derangement of the right knee – S/P arthroscopy and medial meniscectomy; (3) internal derangement of the left knee in the form of medial meniscus tear and partial ALC tear – S/P partial medial meniscectomy without repair of the ACL and morbid obesity (maximum weight approximately 500 lbs., at the time of examination, weighing 438 lbs.) [Ex. A-S; 10/1/04 report pp. 7-12].
21. Dr. Volarich opined that Employee had the following pre-existing and permanent industrial disabilities that were a hindrance to his employment or re-employment:

- (1) 15% permanent partial disability of the body as a whole rated at the lumbar sacral spine due to his chronic lumbar syndrome causing intermittent left leg radicular symptoms prior to July 10, 2003.
 - (2) 20% permanent partial disability of the right lower extremity rated at the knee due to a torn medial meniscus that required arthroscopy, accounting for pain, lost motion, weakness and crepitus in the knee leading up to July 10, 2003.
 - (3) 35% permanent partial disability of the left lower extremity rated at the knee due to the torn medial meniscus and partial tear of the ACL. The rating accounted for arthroscopic repair of the medial meniscus and unoperated ACL attributing to lost motion, pain, swelling, crepitus, atrophy and difficulties with deceleration maneuvers leading up to July 10, 2003.
 - (4) 15% permanent partial disability of the body as a whole due to his chronic morbid obesity contributing to back and lower extremity pain as well as limiting his endurance and mobility prior to July 10, 2003. Dr. Volarich also opined that Employee's pre-existing conditions and disabilities were the result of the July 10, 2003 accident combined synergistically [Ex. A-S; 10/1/04 report].
22. As a result of Employee's pre-existing diagnosed disabilities and his disability related to the July 10, 2002 accident, Dr. Volarich concluded that Employee could no longer continue in his line of employment with Employer and was permanently and totally disabled as a result of the combination of his disabilities [Ex. A-S; Tr. 61:4-62:4]. Dr. Volarich also reviewed the report of Dr. Samuel Bernstein, Psychologist and Vocational Counselor, which confirmed his opinion that Employee was unemployable [Id., Tr. 62:5-63:5].
23. Employee was seen by Dr. Samuel Bernstein on August 11, 2005 for a vocational assessment. Dr. Bernstein testified by deposition on September 11, 2008. His report and deposition were admitted into evidence without objection [Ex. A-T]. Employee's work for Employer fell in the category of sedentary work. Sedentary is defined to mean sitting at least 2/3 of the time in a work situation, not lifting over 10 pounds, in a 7½ or 8 hour day [Ex. A-T; Tr. 26:25-27:13]. Dr. Bernstein concluded that Employee was unemployable in the open labor market due to a combination of his pre-existing diagnosed conditions and injuries to his back following his July 10, 2003 work injury. Employee's back pain alone, which affected his sitting, standing, bending, lifting and concentration, made him unemployable in the open labor market [Id., Tr. 13-15].
24. Employee was examined by Dr. Russell Cantrell on February 26, 2007. Dr. Cantrell testified by deposition, and his reports dated February 26 and March 26, 2007, were admitted into evidence without objection [Ex. 1]. Dr. Cantrell did not examine Employee's wrists, right shoulder or right elbow [Tr. 23:12-24:7]. Based upon his review of the treatment records, Dr. Cantrell concluded that Employee had a zero percentage of PPD referable to the right elbow and 5% permanent partial disability of the right arm at

the shoulder level, half of which was attributable to his work injury and half to his pre-existing degenerative changes. Dr. Cantrell did not provide a disability rating for Employee's wrists [Tr. 21:3-23]. Dr. Cantrell reviewed the available treatment records and took a history of Employee's back problems leading up to Employee's November 2002 and July 2003 work injuries and subsequent falls in the summer of 2006 and November 2006. Dr. Cantrell did not have the December physical therapy records when he evaluated Employee [Tr. 25:3-6]. After examining the lumbar spine, Dr. Cantrell assigned a 2% PPD of the body as a whole as a result of the November 2002 injury and a 3% PPD as a result of the July 2003 injury. As a result of Employee's chronic history of back pain leading up to his November 2002 work injury, and subsequent non-work-related injuries in July 2006 and November 2006, Dr. Cantrell assigned a 7% PPD of the body as a whole [Tr. 20:9-21:2].

25. On June 30, 2011, Spouse settled Employee's July 10, 2003 work injury for 12.5% PPD of the body as a whole referable to the low back and lower extremities. Employee's last day of work was July 29, 2003.

RULINGS OF LAW

Nature and Extent of Permanent Disability

Employee offered substantial proof that the July 2003 work injury combined with the pre-existing permanent partial disabilities causing greater overall disability than the independent sum of the disabilities. When Employee was released from Dr. Katz's care, he was unable to return to the least restrictive (sedentary) work. Dr. Volarich's examination was comprehensive and more persuasive than that of Dr. Cantrell. Employee's deposition testimony and Spouse's testimony was credible.

Dr. Volarich's clinical findings corroborated severe deficits in ambulation, strength and endurance. Again, his examination was more comprehensive and his opinions were more persuasive than those of Dr. Cantrell. Claimant credibly testified that Employee had significant and worsening complaints associated with his July 2003 work-related injury and pre-existing diagnosed conditions and disabilities. She explained how Employee changed even more for the worse after the 2003 injury.

Dr. Volarich's generally high ratings are more easily reconciled with the allegation of permanent total disability, cessation of employment and the treatment record. Employee's reported injury resulted in still more permanent partial disability (PPD) to the low back. The primary injury is determined to have aggravated the back condition to an *overall* PPD of 45 percent of the body referable to the low back with another 15 percentage points resulting from this July 2003 injury (60 weeks) with an additional 30 percentage points pre-existing the (third) reported injury. Employee never returned to work on a full-time basis.

