

IN THE
SUPREME COURT OF MISSOURI

JAMES WINBERRY, deceased)	
Barbara J. Winberry, Jacob Winberry,)	
Joshua Winberry, Hannah Winberry,)	
John Winberry, Heather Winberry, and)	
James Winberry)	
)	
Appellants,)	
)	No. SC88979
vs.)	
)	
TREASURER OF THE STATE OF)	
MISSOURI, AS CUSTODIAN OF)	
THE SECOND INJURY FUND)	
)	
Respondent.)	

**SUBSTITUTE BRIEF OF RESPONDENT, TREASURER OF THE STATE
OF MISSOURI, CUSTODIAN OF THE SECOND INJURY FUND**

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SECOND INJURY FUND

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STATEMENT OF FACTS

Respondent Treasurer agrees in large part with the Appellant's Statement of Facts but offers the additional facts pursuant to Rule 84.04(f).

The only issue presented here is that of the jurisdiction of the Labor and Industrial Relations Commission – an issue not addressed in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W. 3d 900 (Mo. banc 2007). The *Schoemehl* decision addressed the eligibility of a dependent to receive permanent total disability benefits awarded to an injured employee after that injured employee died. It specifically addressed the claim of a surviving spouse. In *Schoemehl*, the injured employee died before the Award became final. *Id* at 901.

On May 24, 2000, an Administrative Law Judge issued an Award finding the Fund liable for PTD benefits to James Winberry. The Commission affirmed that decision in a Final Award issued on December 7, 2000. The Final Award made no mention of any spouse or other dependent. (Respondent's Appendix A-1). Nor was such evidence placed in the record. There was no further appeal.

James Winberry died on February 16, 2006, and the Second Injury Fund ceased making payments on the permanent total disability Award. Months after James Winberry's death, the appellants, who allege to have been James Winberry's dependents, filed a Motion to Substitute Parties with the Commission. (Legal File at 63-64.) Citing *Schoemehl*, they asked the Commission to order that the payments resume, and that they be made to the alleged dependents. In effect, they asked the Commission to amend the ALJ's original award; or at the very least, to expound on its meaning. The Commission

determined that it had no statutory authority, or jurisdiction, to review the award because the time for appeal of the award had expired. (Appellant's Appendix A-2).

On December 4, 2007, the Missouri Court of Appeals, Eastern District, issued an opinion affirming the Commission's determination of lack of jurisdiction. However, because of the general interest and importance of the issue raised, the Court of Appeals transferred this matter to this Court.

ARGUMENT

The Commission is a creature of statute, and has only the authority and jurisdiction granted to it by specific statutory authority. *Farmer v. Barlow Truck Lines*, 979 S.W.2d 169, 170 (Mo. banc 1998.) The Court of Appeals has held that post-award proceedings, such as ones to interpret or enforce an award, are not within the Commission's jurisdiction, but within the jurisdiction of the circuit court. *Falk v. Barry, Inc.*, 158 S.W.3d 327, 329 (Mo.App. W.D. 2005). The Commission properly found that this general rule applies to every case, unless the Commission has been given specific statutory authority to revisit a past award. And, as there is no specific statutory authority for the Commission to revisit this Award, the Commission is without authority to act.

Presumably recognizing the *Falk* holding, these alleged dependents also filed suit in circuit court, asking that the court enter an order pursuant to "RSMo §287.500 (2000) rendering judgment in accordance with said order and substitute [Appellants] as dependents; order any and all back payment of benefits from the date of [Winberry's] death to [Appellants]; to enter its order continuing PTD benefits to the [Appellants] and for interest as provided by law and for their costs herein expended." *James Winberry vs. Treasurer of Missouri*, 07CC-002254 Circuit Court of St. Louis County. That case is still pending.

Implicitly confirming that the Commission cannot act unless there is specific statutory authority to do so, these alleged dependents cite subsection of § 287.200 RSMo. (2006), to support their claim that the Commission has jurisdiction to reopen and modify long-final awards. But, in their argument, they do not consider that subsection in its entirety. Rather, they focus on a single sentence, one that does, as they claim, say that

permanent total disability files “remain open.” But that subsection does not have nearly the breadth of application that the alleged dependents ascribe to it.

The single sentence on which the alleged dependents rely, as well as the first sentence of § 287.200(2), are worded without reservation. But the second and third sentences in the subsection give those sentences context, demonstrating that the purpose of the subsection is not to extend a broad grant of jurisdiction to the Commission to continually reopen and reconsider permanent total disability awards, but rather to address a very narrow subset of claims. The second and third sentences refer specifically to the group of employees who would be totally disabled but for the successful use, perhaps only temporarily, of a device that allows them to function at their former jobs:

All claims for permanent total disability shall be determined in accordance with the facts. When an injured employee receives an award for permanent total disability *but by the use of glasses, prosthetic appliances, or physical rehabilitation the employee is restored to his regular work* or its equivalent, the life payment mentioned in subsection 1 of this section shall be suspended during the time in which the employee is restored to his regular work or its equivalent. The employer and the division shall keep the file open in the case during the lifetime of any injured employee who has received an award of permanent total disability. *In any case where the life payment is suspended under this subsection*, the commission may at reasonable times review the case and either the employee or the

employer may request an informal conference with the commission relative to the resumption of the employee's weekly life payment in the case.

§ 287.200(2) (emphasis added). James Winberry is not a member of that group of injured employees, therefore, that subsection is inapplicable.

The *Falk* decision demonstrates the necessity for the sentence upon which the alleged dependents rely. Without the authority provided by § 287.200(2), the Commission could not amend an Award that is final to account for the successful use of a prosthetic device, nor for some change that later made such use impractical or impossible. To leave responsibility for such questions with the Commission is consistent with the concept of the Commission as an expert body, best able to make determinations concerning disability. But such disability questions are quite different from the succession questions that the alleged dependents wish to litigate. There is no reasonable argument that a circuit court is not at least as capable as the Commission to determine – if it is legally permissible to determine, after an award is final – the identity of an injured employee's dependents.

Moreover, even the sentence that the alleged dependents extract from its context in §287.200(2) is not as broad as they claim. It provides only that the “employer and the division shall keep the file open”; it says nothing about the Fund.

The alleged dependents cite to *Smith v. Ozark Lead Company*, 741 S.W.2d 802 (Mo. App. S.D. 1987) as support for the proposition that all permanent total disability cases are to be “kept open,” and, thus that the Commission retains jurisdiction.

(Appellants Brief at 8). In *Smith*, however, the Court spoke of post-final modification by the Commission only when there is specific statutory authority – such as that found in §§ 287.140, 200(2), and .470 – that allows such modification. *Smith*, 741 S.W.2d 810. That is entirely consistent with *Falk*. The alleged dependents then argue that *Smith*, in combination with §287.470, grants the Commission jurisdiction to review this matter. While §287.470 does allow review of Awards when there has been a “change of condition”, there has been no such change in this matter.

The alleged dependents cannot cite to any “change of condition” that would make § 287.470 applicable in this matter. James Winberry’s death cannot be the “change of condition” that allows for review, because that was an eventuality that could have been considered and litigated at the time of Hearing. Evidence could have been introduced regarding Mr. Winberry’s dependents, with a request that the Award be made payable to the dependents who survived him upon his unfortunate, but inevitable, death. In fact, nothing prevented James Winberry from making the argument and presenting evidence of dependency as in *Schoemehl*. While *Schoemehl* was decided after the Award to James Winberry, a change of, or more accurately new interpretation, of the law cannot be considered a “change in condition.” The fact that another injured worker made an argument, that could now benefit the alleged dependents in this case, simply does not mean the Award to Mr. Winberry can be re-opened and reviewed. If that were the case, no Award would ever be final, because as new legal theories and interpretations arose, every Award could be re-opened at the Commission by one of the parties to take advantage of the new theory.

