

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

Injury No.: 99-068541

Employee: Jesse Bunch
Employer: Yellow Freight System (Settled)
Insurer: Gallagher Bassett Services (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: June 2, 1999

Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 26, 2006. The award and decision of Administrative Law Judge Suzette Carlisle, issued June 26, 2006, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 22nd day of December 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jesse Bunch

Injury No.: 99-068541

Dependents: N/A

Employer: Yellow Freight System (settled)

Additional Party: Second Injury Fund

Insurer: Gallagher Bassett Services (settled)

Hearing Date: March 21, 2006

Before the
**Division of Workers'
Compensation**

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: SC: 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: June 2, 1999.
5. State location where accident occurred or occupational disease was contracted: 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: While exiting a tractor trailer, the employee injured his right knee when his foot became caught on a running board, twisting his right knee, causing it to pop.
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: Right knee.
14. Nature and extent of any permanent disability: 30% referable to the right knee.
15. Compensation paid to-date for temporary disability: \$14, 912.01.
16. Value necessary medical aid paid to date by employer/insurer? \$16,920.31.

Employee: Jesse Bunch

Injury No.: 99-068541

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$705.28
19. Weekly compensation rate: \$470.29/\$294.73
20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Second Injury Fund liability: Yes

37.4625 weeks of permanent partial disability from Second Injury Fund

TOTAL: **\$11, 041.32**

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 20% of all past and future Second Injury Fund payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ann G. Dalton.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Jesse Bunch	Injury No.: 99-068541
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Yellow Freight System (settled)	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Gallagher Bassett Services (settled)	Checked by: SC:tr

PRELIMINARIES

Pursuant to Section 287.450 RSMo., a hearing was held on March 21, 2006, at the Division of Workers' Compensation in the City of St. Louis at the request of Jesse Bunch (Claimant) to determine whether Claimant is entitled to receive compensation for permanent total disability (PTD) from the Second Injury Fund (SIF). The record closed after the hearing. Claimant was represented by attorney Ann G. Dalton and the SIF was represented by attorney Kevin A. Nelson. Yellow Freight System (Employer) and Gallagher Bassett Services (Insurer) settled their case with Claimant prior to the hearing and did not participate in the proceeding. Venue is proper and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

The parties have stipulated to the following: 1) On or about June 2, 1999, the Claimant sustained an accidental injury while working for Employer in St. Louis, Missouri, 2) The Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation Law, 3) The Employer was self-insured, 4) Employer had notice of the injury, 5) The Claim for Compensation was filed within the time prescribed by law, 6) At the relevant time, Claimant's average weekly wage was \$705.28, his rate for temporary total disability (TTD) was \$470.29 and \$294.73 for permanent partial disability (PPD), 7) Employer paid \$14,912.01 in TTD benefits and \$16,920.31 in medical benefits.

The issue to be decided is whether the SIF is liable to pay Claimant for either PTD or PPD benefits, and if so, to what degree?

SUMMARY OF EVIDENCE

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled upon in this award are overruled. Claimant offered Exhibits A-J. Exhibits A and C-J were admitted without objection. A ruling on Exhibit B was reserved and the Exhibit was later admitted after a review of the evidence.

Claimant's Live Testimony

Claimant is a sixty-four year old high school graduate with certification from Bailey Technical School in diesel and automotive mechanics and aircraft mechanic training with the United States Navy in the 1960s. He was honorably discharged after four years of service. He worked as a diesel mechanic before and after military service for a total of thirty four years. As a diesel mechanic for Employer, he performed brake work, maintained and overhauled engines, and welded.

In the performance of his work, he used hand tools, hydraulic pressure, large impact tools, jacks and wrenches weighing up to fifty pounds. Climbing, kneeling, working in awkward positions, and lifting up to one-hundred pounds were activities Claimant performed without help on a daily basis. Claimant input a limited amount of data into the computer but his performance did not require bookkeeping, inventory, receiving or supervisory skills. Claimant worked for Employer for thirty years. He has not worked anywhere since he was injured at work on June 2, 1999 due to the work restrictions, inability to perform tasks and his belief that he is no longer a good employee.

On June 2, 1999, Claimant was working on a tractor trailer when his foot became caught on the running board, twisting his right knee and causing it to pop. Dr. Fagan performed surgery on Claimant's right knee on June 9, 1999. After surgery he had weakness, pain, and limited range of motion, problems in climbing ladders and walking on uneven surfaces, swelling, left knee pain and he was unable to complete work hardening. Dr. Fagan released him from treatment on January 11, 2000 with permanent restrictions of no kneeling, squatting, crawling or lifting heavy weights, but he could not return to Employer with those restrictions.