Employee's pre-existing PPD to other body parts include Employee's pre-existing PPD relative to the bilateral CTS is found to be 25 percent PPD of each hand (87.5 weeks). Employee's prior right knee equates to 15 percent PPD (24 weeks). Employee's prior left knee (with ACL involvement) equates to 30 percent PPD (48 weeks). Employee's prior chronic obesity equates to 10 percent PPD (40 weeks). These amounts are consistent with Employee's work record.

The medical evidence suggests that Employee was rendered permanently and totally disabled as a result of the reported injury herein in combination with pre-existing disability. Upon attaining maximum medical improvement (MMI) on October 20, 2003, Employee was no longer ambulatory and unable to work. Employee had significant low back pain everyday and was not ambulatory after the reported injury. Employee's experts, Dr. Volarich and Dr. Bernstein, rendered well-reasoned opinions that Employee was permanently and totally disabled.

Employee's vocational expert, Dr. Bernstein, found Employee was permanently and totally disabled. Dr. Bernstein noted inability to ambulate freely, right leg radiculopathy accompanying severe low back pain, and sleeplessness due to pain. He further noted Employee's chronic obesity at over 400 pounds his entire adult life which impacted all exertional activity and constituted an interview obstacle because of the health risks inferred by prospective employers. Dr. Bernstein noted the permanent total disability was due to a combination of the prior disability, especially the chronic obesity, and the current low back injury. This testimony was un rebutted.

On cross examination, Dr. Bernstein was challenged but unimpeached on a series of unsourced hypothetical or stamina examples which Dr. Bernstein dismissed as unknown. The line of questioning was abandoned. The undisputed treatment record, prior disabilities, and vocational profile, which includes age, are sufficient to predicate permanent total disability.

Liability of the SIF

The record compels the conclusion that Employee's permanent total disability is the result of the combination of this current disability and his pre-existing disability. Dr. Volarich and Dr. Bernstein stated Employee's pre-existing disability combines with the disability caused by the primary injury to form an increased overall disability that is greater than the simple sum of the disabilities. These opinions were probative and un rebutted. Again, Employee continued full-time work, writing and typing. This limits the amount of PPD that may be found subsequent to the earlier CTS claim of synergistic PPD just five months earlier. Nevertheless, an incremental increase in PPD may be awarded.

The statute requires a separate determination of current PPD and pre-existing PPD and, thereafter, a determination of the existence of synergistic combination must be made. Synergy is the concept in which the current PPD and the pre-existing PPD are found, in combination, to

create a “substantially greater” disability, or an increased overall disability, and for which the employer should not be held liable. The significance of PPD assignments is predicated by the statutory minimum thresholds for injuries to the extremities and injuries to the body as a whole. If it is determined that the current PPD combines with the pre-existing PPD, there results an increased overall PPD from which the current PPD and the pre-existing PPD must be deducted. However, these statutory thresholds do not apply in cases where permanent total disability is alleged. Section 287.220.1 RSMo (2000). Section 287.800 RSMo (2005) requires strict construction.

Here, Employee’s PPD from the primary injury to the low back in combination with pre-existing disabilities to other body parts, particularly both knees, constitutes the *upper body-lower body* synergy. The primary PPD here also combines with the chronic obesity condition and is characterized by the less common *locomotion-type* synergy which limits virtually all exertion.

Survivor Benefits

When an employee has sustained an injury and subsequently dies from reasons unrelated to the injury, any compensation accrued but unpaid at the time of the employee’s death is to be paid to his dependants without administration. Section 287.230.1 RSMo (2000). While the subsection references “liability of the employer,” without reference to the SIF, to withhold the same protection to surviving spouses and other dependents for unpaid benefits from the SIF seems to defeat the benefit of Section 287.220.1, calculation of which depends on the expressly protected accrued employer liability. Reading both sections together permits a posthumous award of PPD benefits from the SIF.

Employee reached MMI as a result of his July 2003 work injury in 2004. Accordingly, PPD benefits had accrued and were unpaid at the time of Employee’s death in 2007. At the time of Employee’s July 2003 work injury, and leading up to his death, Employee was married and lived with Claimant. Accordingly, Claimant is entitled to recover Employee’s accrued and unpaid benefits from the SIF.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Employee is found to have sustained an additional 15 percent PPD of the body referable to the low back as a result of the reported primary injury which case settled pre-trial. In addition, Claimant is found to have sustained permanent total disability as a result of the combination of the primary injury with the pre-existing disabilities described. The SIF is liable for permanent total disability benefits to Employee. The SIF must pay the differential between the PTD rate and the PPD rate for the PPD installment period of 60 weeks beginning October 20, 2003 (MMI date) and, thereafter, at \$662.55 per week for Employee’s lifetime (or until the employee is no longer permanently and totally disabled). See Section 287.200 RSMo (2000, 2009).

However, in this case, all benefits are awarded posthumously. Upon Employee's death on May 20, 2007, PTD benefits are payable to Employee's surviving spouse, Claimant herein. She is entitled to Employee's *inter vivos* benefits until his death under Section 287.230.1 and she is entitled to the posthumous benefits, thereafter, for her lifetime, pursuant to the decision in Schoemehl v. Treasurer, 217 S.W.3d 900 (Mo. Banc 2007). In addition, since PTD benefits are awarded posthumously, Claimant is entitled to collect Employee's past due benefits from the SIF beginning October 20, 2003. Section 287.230.1 RSMo (2000).

Date: _____

Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge

A true copy: Attest:

Division of Workers' Compensation