The statutes and case law cited by the alleged dependents simply do not grant the Commission jurisdiction to reopen the long-final James Winberry award. There is no other statutory basis for the Commission to exercise jurisdiction. If it were possible to modify a Commission award years after it became final in order to insert findings of dependency that the Commission did not adjudicate (and in the Treasurer's view, it is legally not possible), that modification would have to be sought through the courts.

CONCLUSION

For the reasons stated above, the decision of the Commission finding that it lacked jurisdiction to entertain Appellant's request, should be affirmed.

Respectfully Submitted,

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SECOND INJURY FUND

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Rule 84.06 (b)(c) 360 of this Court and contains 1683 words, excluding the cover, this certification and the appendix, as determined by Word software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That two (2) true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 22nd day of January, 2008, to:

Mr. Jeffrey P. Gault
Attorney at Law
222 S. Central, #500
St. Louis, MO 63105

4. That an original and nine (9) true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were hand-delivered, this 22nd day of January, 2008, to:

Clerk of the Supreme Court
State of Missouri
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Jefferson City, Missouri 65102

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APPENDIX

LIRC Award of December 7, 2000..... A-1

Circuit Court Petition..... A-21

§ 287.200 Rev. Stat. Mo. (2000) A-24

§ 287.470 Rev. Stat. Mo. (2000) A-26

§ 287.500 Rev. Stat. Mo. (2000) A-27

FINAL AWARD ALLOWING COMPENSATION
(Modifying Decision of the Administrative Law Judge)
Injury No.: 96-433317

Employee: James L. Winberry
Employer: Ford Motor Company
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: December 11, 1996
Place and County of Accident: Hazelwood, St. Louis County, Missouri

The above referenced workers' compensation case has been submitted to the Labor and Industrial Relations Commission on Application for Review as provided by § 287.480'RSMo. Having reviewed the evidence and briefs and considered the whole record, the Commission modifies the administrative law judge's award and decision.

We agree with the administrative law judge that claimant James Winberry is permanently and totally disabled. We disagree with his award to the extent that it places all liability on the employer Ford Motor Company. We find that claimant is permanently and totally disabled as a result of the combination of both primary and preexisting disabilities and that the Second Injury Fund has liability.

Except for a one-day attempt to return to work, claimant last worked for Ford Motor Company on March 14, 1997. Claimant suffers pain and reduced mobility in his neck and shoulder due to the repetitive trauma of working on an assembly line. Prior to the claim for his primary injuries, claimant twice had surgery on both feet with internal steel fixation, resulting in numbness and the inability to walk in a straight line. Because claimant staggered, his doctor imposed a work restriction, requiring claimant to walk only on ground level. Following a fall from a six-foot height in 1991, claimant continues to suffer pain and a lack of mobility and strength in his left wrist. Surgical release for bilateral carpal tunnel syndrome in 1993 also left claimant with weakness and numbness in both hands. Claimant is obese, weighing more than 300 pounds on a five foot-11 inch frame. He had an intestinal by-pass to reduce his weight but the procedure was reversed due to complications. He has suffered sleep apnea since 1991, a condition that has not been cured despite surgical intervention.

There is no need to recapitulate all of the medical opinions in the record, as those are well summarized by the administrative law judge in his award. The expert testimonies in this case were presented through depositions. Consequently, the administrative law judge was in no better position than the Commission to rule on the credibility of the expert witnesses. *Davis v. Research Medical Center*, 903 S.W.2d 557 (Mo.App. 1995).

Dr. Fusco identified in claimant substantially the same ailments as Dr. Cohen. Dr. Fusco, however, opined that claimant was permanently and totally disabled from the last accident, alone. Conversely, Dr. Cohen, found the claimant was permanently and totally disabled from both the preexisting and primary injuries, which combined synergistically. We find Dr. Cohen's testimony more credible in light of all of the evidence in the record.

SCANNED

Dr. Cohen performed an extensive physical examination of the employee and documented extensive clinical findings of disability for both the preexisting and primary disabilities. Dr. Cohen concluded that claimant suffers only permanent partial disability as a result of the primary injury at Ford Motor Company. Dr. Cohen opined that claimant suffers from overuse disorder or cumulative trauma disorder to the cervical and upper thoracic spine and shoulders. He also diagnosed cervical and upper thoracic myofascial pain disorder and a disc herniation at the C5-6 level with cervical spondylosis. He said claimant suffered from a left rotator cuff tear with impingement and a right rotator cuff tendonitis. He rated claimant as having a 25 percent permanent partial disability to the left shoulder, 20 percent permanent partial disability to the right shoulder, and 25 percent permanent partial disability to the body as a whole referable to the neck, upper thoracic and cervical spine.

Dr. Cohen rated each of claimant's preexisting disabilities as follows: 25 percent to the body as a whole for sleep apnea, 15 percent for each wrist due to carpal tunnel syndrome, and 15 percent for each foot at the level of the ankle. While Dr. Cohen said claimant was unable to work, he concluded that the permanent total disability was the result of both the preexisting and primary disabilities, which combined synergistically. Dr. Cohen found that none of the claimant's disabilities, standing alone, rendered claimant permanently and totally disabled.

Dr. Cohen's opinion is buttressed by the opinion of Mr. Jim England, a vocational expert, who said claimant was precluded from even sedentary work due to a combination of all of his problems. Dr. Cantrell also found that claimant was only permanently and partially disabled from the work at Ford Motor, although his ratings are substantially less than those of Dr. Cohen.

He did not consider the claimant's preexisting disabilities in determining whether claimant could return to the open labor market.

This case is substantially similar to *Garibay v. Treasurer of the State of Missouri*, 964 S.W.2d 474 (Mo.App. 1998), wherein the appellate court held that the claimant was permanently and totally disabled as a result of the combination of primary shoulder disability and the preexisting disabilities that included obesity and sleep apnea.

Based on a thorough review of the entire record, we find claimant's disabilities from the last accident are 20 percent of the left shoulder at the 232 weeks level (46.40 weeks), 20 percent to the right shoulder (46.40 weeks), 25 percent body as a whole due to the disability to the cervical and upper thoracic spine (100 weeks). We further find that claimant is entitled to a 20 percent multiplicity or loading factor due to the combination of the primary injuries, amounting to an additional 38.56 weeks. Ford Motor Company, therefore, has liability for 231.36 weeks of permanent partial disability for the primary disabilities, multiplied by the stipulated rate of \$268.72 for a total of \$62,171.06.

Ford Motor Company shall continue to be liable for future medical benefits, awarded by the administrative law judge. These include anti-inflammatories, analgesics, muscle relaxants and follow-up by a medical care provider selected by the employer to regulate claimant's medications attributable to the primary injuries.

We accept as correct the opinion of Dr. Cohen as to the extent of claimant's preexisting disabilities. We find that these disabilities create a hindrance or obstacle to employment, as required for Second Injury Fund liability. See *Leutzinger v. Treasurer of Missouri*, 895 S.W.2d 591 (Mo.App. 1995). Claimant testified convincingly how his sleep apnea has interfered with

Injury No.: 96-433317

Employee: James L. Winberry

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both his personal and work life. Mr. England also observed that if claimant could find a job, he probably could not keep it for very long due to his propensity to fall asleep during work activity. Claimant's feet problems prevent him from having a job that requires extensive standing or walking on uneven or high surfaces. And the loss of strength and feeling in claimant's hands could interfere with any number of sedentary job functions. Consequently, the record supports a finding that claimant is permanently and totally disabled as against the Second Injury Fund due to the synergistic effect of both preexisting and primary disabilities.

We agree with the administrative law judge's award of 42 and 6/7 weeks of temporary total disability benefits to January 7, 1998. Beginning on that date and for the next 231.36 weeks, the Second Injury Fund is liable for the payment \$244.29, which is the differential between the permanent partial disability and permanent total disability rates. Thereafter, the Second Injury Fund shall pay permanent total disability benefits in the amount of \$513.01 for the remainder of claimant's life.