Dr. Maylack performed Claimant's right knee replacement in January 2002 and a revision surgery in February 2003. Claimant received workers' compensation benefits for the June 1999 injury based on PPD of 30% of his right knee (Exhibit B). Claimant testified his right knee is worse since the June 1999 injury, with increased pain, decreased range of motion, popping, stiffness, swelling and difficulty in standing or sitting, although walking is better.

Now he has good and bad days and has to lay down when activity or weather causes general aches. He spends the day in the house when the pain is worse.

Upon cross-examination, Claimant admitted that before the June 1999 injury, he could bend, stoop, crawl, climb, and lift heavy tools in awkward positions, while working more than forty hours per week without prescription medication, accommodations or restrictions.

Before the June 1999 injury, Claimant had sustained injuries to both his knees, back, neck and left wrist, but he returned to a physically demanding job without restrictions after each injury, did not change jobs, and worked overtime without medication prior to the June 1999 injury.

- Claimant missed six weeks work after arthroscopic surgery performed by Dr. Vierling on his right knee on March 4, 1987. He was released to full duty, without restrictions. After treatment, he moved more slowly, standing or walking caused pain, he was unable to straighten the knee or squat, and it swelled. Mowing with a push mower and gardening were more difficult and required Claimant to take aspirin.
- Claimant required surgery on his left knee after injuring it at work on April 4, 1996. Six weeks later, he returned to work without restrictions and settled the case with his Employer for 30% PPD of the left knee. After treatment, Claimant complained of weakness, pain, limited range of motion, increased difficulty climbing ladders, and walking on uneven surfaces or down stairs. He slowed down, limited heavy lifting, and switched to a riding lawnmower.
- Dr. Mitchell Rotman performed a carpal tunnel release on Claimant's left wrist in August, 1997. After missing five weeks from work, Claimant returned to work without restrictions and settled the case with his Employer for 31.5 % PPD of the left wrist, due to limited range of motion, pain, decreased grip strength, the need for help when working, and increased use of aspirin.
- Claimant received conservative treatment from Dr. Lord in the 1980's for back problems. The treatment consisted of physical therapy, traction and a corset. After the injury, he experienced pain when bending to lift heavy objects or when engaged in twisting motions, and he continued to seek help at work and home.
- Claimant sought treatment from Dr. Caskanett for neck problems in the 1980's. Claimant complained of pain through his shoulders which slowed him down and caused him to ask for help at work and home.

Dr. Volarich examined Claimant twice for knees, back, left wrist and neck problems. Claimant also interviewed with Mr. Brethauer, a vocation rehabilitation counselor. Since the 1999 injury, Claimant's problems include bilateral knee weakness and difficulty walking on uneven surfaces, climbing, and difficulty with prolonged sitting, standing, driving, sleeping, and activity. Weather changes occasionally affect his back and knees. Prior to the June 1999 injury, he stopped turkey hunting and walking in streams to fish. Claimant takes aspirin for his knees, wrist and back.

Medical Records Review

Claimant presented at Healthline on June 2, 1999, complaining of an inability to fully extend his right knee after twisting it while exiting a trailer. X-rays identified advanced degenerative arthritis, found not to be work related, a degenerative baker's cyst, and a loose body impinging the knee. Claimant was placed on limited duty, with no squatting, kneeling, or crawling and referred to Dr. Rende (Exhibit A).

Dr. Fagan, an orthopedic physician in Dr. Rende's office, examined Claimant and on June 9, 1999, removed a large spur from the inferior pole of the patella, a loose body from the intercondylar notch, repaired a lateral meniscus tear and discovered degeneration to exposed bone in the patella region (Exhibit A).

Although Dr. Fagan discontinued therapy in August 1999 Claimant still complained of pain and swelling, limited range of motion and difficulty sitting in a chair. Dr. Fagan informed Claimant he may need a knee replacement in the future due to arthritis. He did not believe the June 1999 injury worsened the arthritis because Claimant already had severe arthritis and was functioning until an osteophyte was knocked off, requiring surgery.

In November 1999, Dr. Fagan found Claimant had reached maximum medical improvement and could return to work with limited lifting, and no kneeling or squatting. However, Claimant requested another month to decide if he was able to return to work.

By December, Claimant reported his right knee was getting worse, with widespread pain. He was unable to return to work, so Dr. Fagan prescribed work hardening. Claimant reported increased problems from work hardening. The physical therapist reported Claimant's inability to progress with either physical therapy or work hardening, so Dr. Fagan ordered a Functional Capacity Evaluation (FCE)

Bill Frazen Jr, the FCE evaluator, reported Claimant complained of increased knee pain with steps, squats or prolonged standing or walking and he functioned below the Heavy work demand level required to perform his job. Claimant was concerned about prolonged standing, walking and climbing activities at work.

In January 2000, Dr. Fagan established permanent restrictions for Claimant as follows: 1) No overhead lifting over eighty pounds, 2) No lifting over one hundred pounds from floor to shoulder and 3) No kneeling or crawling. Dr. Fagan opined the only treatment was a knee replacement, which he did not recommend as it could loosen quickly, leaving Claimant unable to return to heavy work.

Dr. Maylack examined Claimant on December 19, 2001 with a long history of right knee pain and dysfunction, multiple surgeries and trauma in June 1999, and Dr. Maylack recommended a right total knee replacement which was performed on January 16, 2002.

Dr. Maylack opined the June 1999 work injury was a contributing factor in Claimant needing a total knee replacement but most likely is a pre-existing condition related to prolonged standing and previous injuries. He concluded the June 2, 1999 injury was not the substantial factor contributing to the need for a right total knee replacement, which accelerated arthritis in the knee. Later, he amended his opinion and stated the June 2, 1999 injury was both a contributing and substantial factor in Claimant's need for a right total knee replacement. On February 10, 2003, Dr. Maylack revised Claimant's right knee because it had become loose (Exhibit A).

Claimant's prior injuries include: 1) Right knee arthroscopic surgery on March 4, 1987 where Grade 2 and 3 changes were found (Exhibit A), and 2) Pain in the low back, tailbone, and left buttock in 1989. X-rays of the back were negative. Physical therapy, a corset and medication were prescribed (Exhibit C), 3) A left knee partial medial meniscal tear surgically repaired (Exhibit E), 4) Traumatic left carpal tunnel syndrome surgically repaired with diagnosed degenerative left wrist changes (Exhibit F), and 5) Neck and shoulder pain treated conservatively between September 1993 and December 1995 for approximately eight visits (Exhibit H).

Deposition Testimony

Dr. David T. Volarich, a board certified disability evaluator, examined Claimant twice at the request of Claimant's attorney, first on January 22, 2001, and later on November 11, 2003. A supplemental report from the first examination was issued March 8, 2001. Dr. Volarich diagnosed the following conditions related to the January 1999 injury: 1) Right knee torn lateral meniscus with aggravation of degenerative arthritis, 2) Persistent right knee pain, post total joint replacement, 3) Poor outcome for right knee arthroplasty, redo patellar component, 4) Persistent right knee pain – poor outcome, 5) Left hip aggravation, degenerative arthritis with pain due to abnormal weight bearing from right knee joint replacement (Exhibit I-9).

Dr. Volarich opined that the June 2, 1999 injury was a substantial factor in Claimant's need for arthroscopic surgery and a later total knee joint replacement and revision. Dr. Volarich rated Claimant's right knee 60% PPD following the June

2, 1999 injury and found the disability to be a hindrance or obstacle to his employment. He found Claimant's left hip arthritis was aggravated due to abnormal weight bearing from the right leg, but did not rate the disability because Claimant was not at maximum medical improvement (Exhibit I-9).

Dr. Volarich found Claimant to have the following pre-existing disability prior to June 2, 1999: 1) 35% PPD referable to the right knee for a torn lateral meniscus, surgically repaired, 2) 35% PPD referable to the left knee for a torn medial meniscus, surgically repaired, 3) 50% PPD referable to the left wrist for traumatic carpal tunnel syndrome, surgically repaired, 4) 20% referable to the BAW for chronic lumbar syndrome, and 5) 12.5% referable to the BAW for chronic cervical syndrome (Exhibit I-10-11).

Dr. Volarich found Claimant to be unable to work eight hours a day, five days a week throughout the work year as a mechanic or in a similar capacity in the future and found him PTD as a result of a combination of the June 2, 1999 work injury and the pre-existing injuries to his spine, upper and lower extremities. Dr. Volarich concluded the combination of disabilities created a substantially greater disability than the simple sum of each individual injury and a loading factor should be added (Exhibit I-11-12).