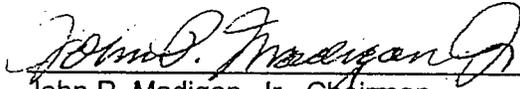
Pursuant to § 286.090 RSMo Cum. Supp. 1999, the Commission affirms the award and decision of Administrative Law Judge Edwin J. Kohner, issued May 24, 2000, except as modified by this opinion. The administrative law judge's decision is incorporated to the extent it is not inconsistent with the findings and conclusions of the Commission.

Claimant's attorney is allowed a lien in the amount of 25% of the award for necessary legal services rendered.

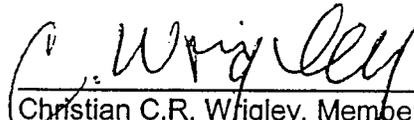
Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 7th day of December 2000.

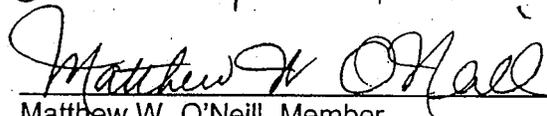
LABOR AND INDUSTRIAL RELATIONS COMMISSION



John P. Madigan, Jr., Chairman

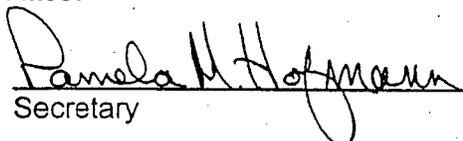


Christian C.R. Wigley, Member



Matthew W. O'Neill, Member

Attest



Secretary

AWARD

Employee:	James Winbeny	Injury No.:	96-433317
Dependents:	N/A		
Employer:	Ford Motor Company		Before the Division of Workers' Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial Relations of Missouri
Insurer:	Self-Insured		Jefferson City, Missouri
Hearing Date:	April 24, 2000	Checked by:	EJK:tr

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: December 11, 1996
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, Self-Insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The claimant developed neck and shoulder pain while performing overhead automotive assembly work
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: Neck, both shoulders
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: James Winberry

Injury No.:

96-433317

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$770.00
- 19. Weekly compensation rate: \$513.01/\$268.72
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
 - 42 6/7 weeks of temporary total disability (or temporary partial disability) \$21,986.14
 - Permanent total disability benefits from Employer beginning January 8, 1998 for Claimant's lifetime Unknown
 - 22. Second Injury Fund liability: No
- TOTAL: UNKNOWN
- 23. Future requirements awarded: See Additional Findings

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Jeffrey P. Gault, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Winberry

InjuryNo.: 96-433317

Dependents: N/A

Employer: Ford Motor Company

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Self-Insured

Checked by: EJK:tr

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, an automotive assembly worker, suffered neck and injuries from overhead work assembling automobiles. The issues for determination are (1) Future medical care, (2) Temporary Disability, (3) Permanent disability, and (4) Liability of the Second Injury Fund. The evidence compels an award for the claimant for permanent total disability benefits and future medical care.

At the hearing, the claimant testified in person and offered depositions of Raymond F. Cohen, D.O., Michael Fusco, M.D., and James England, and voluminous medical records. The defense offered a deposition of Russell Cantrell, M.D.

The Second Injury Fund objected to two settlements from prior Worker Compensation cases, Exhibit T and U, claiming that the settlement agreements are hearsay and that admission of settlement agreements is against public policy absent clear and cogent reasons to the contrary. The Second Injury Fund was a party to neither settlement agreement. The objection is sustained based on relevancy.

Generally, settlement agreements with third parties are not admissible in evidence to establish the validity of a claim or as an admission. State ex rel. Malan V. Huesemann, 942 S.W.2d 424, 427, 278 (Mo. App. 1997). However in Conley v. Treasurer of Missouri, 999 S.W.2d 269 (Mo. App. E.D. 1999), the court found clear and cogent reasons to allow the Second Injury Fund to offer prior settlements executed by the claimant. In Conley, the Second Injury Fund offered a copy of a prior settlement between the claimant and an employer as an admission of the extent of his disability from the primary injury (which was below the statutory threshold for Second Injury Fund liability). The employee objected to his own settlement with the employer. The court held that the Commission may take official notice of a settlement with the employer offered by the Second Injury Fund because to not do so would allow the claimant to relitigate the issue of the amount of his disability from the primary injury. The court of appeals did not determine whether the settlement may be admitted against a party at the hearing who was not a party to the settlement. The collateral estoppel doctrine sets the limits on the relevancy of such prior actions.

The collateral estoppel doctrine precludes parties from relitigating issues of ultimate fact that have previously been determined by a valid judgment.

Traditionally, collateral estoppel was limited by the concept of mutuality, which meant that a judgment could not be used for estoppel purposes unless both parties had been parties to the original judgment. However, this Court has since abandoned the mutuality requirement. Although collateral estoppel is more commonly invoked by defendants, it is also used by plaintiffs "offensively" to estop defendants from relitigating issues that have been determined by a prior valid judgment. This Court has also approved a variation of the doctrine called offensive non-mutual collateral estoppel that may be invoked where the plaintiff was not a party to the earlier judgment.

[F]our factors should be considered when applying non-mutual collateral estoppel: 1) the identity of the issues involved in the prior adjudication and the present action, 2) whether the prior judgment was on the merits, 3) "whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and 4) whether the party had a full and fair opportunity in the prior adjudication to litigate the issue for which collateral estoppel is asserted. In re Caranchini, 956 S.W.2d 910, 912 (Mo. Banc 1997)

In this case, the identity of issues is the same. Conley, supra, at 275. The prior disposition was on the merits of the case and the face of the document shows that the party against whom the collateral estoppel is asserted (Second Injury Fund) was a party to the prior case. However, a claim against an employer/insurer and the Second Injury Fund are against two separate parties defendant and the assertion of a claim against one is not in itself an assertion against the other. 8 CSR 50-2.010 (7); Strange v. SCI Business Products, Case No. ED76810, (Mo.App. E.D. May 5, 2000); Johnson v. River Oaks NursinHome, 872 S.W.2d 664, 665 (Mo.App. S.D: 1994). Further, the employer and the Second Injury Fund retained separate counsel. Clearly, the claimant filed a claim against the Second Injury Fund in the case, but the Second Injury Fund was not a party to the adjudication. The adjudication involved only the claimant and the employer. The adjudication of the Second Injury Fund claim was adjudicated separately. In addition, the separate nature of the Second Injury Fund claim, identified by the regulation, the separate counsel, and the evident conflict of interest between the two parties suggests that the Second Injury Fund was not in privity with a party to the prior adjudication, such as the employer. Use of the settlement against a party not represented in the prior adjudication would deny the Second Injury Fund the opportunity to litigate the issue in an adversary case. The conflict of interest is sufficient to deny the claim of collateral estoppel based on lack of representation or privity with a party in the adjudication. See Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 721 (Mo. Banc 1979). Since the party against whom the prior settlement is offered is different than in the Conley case, this case is distinguishable. The objection is sustained based on relevancy.

The Second Injury Fund also objects based on the rule against hearsay. The statements of disability contained in the document are clearly hearsay. However, the records offered constitute records of a public agency reflecting the activities of the agency and relate to matters observed pursuant to a duty imposed by law as to matters that there is a duty to report. Section 287.390 RSMo 1994. The records constitute a public records and judicial notice exception to the rule against hearsay long recognized by Missouri law. See Conley, supra, Section 536.070, RSMo

1994. The hearsay objection is not supported by Missouri law. However, the relevancy objection to Exhibits T and U is sustained.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 1994, because the accident occurred in Missouri.

SUMMARY OF FACTS

This forty-nine year old Claimant completed high school, studied engineering drafting and welding, and received a certificate in machinist work. The Claimant's vocational history includes work as a restaurant assistant manager and carhop, soldering fuses, and assembly line work.

This employer hired the claimant in 1977 to work on an assembly line until March 14, 1997. The Claimant's job titles included line worker, general utility, and relief man. These positions are all assembly line positions and require lifting air guns, bumpers, fenders, gas tanks, and rear control arms overhead, and attach these parts to cars. For the last five years, the Claimant worked on the rear springs of cars, which required that he retrieve springs from a bin, lift the springs overhead, and use an air gun to affix the springs in place. Since the assembly line was elevated six feet off the ground, the Claimant lifted and held in place twenty and thirty pounds overhead. The Claimant assembled sixty springs an hour, and 560 jobs in a shift. The Claimant had no supervisory duties.

Pre-existing Conditions

In March 1973, the Claimant weighed 320 pounds and underwent small bowel bypass surgery for morbid obesity. By February 8, 1977, the Claimant had lost 145 pounds and at one point, weighed 118 pounds. Due to a chemical imbalance in his system, the surgical procedure was reversed. While working for this self-insured employer, the Claimant weighed between 220-250 pounds. Claimant now weighs three hundred pounds.

In the early 1970's and 1980's, the Claimant had surgery to correct malalignment of his toes on both feet. See Exhibit S. He testified that the problem he suffered with his feet caused him trouble getting up from a sitting position, and walking a straight line. The Claimant suffered from these limitations while working and still has tingling, numbness, and pain in his feet if he stands for long periods.

Dr. Tanphaichitr evaluated the Claimant on September 13, 1991, and prescribed pain medication for the Claimant's pain in his legs, feet and hands. See Exhibit S. On November 1, 1991, the doctor reported pain in the back of the Claimant's neck and across his shoulders. See Exhibit S. On November 8, 1991, the Claimant had a cervical spine MRI revealed degeneration at C5-6 with ventral spur formation centrally and to the left of the midline. See Exhibit S.

In December 1991, the Claimant suffered a fractured left navicular that Dr. Frumson casted until May 22, 1992. See Exhibit M. Since this injury, the Claimant has had left wrist pain, less strength and mobility, and his left thumb locks up.

On April 15, 1992, Dr. Tanphaichitr reported that the Claimant had headaches and pain in his right shoulder. See Exhibit S. When Dr. Frumson evaluated the Claimant's left wrist on May 22, 1992, the doctor reported pain in the claimant's right shoulder. See Exhibit M. On July 15, 1992, Dr. Frumson recommended conservative care for a potential rotator cuff tear. See Exhibit M.

Dr. Frumson evaluated the Claimant on October 15, 1992, and reported pain and swelling in both of the claimant's hands with numbness and tingling. See Exhibit M. The Claimant reported that he had had pain in his right shoulder with loss of motion and power for a long time. See Exhibit M.

Due to ongoing wrist pain, Dr. Frumson performed a left carpal tunnel decompression on September 14, 1993. See Exhibits M, Q. On November 5, 1993, Dr. Frumson performed a right carpal tunnel decompression. See Exhibits M, Q. Dr. Frumson released the Claimant to return to work on January 24, 1994. See Exhibit M. Claimant testified that he does not have much feeling in his hands, that his left thumb locks up, and that he can't hold things tightly. He testified he does not have good strength, has less mobility, and has numbness.

On October 31, 1995, Dr. Fierstein performed an uvulopalatopharyngoplasty for obstructive sleep apnea. See Exhibit K. The Claimant wakes from sleep at night at inappropriate times and sleeps during the day at inappropriate times. Claimant testified that while at work, he fell asleep.

1996 Injury

Claimant testified that for many years while working, he suffered from bilateral shoulder and neck pain. On December 11, 1996, the in the Claimant's neck and bilateral shoulder pain was so extreme he could no longer work. The Claimant received prescription muscle relaxants and restrictions of no lifting above the waist, no bending and looking forward, and no lifting over ten pounds.

Dr. Fusco took cervical spine x-rays on January 7, 1997, revealing mild degenerative disc disease at C5-6 and C6-7 with spurs both anteriorly and posteriorly. See Exhibits C, G. A cervical spine MRI revealed foraminal stenosis at C5-6 secondary to diffuse posterior bone bar with eccentric osteophyte centrally and left paracentrally. See Exhibits C, G. There was also a diffuse posterior bone bar at C3-4 resulting in effacement and apparent flattening of the cervical spinal cord. See Exhibits C, G. There was bilateral neural foraminal encroachment greater on the right side secondary to a combination of uncinat and facet joint changes. See Exhibits C, G.

Dr. Bailey examined the Claimant on January 29, 1997, and reported neck, shoulder and bilateral arm pain beginning a couple of years before and worsening in the last few months. See Exhibit C. Dr. Bailey encouraged the Claimant to swim and stop smoking. The doctor prescribed medication and suggested evaluation of the Claimant's shoulders. See Exhibit C.

Claimant continued working from December 11, 1996, through March 14, 1997, performing light duty work of different errands at the plant.

On March 14, 1997, Claimant was beating out fenders with a hammer standing his entire shift and working ten hours a day, five days a week. The Claimant had trouble making the striking motion due to arm pain. The Claimant called the doctor and left work on medical leave with pain in both arms, shoulders and neck. On March 14, 1997, the Claimant determined he could not work for this employer any longer. The Claimant testified that in March 1997, Dr. Fusco prescribed Percocet for his bilateral shoulder and neck pain.

On April 9, 1997, the Claimant went to a hospital emergency room complaining of left hand and shoulder pain. See Exhibit D. Cervical spine x-rays showed a reversal of the cervical lordosis, degenerative disc disease at C5-6 and C6-7, and osteoarthritis of the facet joints-and the uncovertebral joints in the C4-7 region bilaterally. See Exhibit D.

Dr. Scherer evaluated the Claimant on April 22, 1997, and recorded intermittent left shoulder pain since 1970, but which became severe since December 1996 and causing him to stop working in March 1997. See Exhibit E. The doctor's impression was significant left shoulder tendinitis and possible rotator cuff tear. See Exhibit F. The doctor also reported significant cervical spinal stenosis with radicular pain in the left upper extremity. See Exhibit F. A left shoulder arthrogram on April 23, 1997, was consistent with a torn left rotator cuff tendon. See Exhibit F.

Dr. Lee examined the Claimant on May 22, 1997, and reported that the Claimant had difficulty turning his neck for the last three years, as well as pain in his neck radiating down both arms and popping in his neck, numbness in his fingers and grip weakness. See Exhibit J. Claimant told Dr. Lee that there had been a progression of symptoms. See Exhibit J.

On June 23, 1997, Dr. Lauryssen found that the Claimant had signs of C6 radiculopathy, which had been unresponsive to medical therapy. See Exhibit I. The doctor recommended obtaining a CT-myelogram and suggested that Claimant would significantly benefit from surgical decompression of C5-6. See Exhibit I. On August 29, 1997, the doctor found significant osteophyte formation at C5-6 and opined that this was partially responsible for the neck and bilateral arm pain and numbness. See Exhibit I.

Dr. Fusco examined the Claimant on July 17, 1997 and reported that the Claimant had cervical disc disease, left rotator cuff injury, stabilized hypertension and obstructive sleep apnea with the use of CPAP. The doctor opined that the Claimant was disabled due to the cervical disc disease and left rotator cuff injury alone.

On August 6, 1997, Dr. Fusco reported that although the Claimant had had neck and shoulder pain for several years, he had not been diagnosed with cervical disc disease until January 17, 1997. Claimant was not diagnosed with rotator cuff tear until April 1997. Dr. Fusco opined that the Claimant did not have any preexisting condition that constituted disability nor which would indicate an impending disability.

On September 2, 1997, Dr. Scherer opined that despite the rotator cuff tear on the left the posterior scapular pain was due to the spinal stenosis. See Exhibit F.

On December 2, 1997, Dr. Fusco reported that the Claimant could perform a sit down job with no more lifting than ten pounds.

On December 15, 1997, Dr. Madsen examined the Claimant and found severe cervical spondylosis and cervical stenosis secondary to soft tissue density consistent with a herniated nucleus pulposus at L5-6 as well as bony changes at the same interspace consistent with uncal hypertrophy as well as osteophyte formation or ossification of the posterior longitudinal ligament. See Exhibit F. He recommended surgery to reestablish the diameter of the spinal canal: See Exhibit F. He also noted the reversal of lordosis could be a concern and more of a disability in the long term. See Exhibit F. Though surgery was recommended on Claimant's shoulders and neck, he did not want surgery and has not had any surgery for this condition.

On May 27, 1998, Dr. Fusco examined the Claimant and doubted that the claimant could perform a desk job due to his chronic neck and shoulder pain and lack of recent nonmanual work. See Exhibit B.

In June 1998, the employer asked the Claimant to drive cars off the assembly line onto a parking lot. The Claimant performed this job for six hours of one shift but could not finish or continue due to neck pain from turning his head and bilateral shoulder pain from reaching into the glove compartment. At that time, the Claimant consumed Percocet. The Claimant did not return to work after June 1998 and testified that due to his neck and shoulder pain he cannot do any job for his employer.

The Claimant now has pain throughout his body. The Claimant testified his neck and shoulder pain has worsened since March 1997, and that he is tired all of the time. The Claimant testified he has problems concentrating and that his mind goes blank. He is able to drive but must be extremely cautious. The Claimant has pain in his neck and shoulders and a frequent pop in his neck. When the Claimant looks up and down, he feels he has gravel grinding in his neck. The Claimant suffers from extreme headaches once or twice a month that require he lay down the entire day. The Claimant must turn his entire body to look left and right. He can lift his arms only waist high and can lift twenty five to thirty pounds waist high. The Claimant can reach for a coffee cup with his left hand, but must use both hands to replace the coffee cup. The Claimant can lift a gallon of milk to his waist, but cannot get the carton from the refrigerator due to the height of the shelf.

The Claimant also has low back pain, and bilateral knee problems. He has difficulty walking in a straight line, walking up steps and must use a handrail. The Claimant now consumes Percocet two times a week, aspirin twenty times a day, Alieve, and Daypro. The Claimant testified his medicine makes him drowsy, and that his wife helps him take his medication, because he forgets.

Dr. Fusco

On July 2, 1998, Dr. Fusco testified that the Claimant is disabled and unable to work in any capacity, that the Claimant suffers from cervical disc disease and rotator cuff injuries to his shoulders causing chronic pain, for which the Claimant takes pain medication. See Dr. Fusco deposition, pages 9, 10. The doctor opined that the Claimant is not able to do sedentary work

because the Claimant takes narcotic medication and muscle relaxants. See Dr. Fusco deposition, pages 9, 10. The doctor explained that the Claimant's pain medications impair the Claimant mentally such that the Claimant is precluded from operating equipment and performing clerical work. See Dr. Fusco deposition, pages 9, 10. The doctor noted that the Claimant had had an uvulopalatopharyngeoplasty for obstructive sleep apnea and still suffers from daytime hypersomnolence. See Dr. Fusco deposition, page 26.

Dr. Fusco testified that the Claimant's work caused his current neck and shoulder condition. See Dr. Fusco deposition, page 8. He testified that due to the Claimant's neck and shoulder condition alone, the Claimant is precluded from driving cars off the assembly line, and precluded from doing assembly line work. See Dr. Fusco deposition, page 23. Dr. Fusco testified that the Claimant is limited mentally from the medication he is taking for neck and shoulder pain. See Dr. Fusco deposition, pages 15-16. The Claimant takes Percocet, which causes drowsiness, constipation, confusion, and lack of concentration and attention. See Dr. Fusco deposition, pages 21-22. Dr. Fusco testified that Claimant's concentration problems are also caused by chronic pain in his neck and shoulders. See Dr. Fusco deposition, page 27. He testified that the Claimant's sleep apnea condition contributes to the Claimant's total disability, but that the Claimant is totally disabled without the sleep apnea condition. See Dr. Fusco deposition, pages 16, 25, 28.

Dr. Cohen

On April 19, 1999 Dr. Cohen examined the Claimant and testified that on December 11, 1996, the Claimant suffered an overuse disorder or cumulative trauma disorder of his cervical spine, upper thoracic spine, and bilateral shoulders; cervical and upper thoracic myofascial pain disorder; cervical disc herniation at C5-6 with cervical spondylosis; left rotator cuff tear with impingement and right rotator cuff tendonitis with impingement. See Dr. Cohen deposition, pages 6, 13-16. The doctor testified that the Claimant has significant complaints of pain in his neck and shoulders, which increases with any movement of his head or lifting his arms above shoulder level. See Dr. Cohen deposition, pages 8, 9. The doctor testified that the Claimant has weakness in both arms and difficulty sleeping due to pain. See Dr. Cohen deposition, page 9. The pain in the Claimant's arms radiates down to his elbows. See Dr. Cohen deposition, page 9. Dr. Cohen testified that due to the diagnoses related to the December 1996 injury alone, the Claimant is incapable of performing his assembly line work. See Dr. Cohen deposition, page 34. Dr. Cohen testified that Percocet and Darvocet are narcotic medications that can cause patients difficulty concentrating and maintaining attention. See Dr. Cohen deposition, page 36. Dr. Cohen testified that the claimant has a 25% permanent partial disability of the person at the neck and upper thoracic area as a result of the primary work related injury, plus 25% at the left shoulder and 20% at the right shoulder. See Dr. Cohen deposition, page 16. Dr. Cohen rated the pre-existing disabilities at 15% each of the right and left ankle; 15% at the left wrist and 15% at the right wrist; plus 25% of the body as a whole due to the obstructive sleep apnea. See Dr. Cohen deposition, page 21. Dr. Cohen testified that the pre-existing conditions combined with the primary repetitive trauma disability to create a greater overall disability than their simple sum and, therefore, combine synergistically. See Dr. Cohen deposition, page 22. Dr. Cohen further testified that the pre-existing conditions and disabilities were a hindrance or an obstacle to Claimant's employment or re-employment before the primary injury diagnoses. See Dr. Cohen deposition, page 22. , Dr. Cohen further testified that Claimant is not capable of working and is

presently permanently and totally disabled. See Dr. Cohen deposition, page 23. Dr. Cohen's opinion was that the total disability was a result of the combination of his past and present disabilities. See Dr. Cohen deposition, page 23.

Mr. England

James England, a vocational rehabilitation expert, testified that the Claimant really had no transferable skills. See England deposition, page 41. Mr. England testified about Claimant's functional restrictions and limitations. Mr. England reported that the doctors recommended Claimant lift no more than 10 pounds as a permanent restriction, with no working overhead or bending and twisting, which didn't really leave anything that he knew a person would be able to do vocationally. See England deposition, page 45. Mr. England testified that the claimant is physically limited by his medical condition and that he is not employable in the open labor market. See England deposition, pages 46-47. Mr. England testified that no employer would consider hiring somebody with the claimant's combination of problems. See England deposition, page 47. Mr. England testified that even if an employer did hire Claimant, that he would not be able to sustain employment nor to last in any kind of employment setting even at a sedentary level. See England deposition, page 47. Mr. England testified that the claimant is not effectively able to compete for employment in the open labor market. See England deposition, page 48. Mr. England testified that the Claimant is permanently and totally disabled from all work and that the pre-existing hand injuries, feet problems and sleep apnea were each a hindrance and obstacle to Claimant's employment before the culmination of his neck and shoulder conditions. See England deposition, page 48. Mr. England testified that if Claimant was unable to perform driving cars off the end of the assembly line that there was not anything else that he could do. See England deposition, page 50. Mr. England testified that any previous machinist training which Claimant had at Metro Business College would probably not be usable because it had been so long since he had learned that and had never used it. See England deposition, page 56. Mr. England testified that concentration is probably a key to Claimant's condition because if you can't pay close attention there wouldn't be much point in having any kind of a job. See England deposition, page 60. Mr. England further testified that he could not envision Claimant lasting in any kind of a work setting with the combination of problems, which he has. See England deposition, page 63.