Upon cross-examination, Dr. Volarich admitted he is not a vocational expert and he acknowledged that Claimant returned to unrestricted duty after each injury before June 2, 1999 without accommodations or significant time lost time from work, performing the same type of physical work forty or more hours per week. He conceded that a diagnosed herniated cervical disc by Dr. Lord was not based on diagnostic testing, and may be a sprain or caused by bone spurs. Dr. Volarich noted Claimant reported decreased symptoms when driving, improved cervical and lumbar movement and he took prescription medication from 2001 to 2003 (Exhibit I-20). Although he found Claimant PTD, Dr. Volarich was not opposed to Claimant working within the restrictions he set; limited crawling and kneeling, caution on uneven terrain, slopes and ladders, carrying weight, avoiding prolonged weight bearing, use of pads on his knees, strength training and Glucosamine (Employee's Ex. 4-8).

Michael Brethauer, a vocational rehabilitation and career counselor, interviewed Claimant twice at the request of Claimant's attorney to determine his employability in the open labor market. The first meeting was an in-depth interview in 2001, the second meeting lasted forty five minutes prior to the hearing. Mr. Brethauer evaluated Claimant in three areas: a. Cognitive; Academic and Dexterity Ability; b. Transferable Skills and Aptitudes; and, c. Skills Ability Analysis. Based on the following information he concluded Claimant was unable to compete in the open labor market.

A. Vocational Testing - Cognitive, Academic and Dexterity Ability

He found Claimant tested below the expected level for a mechanic in cognitive and academic ability (Exhibit J-20). The three test results were: 1) An IQ of 85 for cognitive ability, with average being 90 to 109, 2) Low average on the Woodcock-Johnson test in academic ability, and 3) Very low hand/finger dexterity and motor coordination compared to male hourly production workers (Exhibit J 7-9), and auditory processes (Employee's Ex.2-6). He concluded the battery of tests reflect Claimant's ability to function.

B. Transferable Skills and Aptitudes Analysis

Mr. Brethauer used a worker trait factor system and the Dictionary of Occupational Titles to identify the skills and aptitudes demonstrated by the average diesel mechanic with Claimant's education in order to identify potential jobs. The report showed Claimant demonstrated the following worker traits:

- I. Below Average aptitude and ability in: 1) Clerical perception, 2) Eye-hand-foot coordination, and 3) Color discrimination.
- II. Average ability in: reasoning, mathematical and language development, general learning ability, verbal and numerical skill, spatial and form perception, motor coordination, and finger dexterity. From a vocational rehabilitation standpoint, he found Claimant demonstrated average reasoning development and general learning ability, which indicated strength to learn new job skills and duties.
- III. Cognitive ability to use rational and systematic thought to solve problems and deal with multiple variables to handle situations, and interpret instructions in written, oral, diagram or schedule form. Tasks utilizing these skills are: 1) Planning lay-out, installing and wire repair, 2) Testing circuits, 3) Inspecting machinery for conformance with blueprints and specifications, 4) Measuring dimensions, scales, micrometers and gauges, 5) Scheduling appointments, 6) Providing information, 7) Reading and routing mail and 8) Composing routine correspondence.
- IV. Mathematic and numerical capacity to compute discounts, interest, profit and loss, commission, mark-up and selling price. Tasks utilizing these skills include: 1) Computing wages and posting them to payroll records, 2) Time sheets and work tickets, 3) Renting automobiles, 4) Computing per diem and bills, 5) Receiving cash, making change, cashing checks, 6) Measuring strength, hardness, conductivity or other metal properties (Exhibit J-20). He cautioned Claimant may require training to perform some of these tasks.

- V. Language and verbal ability to read novels, magazines, atlases and encyclopedias, write reports, essays with proper form, punctuation, spelling, grammar and speak to an audience. Tasks utilizing these skills are: 1) Recordkeeping, 2) Verifying bills, 3) Preparing forms, 4) Greeting customers, 5) Answering questions, 6) Delivering, selling or displaying items and services.

However during the deposition, Mr. Brethauer testified that the above results represent the aptitudes and abilities demonstrated by diesel mechanics in general, not Claimant's skills in particular, and the results assume diesel mechanics can learn these tasks. In determining employability, he considered many factors; work history, test results and education.

C. Skills and Abilities Analysis (O*NET Database)

The purpose is to identify and analyze transferable skills, create skills-match profiles and explore career options capitalizing on prior experience. Mr. Brethauer found workers in Claimant's pre-injury occupation demonstrate average or above skills and abilities in the following: repairing equipment, maintenance, troubleshooting, testing, product inspection, problem identification, equipment selection, identification of key causes, deductive and inductive reasoning, control precision, finger and manual dexterity, wrist-finger speed and visualization.

On cross-examination, he acknowledged Claimant worked more than forty hours a week without medical restrictions prior to June 2, 1999. He also acknowledged Claimant had no permanent restrictions on sitting, standing, walking or climbing when released from medical care after the June 1999 work injury. He conceded Claimant could physically perform the following tasks: 1) Sort or deliver packages (weighing up to forty pounds), 2) Type, 3) Cashier work, 4) Sales, 5) Waiter, 6) Busboy or 7) Parking lot attendant. And he conceded Claimant could perform the following tasks from a physical and intellectual standpoint: 1) Driver, 2) Some assembly lines, 3) Load a dishwasher, or 4) Food service. Although Claimant could perform clerical work from a physical standpoint, Mr. Brethauer stated test results do not indicate he has the aptitude to perform such jobs (Exhibit J-15).

Finally, utilizing information obtained from Claimant's interview, test results, medical records and restrictions, he ran three computerized job matching programs and was unable to identify any job matches for Claimant. Therefore, he concluded Claimant was unable to compete in the open labor market in 2001. He maintained this opinion after interviewing Claimant in 2003 (Deposition Exhibit 2-9).

FINDING OF FACT AND RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant is not PTD, however, I find Claimant to be PPD, triggering SIF liability. Specifically, I find the following:

Issues relating to Permanent Total Disability owed by the Second Injury Fund

Claimant has argued that the SIF was liable for PTD benefits as a result of the combination of his last right knee injury and his pre-existing injuries to his right knee, left knee, left wrist, back and neck. In post hearing briefs, Claimant sought a weekly differential of \$175.56 for 48 weeks from the SIF beginning January 12, 2000, and thereafter at the full PTD rate of \$470.29 for life. The SIF contended Claimant is not PTD because he can compete in the open labor market and if he is found to be PTD, it is from the last injury alone, therefore the SIF is not liable.

The employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury Fund liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo.1968). Section 287.220 RSMo, pertaining to SIF liability, provides that in a case of permanent total disability the Commission must make three findings regarding disability:

- 1) There must be a determination that the employee has permanent disability resulting from the last injury alone, and
- 2) There was a pre-existing permanent disability that was serious enough to constitute a hindrance or obstacle to employment or re-employment which combines with the disability from the compensable work related injury to create a greater overall disability to the employee's body as a whole than the simple sum of the disability from the work injury and the pre-existing disability considered separately, and
- 3) There must be a determination that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

I find Claimant met his burden on Points 1 and 2 but not Point 3. On the first point, Drs. Fagan and Volarich found the lateral meniscus repair was required to cure and relieve the effects of the June 1999 injury and that Claimant had preexisting arthritis. They disagreed on whether the arthritis caused the need for a knee replacement and subsequent revision.

I find Dr. Volarich's opinion to be more persuasive. He opined the June 2, 1999 work injury aggravated Claimant's pre-existing arthritis requiring surgery and subsequent total knee replacement, due to his poor results from the earlier surgery. I find Claimant's symptoms increased after the June 1999 injury, affecting his ability to continue working as a diesel mechanic. I find the June 1999 work injury aggravated Claimant's preexisting arthritis and combined with a poor surgical result which caused the need for right knee arthroscopic surgery, total right knee replacement and revision. I find Claimant sustained PPD from the June 1999 work related injury.

I find Claimant to be credible on the second point. He testified that after injury to both knees, it was harder to climb ladders, walk on uneven surfaces or stairs, kneel, squat or lift heavy items. He stopped using a push mower and began taking aspirin. The preexisting injuries affected Claimant's home and work activities. Although Claimant returned to heavy-duty work without restriction, this does not make these injuries non disabling. I find the prior left and right knee injuries, left carpal tunnel release, back and neck problems to be a hindrance or obstacle to Claimant's employment or re-employment.

I do not find Claimant has met his burden on Point Three. Section 287.020.7 RSM. Defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. See *Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo. App.1996) (*overruled on other grounds*). The determinative test to apply when analyzing PTD is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206, 210(Mo. App. E.D.1999) (*overruled on other grounds*). Even though a claimant might be able to work for brief periods of time, or on a part-time basis it does not establish they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo. App. 1995)

The issue of PTD turns on the restrictions applied by the experts and the restrictions placed by Drs. Fagan and Volarich and Mr. Brethauer do not support a PTD conclusion.