Dr. Cantrell

Dr. Cantrell examined the Claimant on August 18, 1999, and testified that the Claimant's complained of posterior neck pain and headaches, pain in both arms, shoulder and elbow regions. The doctor testified that the Claimant had complaints of pain with right and left side bending and a pulling sensation in the neck with forward flexion and extension. The Claimant had a decreased active range of motion of both shoulders during flexion and abduction movements. The doctor testified the Claimant's current medication included Percocet, Darvocet, aspirin, antihypertensive medication, diuretic and vitamin supplement. Dr. Cantrell concluded that the Claimant's neck and bilateral shoulder pain was not causally related to his job duties, but was more consistent with progressive degenerative osteoarthritis. The doctor testified that the Claimant's work might serve as temporary exacerbating factor, but the substantial cause of the Claimant's condition's osteoarthritis. Dr. Cantrell testified that the Claimant's work certainly is an exacerbating factor in causing the Claimant's symptoms, but not the substantial factor.

Dr. Cantrell testified that the rotator cuff tear in the claimant's left shoulder was caused by micro trauma. Dr. Cantrell testified that Claimant's twenty year work history of extreme weight pressure and using power tools overhead was only a minor contributing factor but not a substantial causative factor of the torn rotator cuff. See Dr. Cantrell deposition, page 18. Dr. Cantrell rated the claimant's bilateral shoulder disability at 3-4% permanent partial disability to from the overhead work activities causing pain associated with arthritis. Dr. Cantrell rated the Claimant's cervical spine disability at four percent permanent partial disability of the body as a whole secondary to exacerbation of pre-existing degenerative joint disease at the cervical spine, which was caused by the activity he was performing while he was working. See Dr. Cantrell deposition, page 25. Dr. Cantrell testified that this four percent disability was attributable to pain caused by work. See Dr. Cantrell deposition, pages 26-27. Dr. Cantrell further testified that the work process caused the 3% disability of each shoulder secondary to exacerbation of underlying AC osteoarthritis with secondary rotator cuff tendinitis. See Dr. Cantrell deposition, page 27. Dr. Cantrell testified that he did not evaluate any of the claimant's prior medical problems. See Dr. Cantrell deposition, page 28.

FUTURE MEDICAL CARE

Section 287.140.1, RSMo, requires the employer to provide medical treatment as a component of an employee's compensation due to injury. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). The pertinent portion of the statute reads, "[I]n addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Where future medical benefits are to awarded, the medical care must of necessity flow from the accident, via evidence of a "medical causal relationship" between the injury from the condition and the compensable injury, before the employer is to be held responsible. Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985). It is not necessary for a claimant seeking future medical benefits to produce conclusive evidence to support the claim, but the employee need only show a need for additional medical treatment by reason of the compensable accident as a reasonable probability. A mere possibility of a need for future medical care does not constitute substantial evidence to support an award, but if a medical expert testifies as to there being a reasonable probability (founded on reason and experience which inclines the mind to believe but leaves room for doubt) for the treatment, then it maybe - ordered. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). "The right to obtain future medical treatment should not be denied merely because it has not yet been prescribed or recommended as of the date of the date of the workers' compensation hearing." Mathia, 929 S.W.2d at 277. The compensation law does not require a worker to wait until he finds himself totally disabled in order to file a claim for compensation. Mickey v. City Wide Maint., 996 S.W.2d 144 (Mo.App. W.D. 1999).

Dr. Fusco opined that the claimant's chronic neck and shoulder conditions require ongoing anti-inflammatories, analgesics, and muscle relaxants and that the claimant's work-related activities were a substantial factor compelling the medical requirements. See Dr. Fusco deposition, page 11. Dr. Cantrell, who examined the claimant on August 18, 1999, opined that the claimant's symptoms are "associated with osteoarthritis in his shoulders and neck. Relative to a specific, injury he's reported, I don't think any further treatment is necessary. ... There [are]

no further treatments ... regarding the pain complaints he was having while he was working. First off, he's no longer working, so in theory if the work is causing the pain he shouldn't be hurting anymore. He's still hurting and he's hurting because he's got arthritis, not because of the job he was doing. He remains symptomatic even though he's been retired for well over a year. Again, the symptoms, that kind of supports it being an underlying degenerative problem." See Dr. Cantrell deposition, pages 5, 24, 25.

Dr. Fusco treated the claimant's condition over a long period and offered credible conclusions regarding the claimant's condition and prognosis. Dr. Cantrell examined the claimant once. Dr. Fusco's conclusions are more credible given the length of his relationship to the claimant's condition and his role as treating physician. The claimant is awarded ongoing anti-inflammatories, analgesics, and muscle relaxants and follow-up care by a medical care provider selected by the employer to regulate the medications.

TEMPORARY DISABILITY

Compensation must be paid to the injured employee during the continuance of temporary disability but not more than 400 weeks. Section 287.170, RSMo 1994. Temporary total disability benefits are intended to cover healing periods and are unwarranted beyond the point at which the employee is capable of returning to work. Brookman v. Henry Transp., 924 S.W.2d 286, 291 (Mo.App. E.D. 1996). Temporary awards are not intended to compensate the Employee after the condition has reached the point where further progress is not expected. *Id.* The claimant stopped working after March 13, 1997, and Dr. Fusco opined on January 7, 1998, that the claimant would never return to work. See Exhibit B. The employer unsuccessfully attempted to return the claimant to work on June 25, 1998. See Exhibit B. The claimant is awarded temporary total disability benefits from March 14, 1997, to January 7, 1998, 42 6/7 weeks.

PERMANENT DISABILITY

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. 466 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). The standard for determining whether Claimant was permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. Joulzhouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997).

Given the overwhelming expert findings from Mr. England, Dr. Cohen, and Dr. Fusco and no substantial evidence to the contrary, the Claimant is permanently and totally disabled. The issue in this case is whether the Employer or the Second Injury Fund bears liability for the permanent total disability.

The Second Injury Fund can only be liable for permanent total benefits when a "prior injury combines with a later, on the job injury so as to produce permanent and total disability that

would not have resulted in the absence of the prior disability or condition." Wuebbling v. West County Drywall, 898 S.W.2d 615, 616-617 (Mo.App. 1995). If the primary injury is serious enough to disable the claimant permanently and totally, then it is irrelevant if any injury or condition pre-existed the primary injury. Messex v. Sachs Elec. Co., 989 S.W.2d 206, 215 (Mo.App. E.D. 1999).

An employer is liable for permanent total disability compensation under RSMo §287.200 (1994) where there is evidence in the record that the primary accident alone caused the employee to be permanently and totally disabled. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 276 (Mo.App. 1996); Moorehead v. Lismark Distributing Co., 884 S.W.2d 416, 419 (Mo.App. 1994); Roby v. Tarleton Corp., 728 S.W.2d 586, 589 (Mo.App. 1987). The first step in determining Second Injury Fund liability is to determine the amount of disability caused by the last accident alone in isolation. Kizor v. Trans World Airlines, 5 S.W. 2d 195, 200 (Mo.App. W.D. 1999).

Before December 11, 1996, the Claimant worked on an assembly line affixing rear springs onto automobiles. This job required the Claimant to retrieve the rear spring, lift the rear spring into place, and affix the spring with an air gun. The assembly line was situated six feet in the air, and all the lifting and affixing was overhead. The Claimant assembled sixty rear springs per hour and 560 rear springs in a shift. Both Dr. Fusco and Dr. Cohen testified that the Claimant's overhead work caused his current neck and shoulder condition.

In this case, the Claimant's primary claim includes repetitive use injuries to both shoulders and neck. Dr. Cohen testified that on December 11, 1996, the Claimant suffered from an overuse disorder or cumulative trauma disorder of the cervical spine, upper thoracic spine, and bilateral shoulders; cervical and upper thoracic myofascial pain disorder; cervical disc herniation at C5-6 with cervical spondylosis; left rotator cuff tear with impingement and right rotator cuff tendonitis with impingement. See Dr. Cohen deposition, pages 12-14. The doctor testified that the Claimant has significant complaints of pain currently in his neck and shoulders, which increases with any movement of his head or lifting his arms above shoulder level. See Dr. Cohen deposition, pages 8, 9. The doctor testified that Claimant has weakness in both arms and difficulty sleeping due to pain. See Dr. Cohen deposition, page 9. The pain in Claimant's arms radiates down to his elbows. See Dr. Cohen deposition, page 9.

As a result of these injuries, Claimant received permanent work restrictions of no working overhead, no lifting more than ten pounds, no repetitive lifting, no repetitive movement with either arm, and no turning the head repeatedly. See Dr. Fusco deposition, pages 20, 21. However, the claimant's narcotic medication for chronic neck and shoulder pain medication has drowsiness side effects impairing his concentration and attention. See Dr. Fusco deposition, page 21; Dr. Cohen deposition, pages 34-36.

Due to the last injury alone, the Claimant can no longer perform assembly line work for this employer. See Dr. Cohen deposition, page 34; Dr. Fusco deposition, page 23. Since the Claimant's position required overhead work, Mr. England, Dr. Cohen, and Dr. Fusco testified that the restrictions from the last injury alone totally disable the Claimant from performing his prior relevant work for this employer. See Dr. Cohen deposition, page 34; Dr. Fusco deposition, page 23; England deposition, page 55.

Due to the last injury alone, the Claimant, is not capable of driving cars off an assembly line. After the Claimant quit working in March 1997, the employer offered the Claimant a light job requiring that he drive cars off an assembly line to a parking lot. The Claimant testified that he was unable to do this job, because it required that he repeatedly turn his head to check for other cars and reach with his right arm into the glove compartment. Mr. England and Dr. Fusco testified that the restrictions from the primary injury alone make it impossible for the Claimant to perform this job. See England deposition, page 55; Dr. Fusco deposition, page 23.

Due to the primary injury alone, Claimant can no longer perform any job utilizing his soldering skills or machinist training. See England deposition, page 57. Mr. England testified that Claimant's only transferable skills are in soldering. See England deposition, page 57. Mr. England also testified that Claimant is not capable of using his soldering skills in an employment setting, due to pain in his arms and neck. See England deposition, page 57. Mr. England testified that the lifting restriction from the primary injury would preclude Claimant from performing as a machinist. See England deposition, page 58.

Due to the primary injury alone, the Claimant cannot work at any light or sedentary job. Mr. England testified that the drowsiness side effects from the pain medication preclude Claimant from performing as a hotel night clerk, self-service cashier, sitting security guard, and other sedentary occupations that do not involve repetitive use of the arms, but do require close attention to detail. See England deposition, pages 55-60. His opinion assumes the last injury impaired the Claimant's concentration and attention to detail.

In this case, the Claimant's chronic pain and medication impair his ability to concentrate and maintain attention. See Dr. Fusco deposition, page 21. Dr. Fusco testified that the Claimant consumes Percocet with side effects of drowsiness, constipation, and confusion. See Dr. Fusco deposition, page 21. Dr. Fusco testified that Claimant is limited mentally due to the side effects of his pain medication and muscle relaxants. See Dr. Fusco deposition, page 22. On May 27, 1998, Dr. Fusco reported that the Claimant complained of difficulties concentrating and maintaining attention due to the pain medication. See Exhibit B. Dr. Fusco testified that the Claimant's chronic neck and bilateral shoulder pain also reduces the claimant's attention and concentration. See Dr. Fusco deposition, page 22.

Due to the primary injury alone, the Claimant is permanently and totally disabled. Dr. Fusco testified that Claimant suffers from a combination of physical problems, including preexisting sleep apnea. However, Dr. Fusco also testified that if the Claimant did not suffer from sleep apnea, he would still be permanently and totally disabled from the effects of his primary injury alone. See Dr. Fusco deposition, pages 16, 25, 28. Given Dr. Fusco's long relationship as the treating physician, his findings are more credible than those of the other physicians. For instance, Dr. Cohen didn't even know what medications the claimant consumed. See Dr. Cohen deposition, page 34. Dr. Cantrell did not consider the effect of any preexisting condition.

The self-insured employer's counsel zealously argued in his brief that Dr. Fusco's testimony should be given less weight than that of the other experts, because he focused only on the effects of the last injury and disregarded the claimant's prior disabilities. However, this appears to be the approach mandated by the above authorities and is the only expert to so opine.

Kizior, supra. The crux of the defense position appears to be Dr. Cantrell's assertion that the claimant suffered from pre-existing progressive degenerative arthritis and that the claimant's work was not a substantial factor causing the claimant's disability. See Dr. Cantrell deposition, pages 22, 23. However, the other two experts found that the claimant's work was a substantial factor causing the claimant's disability. The credentials of the experts appear to be similar, but Dr. Fusco was the treating physician and had a greater opportunity to observe the claimant's condition and its progression. Further, he was the only expert that knew the medications consumed by the claimant and its impact on the claimant's concentration and attentiveness. The greater weight of the evidence is that the claimant's work was a substantial factor causing the claimant's disability. Although Dr. Cantrell attempts to minimize the extent of the disability that was work-related (four percent of the cervical spine and three percent of each shoulder), his distinction is contrary to the weight of the other evidence, and he bears no greater credentials to distinguish the origin of the condition than the other experts based on the practice and board certifications in the record. Although his distinctions have a common sense appeal, the greater weight of the expert evidence is to the contrary.

The Claimant is unemployable in the open labor market and therefore permanently and totally disabled from the primary injury alone without regard to any prior disability or condition. The self-insured employer bears liability to pay the claimant permanent total disability benefits for the claimant's life.

SECOND INJURY FUND

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

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 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. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
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. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

6. In cases arising after August 27, 1993, the extent of both the preexisting 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 Second Injury 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 reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

The role of the Second Injury Fund in cases where the claimant becomes unemployable is to remove...

... the incentive to discriminate against disabled workers by offering assurance to employers that if the prior disability combines with a later, on-the-job injury so as to **produce permanent and total disability that would not have resulted in the absence of the prior disability or condition**, the employer's liability will be no greater than it would have been if the employee had been a perfectly healthy, non-disabled worker. The balance of the compensation for the employee's permanent and total disability is provided by the Second Injury Fund, which in effect spreads the risk attendant to the employers of disabled workers among all insurance carriers contributing to the Fund. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 617, 618 (Mo.App. E.D. 1995)

However, Fund liability is only triggered by a finding of the presence of an actual and measurable disability at the time the work injury is sustained. The "degree or percentage of disability" which existed prior to the work injury and the resultant disability must be deducted from the combined disability for calculation of Fund liability. Section 287.220.1. **If all of Claimant's disability is from the work injury, then there is no Fund liability.** However, if there is any

percentage of Claimant's disability that is not attributable to the work injury, then the Fund becomes liable for the difference. The employer and insurer, and claimant, are required to offer evidence to support a finding that apportions the percentage of the work-related injury and the percentage of the degenerative disc disease. The extent or percentage of disability from the preexisting condition must be ascertained if Section 287.220.1 is to be given any meaning. Messex v. Sachs Elec. Co., 989 S.W.2d 206, 215 (Mo.App. E.D. 1999).

In Maas v. Treasurer of State of Mo., 964 S.W.2d 54.1 (Mo.App. E.D. 1998), the evidence compelled a finding that the claimant "became permanently and totally disabled solely as a result of the work-related accident and without regard to any preexisting conditions," and the court sustained the denial of the claim. In Roller v. Treasurer of State of Mo., 935 S.W.2d 739 (Mo.App. S.D. 1996), the Court sustained a finding that the claimant was permanently and totally disabled solely as a result of the last accident, that the employer would have been liable for such permanent and Total disability had the claimant not settled her claim against her employer, and that the Second Injury had no liability. The evidence in this case compels a similar finding. Thus, the self-insured employer bears legal responsibility for permanent total disability since the parties have not elected to compromise the claim. The Second Injury Fund has no liability.

To complete the record, the claimant suffered from pre-existing disabilities at 15% each of the right and left ankle; 15% at the left wrist and 15% at the right Wrist; plus 25% of the body as a whole due to the obstructive sleep apnea. See Dr. Cohen deposition, page 21. The pre-existing conditions combined with the primary repetitive trauma disability synergistically. See Dr. Cohen deposition, page 22. The pre-existing conditions and disabilities were a hindrance or an obstacle to the Claimant's employment or re-employment before the primary injury diagnoses. See Dr. Cohen deposition, page 22. The Claimant is not capable of working and is presently permanently and totally disabled. See Dr. Cohen deposition, page 23. Dr. Cohen's opinion was that the total disability was a result of the combination of his past and present disabilities. See Dr. Cohen deposition, page 23. However, Dr. Cohen was unaware of the pain medication with drowsiness side effects that the claimant consumed as a result of the neck and shoulder injuries. See Dr. Cohen deposition, pages 34, 36. Although Dr. Cantrell testified that the claimant was employable, Mr. England's expertise as a vocational counselor renders his finding that the claimant is unemployable due to his cervical and bilateral shoulder pain and drowsiness side effects from the claimant's pain medication more credible.

Date: May 24, 2000


Edwin J. Kohner
Administrative Law Judge Division
of Workers' Compensation

Jo Ann Karll,
Director
Division of Workers' Compensation

CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

James L. Winberry, deceased.)
Barbara J. Winberry, individually, and as)
next friend of Jacob Winberry, Joshua)
Winberry, Hannah Winberry, John Winberry)
minor children, and Heather Winberry, and)
James Winberry, dependents)

Plaintiffs,)

v.)

Treasurer of Missouri, as Custodian of)
the Second Injury Fund,)
)
Defendant,)

serve,)
Sarah Steelman,)
State Treasurer)
201 W. Capitol Ave.)
Capitol Building, Room 229)
Jefferson City, MO 65101 (Cole County))

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PETITION TO ENFORCE ADMINISTRATIVE ORDER

COME NOW, the Plaintiffs and for their cause of action to enforce an order of the Missouri Labor and Industrial Relations Commission (LIRC) pursuant to RSMo 287.500(2000) and state:

1. Employee, James L. Winberry, was awarded Workers' Compensation benefits including Permanent Total Disability benefits by the Labor and Industrial Relations Commission of the State of Missouri, in case number 96-433317; final order entered

December 7, 2000. A certified copy of the decision of the LIRC is attached and marked

Exhibit 1. Said injury occurred on December 11, 1996 in St. Louis County Missouri.

2. James L. Winberry and Barbara J. Winberry were married on September 12, 1980 in St. Louis, Missouri. Barbara J. Winberry and James L. Winberry were never divorced.

3. James L. Winberry and Barbara J. Winberry have six surviving children, all of whom were dependent upon James L. Winberry for support, namely Jacob Winberry a minor, date of birth 6-25-97; Joshua Winberry a minor, date of birth 1-1-95; Hannah Winberry a minor, date of birth 3-1-93; John Winberry a minor, date of birth 2-18-91; Heather Winberry, afflicted with neurofibromatosis, date of birth 11-11-87 and James Winberry, a disabled person, date of birth 10-1-83.

4. James L. Winberry died on February 16, 2006.

5. In January 2007, the Supreme Court of Missouri handed down its opinion in Schoemel v. Treasurer of Missouri, SC87750 (MO 2007), which allowed dependents of a deceased recipient of Permanent Total Disability benefits against the Second Injury Fund to continue receiving payments for the duration of the dependents' lifetimes, after the Employee's death.

6. On May 2, 2007, the Labor and Industrial Relations Commission handed down an order indicating that it lacked jurisdiction to enter an order continuing payments to the deceased employee's dependents. A certified copy of that order is attached as Exhibit 2.

2. Barbara J. Winberry, presumed dependent of James L. Winberry, deceased,

and her children, Jacob, Joshua, Hannah, John, Heather and James Winberry, have filed an affidavit with the LIRC (see Exhibit 3 attached) and have requested the LIRC to substitute her as dependent in place of her deceased husband the employee, for herself and for her dependent minor children (see Exhibit 4 attached).

WHEREFORE, Barbara J. Winberry as surviving widow and presumed dependent of James L. Winberry, deceased requests the Court to enter its order pursuant to RSMo 287.500 (2000) rendering judgment in accordance with said order and substituting Barbara J. Winberry and her dependent children, Jacob, Joshua, Hannah, John, Heather and James Winberry as dependents; to order any and all back payment of benefits from the date of James L. Winberry's death to the dependents; to enter its order continuing Permanent Total Disability payments to the dependents and for interest as provided by law and for their costs herein expended.

GAULT & WARNER, LLC

By 

JEFF GAULT #28734

222 Central, #500

Clayton, MO 63105

Phone: (314) 863-2230 Fax: (314) 863-2348

287.200. Permanent total disability, amount to be paid--suspension of payments, when

1. Compensation for permanent total disability shall be paid during the continuance of such disability for the lifetime of the employee at the weekly rate of compensation in effect under this subsection on the date of the injury for which compensation is being made. The amount of such compensation shall be computed as follows:

(1) For all injuries occurring on or after September 28, 1983, but before September 28, 1986, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings during the year immediately preceding the injury, as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to seventy percent of the state average weekly wage, as such wage is determined by the division of employment security, as of the July first immediately preceding the date of injury;

(2) For all injuries occurring on or after September 28, 1986, but before August 28, 1990, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings during the year immediately preceding the injury, as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to seventy-five percent of the state average weekly wage, as such wage is determined by the division of employment security, as of the July first immediately preceding the date of injury;

(3) For all injuries occurring on or after August 28, 1990, but before August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred percent of the state average weekly wage;

(4) For all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage;

(5) For all injuries occurring on or after September 28, 1981, the weekly compensation shall in no event be less than forty dollars per week.

2. All claims for permanent total disability shall be determined in accordance with the facts. When an injured employee receives an award for permanent total disability but by the use of glasses, prosthetic appliances, or physical rehabilitation the employee is restored to his regular work or its equivalent, the life payment mentioned in subsection 1 of this section shall be

suspended during the time in which the employee is restored to his regular work or its equivalent. The employer and the division shall keep the file open in the case during the lifetime of any injured employee who has received an award of permanent total disability. In any case where the life payment is suspended under this subsection, the commission may at reasonable times review the case and either the employee or the employer may request an informal conference with the commission relative to the resumption of the employee's weekly life payment in the case.

287.470. Commission may review and change award

Upon its own motion or upon the application of any party in interest on the ground of a change in condition, the commission may at any time upon a rehearing after due notice to the parties interested review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall immediately send to the parties and the employer's insurer a copy of the award. No such review shall affect such award as regards any moneys paid.

287.500. Circuit court may act upon memorandum--procedure

Any party in interest may file in the circuit court of the county in which the accident occurred, a certified copy of a memorandum of agreement approved by the division or by the commission or of an order or decision of the division or the commission, or of an award of the division or of the commission from which an application for review or from which an appeal has not been taken, whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though said judgment were a final judgment which had been rendered in a suit duly heard and determined by said court. Any such judgment of said circuit court unappealed from or affirmed on appeal or modified in obedience to the mandate of the appellate court, whenever modified on account of a changed condition under section 287.470, shall be modified to conform to any decision of the commission, ending, diminishing or increasing any weekly payment under the provisions of section 287.470 upon the presentation to it of a certified copy of such decision.