Dr. Fagan only restricted lifting, crawling and kneeling but placed no restrictions on walking, standing or sitting. Dr. Volarich is not a vocational expert, but he found Claimant to be PTD, and was not opposed to him working within the limitations he provided: limiting crawling, squatting, stooping, pivoting, climbing, impact actions and kneeling.

Mr. Brethauer's evaluation was not credible. Claimant's vocational tests were average in eight of nine areas, auditory processes being the only below average score, yet he did not find Claimant had the aptitude for clerical work. The transferable skills and skills and aptitude sections are not credible. Results show Claimant demonstrated transferable skills, but Mr. Brethauer testified this was a statement about general skills possessed by diesel mechanics' and not specifically about Claimant's transferable skills. I find the results offer no guidance in determining Claimant's transferable skills.

The skills and abilities section measured by the O*Net database focus on skills of the average diesel mechanic and Claimant tested below the average. However, Claimant worked successfully as a diesel mechanic for over thirty years, yet he possessed no transferable skills and aptitudes, according to Mr. Brethauer.

After concluding Claimant could not compete in the open labor market, Mr. Brethauer acknowledged Claimant could physically and intellectually perform work as a driver, on some assembly lines, load a dishwasher or work in foodservice. He concluded from a physical standpoint, Claimant could sort or deliver packages (up to forty pounds), type, cashier, sales, waiter, and work as a busboy or as a parking lot attendant although this contradicted his test results. I find Mr. Brethauer's opinion is not persuasive. The transferable skills tests showed Claimant demonstrated the temperament and adaptability to perform a variety of work tasks, along with decision making and problem solving skills.

There is no doubt Claimant has significant injuries that prevent him from continuing in his chosen occupation at the same level he has worked in the past. However, he has not attempted to work within the restrictions set by either Dr. Fagan or his chosen expert. Claimant's own vocational expert admitted he could physically and intellectually perform certain tasks. He has not demonstrated an inability to perform tasks within his restrictions nor has he been denied employment because of them. He did not inquire whether his Employer could accommodate his restrictions or employ him in an appropriate position. Claimant believes he cannot work because the restrictions prevent him from being a good employee, however, this alone is insufficient evidence to prove he is unable to compete in the open labor market. Therefore, I do not find Claimant to be PTD and the SIF is not liable for PTD benefits.

Issues relating to permanent partial disability owed by the Second Injury Fund

Once a determination is made that a claimant is not PTD, the inquiry turns to what degree, if any, is an individual permanently partially disabled for purposes of SIF liability. *Leutinger v. Treasurer of the State of Missouri*, 895 S.W.2d 591, 593 (Mo. App. 1995). Section 287.220.1 RSMo., provides the SIF is triggered in all cases of PPD where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with

the preexisting disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and the preexisting conditions must produce additional disability greater than the last injury standing alone.

Claimant settled the pre-existing left knee injury for 30%, the 1999 right knee injury for 30% and the pre-existing left wrist injury for 16.5%. The SIF objected to the admission of the Stipulation for Compromise Settlement (Exhibit B) between the Employer, Insurer and Claimant for the June 1999 injury because the SIF was not a party to the agreement. However, based upon the treatment records and Claimant's credible testimony, I find Claimant sustained 30% PPD of the right knee from the June 1999 work injury. Therefore, the SIF objection is overruled and Exhibit B is admitted.

I find Claimant's preexisting injuries to his left knee and left wrist resulted in a hindrance or obstacle to his employment and meet the statutory threshold for SIF liability. However, I do not find Claimant's prior injuries to his right knee, neck, and low back, rise to the level of disability needed to trigger SIF liability.

I find Claimant to have PPD of 30% of the left knee and 16.5% of the left wrist. I find that when Claimant's last injury to his right knee, totaling 30% of the knee, is combined with his preexisting left knee and left wrist disability, the combination creates a substantially greater disability than the simple sum, and a synergistic affect occurs. Applying a 30% load factor, Claimant is entitled to receive 37.4625 weeks of PPD compensation from the SIF or \$11,041.32.

CONCLUSION

Claimant sustained an injury on June 2, 1999, that arose out of and in the course of his employment with Employer and included a right arthroscopic knee surgery, total right knee replacement and revision. Employer and Insurer have reached a compromise settlement with Claimant of 30% referable to the right knee for this injury. Claimant is awarded 37.4625 weeks of additional PPD totaling \$11,041.32 from the SIF. Claimant's attorney is entitled to a 20% lien.

Date: _____

Made by: _____

SUZETTE CARLISLE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation