# FINAL AWARD DENYING COMPENSATION

Injury No.: 06-062586

Employee: Weldon Poarch

Employer: Madison Apartment Group (Settled)

Insurer: Firemen's Fund Insurance Co. (Settled)

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.[1] Having reviewed the evidence, read the briefs, heard oral argument and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the ALJ dated October 6, 2010, as modified herein.

The ALJ concluded that employee is denied benefits against the Second Injury Fund because employee did not suffer a compensable primary injury. The ALJ went on to discuss whether the alleged injury aggravated employee's preexisting cardiovascular disease and whether the alleged injury combined with employee's preexisting disabilities to result in employee's permanent total or enhanced permanent partial disability.

We agree with the ALJ's determination that employee failed to meet his burden of proving that he sustained a compensable primary injury. However, we find that the ALJ's analysis should have concluded after making such determination because after having found that employee did not sustain a compensable primary injury all other issues are moot.

The first sentence of § 287.220.1 RSMo provides that "[a]ll cases of permanent disability where there has been previous disability shall be compensated as herein provided." The Courts have consistently interpreted this first sentence of § 287.220 RSMo as stating that "[i]n order for a claimant to recover against the [Second Injury Fund], he must prove that he sustained a compensable injury, referred to as 'the last injury,' which resulted in permanent partial disability." *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. 2008). Consequently, if the employee did not sustain a compensable "last injury," there is no need to proceed to the next step in the Second Injury Fund liability analysis.

We find that employee failed to meet his burden of proof that he sustained an accident or primary injury; therefore, our analysis ends at the first sentence of § 287.220 RSMo.

[1] Statutory references are to the Revised Statutes of Missouri 2005 unless otherwise indicated.

All other issues are moot and we specifically do not adopt the portions of the ALJ's award discussing moot issues.

We affirm the ALJ's denial of Second Injury Fund liability.

The award and decision of Administrative Law Judge Kenneth J. Cain, issued October 6, 2010, is attached and incorporated by this reference to the extent it is not inconsistent with this award.

Given at Jefferson City, State of Missouri, this 2nd day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

# FINAL AWARD

Employee: Weldon Poarch Injury No. 06-062586

Dependents: N/A

Employer: Madison Apartment Group (previously settled)

Insurer: Firemans Fund Insurance Company

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: August 3, 2010; final brief rec'd Sept. 3, 2010 Checked by: KJC/pd

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.

2. Was the injury or occupational disease compensable under Chapter 287? No.

3. Was there an accident or incident of occupational disease under the Law? No.

4. Date of accident or onset of occupational disease: alleged April 22, 2006.

5. State location where accident occurred or occupational disease was contracted: alleged Kansas City, Clay County, Missouri.

6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? No.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee, while in the course and scope of his employment as a maintenance technician for the Madison Apartment Group alleged that he was exposed to muriatic acid and that he sustained injuries to his heart and respiratory system.

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: alleged heart and respiratory system

14. Nature and extent of any permanent disability: See additional findings of fact and rulings of law.

15. Compensation paid to date for temporary disability: N/A

16. Value necessary medical aid paid to date by employer/insurer? N/A

17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: $520

19. Weekly compensation rate: $346.84

20. Method wages computation: By Agreement.

## COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: N/A
The employee and the employer previously settled the employee's claim against the employer based on a permanent partial disability of 11 percent to the body as a whole.
N/A weeks for temporary total disability.
N/A weeks for disfigurement.
.

22. Second Injury Liability: None.
.

23. Future requirements awarded: None.

Total: None

The compensation awarded to the Claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney, for necessary legal services rendered to the employee: N/A

# FINDINGS OF FACT and RULINGS OF LAW:

Employee: Weldon Poarch Injury No. 06-062586

Dependents: N/A

Employer: Madison Apartment Group (previously settled0

Insurer: Firemans Fund Insurance Company

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: August 3, 2010; final brief rec'd Sept. 3, 2010 Checked by: KJC/pd

The Employee settled his claim against his Employer on February 9, 2009 based on a permanent partial disability of 11 percent to the body as a whole due to an alleged exposure to muriatic acid at work. The remaining parties were the Employee and the State Treasurer as Custodian of the Second Injury Fund.

The Employee and the State Treasurer as Custodian of the Second Injury Fund entered into various admissions and stipulations. The remaining issues are as follows:

1) whether the Employee sustained an injury and/or an occupational disease arising out of and in the course of his employment; and
2) liability of the State Treasurer as Custodian of the Second Injury Fund for compensation and if so the extent of any such liability.

At the hearing, Mr. Weldon Poarch (hereinafter referred to as Claimant), testified that he was born on September 14, 1946, and that he stood 5 foot 8 inches tall and weighed 149 pounds. He stated that he had an Associate of Arts degree in Fire Sciences from Penn Valley Community College. He also stated that he served in the Air Force for four years where he was trained as an aircraft mechanic and that he later received vocational training in heating and air conditioning. He stated that he was previously a licensed real estate salesman and broker.

Claimant testified that he had worked as a mechanic and later in the electronics field where he did commercial and residential wiring. He stated that he worked as a fireman from 1970 to 1995. He stated that he became a captain for the fire department. He stated that he served as a battalion chief for six months. He stated that his job with the fire department was strenuous. He stated that it required heavy lifting and the ability to climb ladders. He stated that he retired from the job because he was "getting old and worn out".

Claimant testified that while working as a fireman he owned a real estate business where he sold commercial real estate and managed rental property. He stated that he ordered supplies and essentially supervised the maintenance staff. He also stated that after he retired from his job as a fireman he did maintenance work primarily at apartment complexes. He stated that he

worked as a maintenance supervisor. He stated that he did HVAC, electrical and plumbing work. He stated that he was EPA certified.

Claimant testified that in 1997 he had open heart surgery. He stated that his doctor did a five-way bypass procedure. He stated that while working as a fireman he sustained an injury to his right rotator cuff which required surgery and that on one occasion he experienced problems with smoke inhalation. He stated that he did not file a workers' compensation claim for the rotator cuff injury. He stated that each of the impairments affected him at work.

Claimant testified that his alleged injury at work occurred on April 22, 2006 when he was working in maintenance for the Madison Apartment Group. He stated that the injury occurred while he was spraying the bathroom of an apartment to try to remove mold. He stated that muriatic acid was sprayed to remove the mold. He stated that the fumes became so strong when he sprayed with the muriatic acid that everyone in the apartment had to leave.

Claimant testified that about seven to ten days after spraying the apartment he could not lie down at home without choking. He stated that he had to sleep in a recliner. He stated that on May 5, 2006 he sought treatment.

Claimant testified that on June 9, 2006, he saw Dr. Schenk with complaints of breathing difficulties. He stated that Dr. Schenk had been his friend since childhood. He stated that Dr. Schenk recommended a hospitalization, which he refused because he did not have insurance. He stated that Dr. Schenk advised him to get an echocardiogram.

Claimant testified that he next saw Dr. Gutovitz, a cardiologist, who prescribed a defibrillator. He stated that he did not get the defibrillator until three years later in November 2009 due to a lack of insurance. He also stated that he told Dr. Gutovitz on July 17, 2006 that he wanted to return to work and that the doctor provided restrictions allowing him to work four hours per day with no lifting over 20 to 25 pounds. He stated that although he returned to work under those restrictions, he ended up doing the same tasks as he did before the doctor provided the restrictions. He stated that he lost his job at the Madison Apartments on September 30, 2006 because the company needed someone to work full time.

Claimant testified that subsequent to September 2006 and that for about two years he did maintenance work for other apartment complexes. He stated that on his last job he did some work for an apartment complex where his wife was the apartment manager. He stated that he filled in when other workers were off and that he sometimes answered the phone and had customers complete applications to rent apartments, showed model apartments and ran errands for the maintenance staff. He stated that he worked between two and eight hours per week. He stated that he worked until June of last year. He stated that he did not receive any pay.

In addition to the heart bypass surgery, rotator cuff injury and smoke inhalation problems testified to earlier, Claimant indicated that about 20 years ago he was diagnosed with diabetes and that he was on insulin for a short period. He stated that he was still on medication for diabetes. He stated that he developed cataracts shortly before the alleged April 2006 accident at work. He reiterated that all of his preexisting medical conditions affected his ability to work.

Claimant testified that subsequent to the accident at work he was diagnosed with two myocardial infarctions and that he had determined that he had suffered a third myocardial infarction for which he did not receive any treatment. He stated that his first myocardial infarction and the one he self-diagnosed occurred on May 18, 2006. He stated that about a month later he saw Dr. Schenk who advised him that he had fluid in his lungs and that he was in danger of experiencing a myocardial infarction. He stated that he told the doctor that based on his training he had determined that the myocardial infarction had already occurred. He stated that in 2008 and in 2009 he was diagnosed by medical professionals with myocardial infarctions.

Claimant testified that his daily activities were limited. He stated that on a typical day he fixed breakfast, went to the club to talk with his friends, had lunch with his wife and then took a nap. He stated that he did no yard or housework or repairs to his house. He stated that he had problems climbing stairs. H stated that he still slept in his recliner. He stated that his wife won a cruise in January 2010 and that he had problems with the walking on the cruise ship. He stated that he could probably walk about one fourth of a block. He stated that he could drive about 100 miles without resting. He stated that he was on four different types of medications.

On cross-examination by the Second Injury Fund, Claimant testified that he and his supervisor were in the apartment when he sustained the alleged April 2006 injury. He stated that around 1970 he had used some muriatic acid when he assisted a fire captain in cleaning gutters. He stated that between 1970 and 2006 he had a very limited use of muriatic acid and then only when he was cleaning gutters.

Claimant admitted that the bottle he used to spray the apartment for mold at work in April 2006 was not labeled. He admitted that he did not experience any immediate problems on the day of the alleged accident. He admitted that he did not begin to experience any problems until about 10 days later when he began to cough while lying down. He stated that he attributed the coughing to his alleged exposure to muriatic acid. He stated that both he and his supervisor agreed that the substance in the bottle used in April 2006 was muriatic acid.

Claimant admitted that he continued to work after April 2006. He admitted that on May 18, 2006 when he rendered a self-diagnosis that he had sustained a myocardial infarction that he had carried a refrigerator, stove, washer and dishwasher out of an apartment prior to experiencing the alleged myocardial infarction. He stated that on the day of his alleged myocardial infarction he dropped to his knees, vomited and passed out.

Claimant admitted that he did not seek any medical treatment on the day he experienced the alleged self-diagnosed myocardial infarction. He admitted that he did not seek any treatment until June 2006.

Claimant admitted that subsequent to the alleged April 2006 accident that he was not fired from any job due to an inability to do the work. He admitted that subsequent to each of his prior work related injuries and the five vessel bypass grafting procedure that he had returned to work full time and with no medical restrictions. He alleged that he had no problems with his heart from 1997 to 2006.

Finally, Claimant testified that although he did not receive any pay per se when he worked at the apartment complex managed by his wife; that her pay was based in part on the

amount of income made on the property. Thus, if he had received pay the apartment complex would have made less income on the property and his wife's pay would have been reduced. He admitted that his duties for the apartment complex where he worked for his wife were beneficial to the complex.

Claimant admitted that his cataract surgeries were in late 2007 or early 2008. He admitted that no doctor had told him that the alleged muriatic acid exposure was the sole cause of his problems.

Claimant's wife, Ms. Judith Poarch, testified at the hearing on Claimant's behalf and provided corroborating testimony. She stated that they had been married approximately 24 years. She stated that her primary job was teacher or librarian in elementary schools. She stated that Claimant's condition had gotten worse after the two myocardial infarctions which occurred after April 2006.

## Medical evidence

The medical evidence consisted of the deposition testimony of Allen J. Parmet, M.D., and various other reports and records. Dr. Parmet, who testified on Claimant's behalf, examined Claimant on March 6, 2008. He noted that Claimant was still working at the time of the evaluation. He stated that Claimant provided a history of being exposed to muriatic acid at work. He stated that Claimant told him that he was not wearing any protective equipment during the exposure.

Dr. Parmet indicated that muriatic acid was potent. He stated that at high levels muriatic acid could dissolve a person's clothing and hair and burn the eyes, nose and lungs. He stated that an exposure at a lower level could actually cause more injury to the lungs because at a high level the person would probably leave the environment more quickly.

Dr. Parmet stated that an exposure to muriatic acid could cause shortness of breath. He stated that due to Claimant preexisting severe heart disease an exposure could compromise his lung function even further. He acknowledged that Claimant did not complain of any breathing problems until weeks after the alleged exposure. He acknowledged that Claimant had severe heart failure. He acknowledged that Claimant's pulmonary function studies were "actually quite normal."

Dr. Parmet diagnosed Claimant with a Class II to III cardiac dysfunction He stated that that Class I was severe and that a person with the diagnosis would be basically nonfunctional. He stated that Class IV was nearly normal.

Dr. Parmet's diagnoses also included coronary artery disease, diabetes II with complications, bilateral cataracts with lens implantations, diabetic retinopathy and a right shoulder rotator cuff repair. He concluded that prior to the alleged April 2006 accident that Claimant had sustained a permanent partial disability of 10 percent due to his heart condition.

Dr. Parmet concluded that the alleged exposure to muriatic acid at work in April 2006 had caused additional disability to Claimant's heart. He stated that Claimant now had a permanent partial disability of 30 percent to the body as a whole due to his heart condition with

10 percent of the 30 percent due to the preexisting condition which he characterized as severe and 20 percent due to the alleged exposure. He stated that the alleged exposure did not aggravate Claimant's coronary artery disease.

In addition, Dr. Parmet testified that Claimant had a 63 percent permanent partial disability of each eye at the 140 week level. He stated that Claimant's preexisting right shoulder injury had resulted in a permanent partial disability of 15 percent at the 230 week level. He stated that the total disability from all of Claimant's impairments exceeded the mere sum. He stated that he assigned a 15 percent "load factor."

Finally, Dr. Parmet stated in his report that "Mr. Poach is capable of functioning at the sedentary level of labor on a part-time basis only; that is up to a four-hour work day." He stated, however, that due to Claimant's visual impairment that Claimant could not perform jobs that required visual acuity. He stated that Claimant would not qualify for a commercial driver's license.

On cross-examination by the Second Injury Fund, Dr. Parmet admitted that he was not a cardiologist or pulmonologist. He admitted that he did not treat Claimant. He admitted that he did not see Claimant until two years after the alleged accident. He admitted that he did not know the amount or the concentration level of the alleged muriatic acid in the bottle Claimant used to spray the apartment. He admitted that he did not know about Claimant's prior inhalation injury. He admitted that he did not have all of the records pertaining to Claimant's prior right rotator cuff injury. He admitted that he saw nothing in Claimant's medical records showing that Claimant had been restricted at work due to his diabetes. Later, on re-cross examination he admitted that Claimant's exposure was not "massive." He stated that with a "massive" exposure there would have been severe findings including eye and nose burns and pulmonary edema which would have occurred within a few hours.

The medical records were essentially cumulative of the other evidence. In 1997 Claimant was complaining of breathing problems. His doctor determined that he needed cardiac bypass surgery. Claimant complained of an inability to sleep at the time. In January 2001 Dr. Schenk ordered x-rays due to Claimant's complaints of chest congestion. A June 9, 2006 chest x-ray showed bilateral pleural effusion and evidence of congestive heart failure. On June 23, 2006 Dr. Schenk noted that Claimant's cardiologist had diagnosed severe cardiomyopathy, which was not believed to be ischemic in nature.

On July 10, 2006, Dr. Schenk noted that Claimant believed that his heart problems were caused by an alleged exposure to muriatic acid. On July 18, 2006, Dr. Schenk noted that a defibrillator had been prescribed for Claimant and that Claimant was "trying to tie all this in to Workman's Compensation."

Claimant's Exhibit A also contained the records of Allen Gutovitz, M.D., of Cardiovascular Consultants, P.C. Dr. Gutovitz noted that Claimant complained of a worsening of his shortness of breath. He noted that Claimant had coronary artery disease. He noted that Claimant had a "recent spell" of congestive heart failure. On July 13, 2006, he recommended a defibrillator and noted that Claimant had Class II-III congestive heart failure. On July 17, 2006, he released Claimant to return to work at a "half-time status" with no temperature extremes and no lifting over 20 pounds.

On August 22, 2006, Dr. Gutovitz noted that "The patient asked whether the muriatic acid could've contributed to his worsening left ventricular function, and it is certainly possible, particularly if he had a myocardial infarction at that time. He was not hospitalized at that time, and I have no medical records of his care from that time until the time I saw the patient initially on June 13, 2006. In my opinion it is possible that the muriatic acid spill and exposure that the patient sustained contributed to his worsening left ventricular dysfunction, although I do not have documentation."

On September 18, 2006, Dr. Gutovitz's nurse, Ginger McIntosh-James, RN, noted that Dr. Gutovitz's recommendation was that Claimant work no more than four to six hours per day and that he limit his lifting to 20-25 pounds on a regular basis.

## Vocational evidence

Claimant offered into evidence the April 1, 2010, deposition testimony of Terry Cordray, a certified vocational rehabilitation counselor. Mr. Cordray stated that 50 percent of his cases were FELA and the other 50 percent workers' compensation and personal injury. He stated that all of his FELA cases were on referrals from plaintiff's attorneys as were 35 percent of his workers' compensation cases. He stated that he evaluated Claimant on October 21, 2009.

Mr. Cordray testified that the evaluation lasted four hours and that Claimant told him that he was sick at the time of the evaluation. He stated that Claimant also told him that he was too ill to drive to the evaluation. Mr. Cordray noted Claimant's educational and work background and EPA certification in the use of Freon. He stated that Claimant had no transferable job skills. He stated that Claimant could no longer get a real estate license.

Mr. Cordray testified that Claimant's scores on the academic achievement tests were average in reading, spelling and arithmetic, but "not high" on the aptitude test which measured general ability. He stated that the testing showed that skilled technology was probably the only area in which Claimant could work. He stated that those jobs were in mechanics, construction, carpentry and appliance repair and involved outdoor work. He stated that those jobs were unrealistic for Claimant. He stated that those jobs would also include skilled service occupations such as barber, security guard and nurse's aide.

Mr. Cordray concluded that Claimant could not do any of his prior jobs. He indicated that unskilled sedentary jobs were only about 5 percent of the jobs in the labor market. He stated that Claimant's physical capacity was below the sedentary level due to the restrictions limiting him to less than full-time work. He stated that based on his labor assessment the only potential job that Claimant could do was a bank teller job. He stated that Claimant might be able to do cashier work. He stated that he believed that Claimant was not employable. He stated that in his opinion Claimant was totally disabled.

On cross-examination by the Second Injury Fund, Mr. Cordray admitted that he did not review any of Claimant's employment records. He admitted that he had not reviewed any record showing that any employer had found Claimant incapable of doing any of the jobs Claimant worked on subsequent to the alleged April 2006 accident.

Mr. Cordray recognized that while he believed that Claimant was permanently and totally disabled; the two physicians' whose records he reviewed, Drs. Parmet and Gutovitz, and who offered opinions on Claimant's employability concluded that Claimant could work, albeit on a part time basis. He admitted that to his knowledge Claimant had not applied for the part time job as a bank teller he had concluded that Claimant could do. He admitted that he did not do any subsequent labor market surveys to try to find jobs for Claimant.

## Second Injury Fund Exhibits

The Second Injury Fund offered into evidence the Stipulation for Compromise Lump Settlement between Claimant and his employer of the alleged April 22, 2006 injury. The stipulation showed that Claimant's employer did not pay for any medical treatment. Temporary total disability benefits were paid in the amount of $1,317.31. The stipulation further showed that Claimant settled his claim against his employer for a lump sum payment of $16,000, which the stipulation stated represented a permanent partial disability of 11 percent to the body as a whole plus additional consideration.

## Law

After considering all the evidence, including the testimony at the hearing, the medical reports and records, Dr. Parmet's deposition testimony, Mr. Cordray's vocational testimony, the other exhibits and observing Claimant's appearance and demeanor, I find and believe that Claimant did not meet his burden of proving that he sustained an injury by accident as defined by Missouri law. Therefore, compensation must be denied. The Second Injury Fund is not liable for any benefits.

## Accident

Claimant had the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2nd 196 (Mo .App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3rd 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant, as noted above, did not prove that he sustained an injury by accident as defined by Missouri law.

The Missouri statute defines "accident" and "injury" as follows:

2. The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(4) A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition.

§ 287.020 RSMo. 2005.

Thus, to prove a compensable "accident", Claimant needed to establish objective symptoms of an injury caused by a specific event during a single work shift. To prove a compensable "injury" he needed to prove that his work was the prevailing factor in causing both the resulting medical condition and the disability. Prevailing factor is defined as the primary factor in relation to all others in causing both the resulting medical condition and the disability.

Claimant clearly failed in his burden of proof. Claimant alleged an accident based on a one-time occupational exposure to muriatic acid. Claimant, however, offered no credible evidence showing that he was in fact exposed to muriatic acid. He offered no credible evidence showing what he was allegedly exposed to or as to whether the substance was toxic.

Claimant further offered no credible evidence showing that muriatic acid could have caused the symptoms he complained of, particularly a myocardial infarction three weeks after the alleged exposure or an injury and the disability he alleged to his cardiovascular system. He offered no credible evidence proving that his alleged exposure to muriatic acid or any other substance was the prevailing factor in causing his alleged resulting medical condition or disability. He offered no evidence showing that he had any objective symptoms of an injury caused by the alleged exposure.

Claimant alleged that his exposure to the muriatic acid occurred when he was cleaning mold from a bathroom as part of his duties as a maintenance technician for an apartment complex. He stated that to remove the mold he sprayed a substance from a bottle. He admitted that the bottle was not labeled. He offered no proof that the substance in the bottle was muriatic acid. He offered no proof as to what was in the bottle. He did not testify that he had ever previously sprayed muriatic acid to remove mold. He did not testify nor offer any proof that he had ever previously used muriatic acid on his job at the apartment complex. He did not testify that he had ever observed any other employee of the apartment complex use muriatic acid on the job. He did not testify that he had ever seen muriatic acid stored on the premises at the apartment complex. He offered no proof that muriatic acid was stored on the premises at the apartment complex. He admitted that he did not know the concentration level of the substance in the bottle he used to spray to remove the mold. He offered no credible evidence showing that he used muriatic acid on his job at the apartment complex or that it was used to remove the mold in the bathroom.

In addition, Claimant failed to have the substance in the bottle tested. He did not establish himself as an expert in identifying muriatic acid or any other substance. He is not a chemist. He is not a toxicologist. He did not offer the testimony or report of any expert who had identified the substance he used to spray for the mold as muriatic acid or any other possible toxic substance. He did not offer the testimony of any expert who had tested the concentration level of the substance in the bottle and who could identify it and explain its toxicity on the human body or that the concentration level of the substance could have even caused the injury and disability he alleged. His whole case was based on his uneducated self-diagnosis or determination that he was exposed to some substance for which he offered no credible proof that he was in fact exposed or that the substance was toxic. That alone clearly showed that he failed in his burden of proof.

Claimant also failed to offer any Material Safety Data Sheets (MSDS) which would have identified the substance in the bottle and explained the effects of an exposure to whatever substance was in the bottle. Claimant offered no credible evidence showing that he was in fact exposed to muriatic acid or that muriatic acid could have caused the conditions he complained of as a result of the alleged exposure.

Claimant further admitted that he did not experience any immediate symptoms or problems as a result of the alleged exposure to muriatic acid other than the alleged initial irritation which allegedly caused him and another coworker to leave the apartment. He stated that he did not experience any alleged symptoms until weeks later when he began coughing at night when he attempted to lie down. No doctor, however, testified that muriatic acid would remain dormant in a person's system for weeks and then become active.

The record further reflected that Claimant rendered a self-diagnosis and concluded that he had suffered a myocardial infarction or heart attack on May 18, 2006. He admitted that he suffered the alleged self-diagnosed myocardial infarction on a day in which he had moved a refrigerator, stove, washer and dishwasher. He did not explain how he determined that the self-diagnosed myocardial infarction was caused by the alleged exposure to muriatic acid at work three weeks earlier as opposed to the heavy lifting he did shortly before the alleged self - diagnosed myocardial infarction.

In addition, Claimant admitted that he did not seek any medical treatment for the alleged self -diagnosed myocardial infarction until nearly a month after it allegedly occurred. Claimant, who is not a physician, then attempted to relate the alleged self-diagnosed myocardial infarction to his alleged self-diagnosed exposure to muriatic acid and he solicited medical opinions to support his position. Again, Claimant failed in his burden of proof.

Initially, Claimant sought an opinion from Dr. Gutovitz. He did not depose Dr. Gutovitz. There was no evidence that Dr. Gutovitz had ever treated a patient exposed to muriatic acid or any other toxic substance. There was no evidence that Dr. Gutovitz knew the effects of an exposure to muriatic acid or any other toxic substance. Dr. Gutovitz's report even mischaracterized the alleged exposure. The doctor's report referred to the exposure as a spill of muriatic acid, whereas there was no evidence that Claimant was exposed to a spill of any substance at work.

Dr. Gutovitz noted that "The patient asked whether the muriatic acid could've contributed to his worsening left ventricular function, and it is certainly possible, particularly if he had a myocardial infarction at that time. He was not hospitalized at that time, and I have no medical records of his care from that time until the time I saw the patient initially on June 13, 2006. In

my opinion it is possible that the muriatic acid spill and exposure that the patient sustained contributed to his worsening left ventricular dysfunction, although I do not have documentation."

Claimant did not sustain a myocardial infarction on the day of the alleged exposure. There was no credible evidence that he sustained a myocardial infarction at anytime near the alleged exposure. The doctor's opinion was based on speculation and possibilities rather than facts. He admitted that he had no documentation showing that the alleged exposure had contributed to the worsening of Claimant's left ventricular function, yet he offered a conclusory opinion to that effect. An opinion based on possibilities and speculation, rather than medical certainty was entitled to little weight. The facts and medical certainty showed that Claimant had severe cardiovascular disease prior to the alleged exposure in April 2006. There was no credible evidence that the alleged exposure in April 2006 was the prevailing or most important factor in causing his ventricular abnormalities or any other medical condition or disability.

There was no evidence that the alleged exposure to the unknown substance aggravated Claimant's preexisting severe cardiovascular disease. Moreover, even if such evidence existed, the case would still not be compensable. See Gordon v. City of Ellisville and Treasurer of the State of Missouri as Custodian of the Second Injury Fund, 268 S.W. 3d 454 (Mo. App. E.D. 2008) where the Court found that an aggravation of a preexisting condition was no longer compensable under the August 28, 2005 statutory definition of accident and injury which required that the employee's work be the prevailing factor in relation to all others in causing the resulting medical condition and disability.

The Court in Gordon noted that under the pre- August 2005 statute, an aggravation of a preexisting medical condition could be compensable where the standard for proving an accident was less stringent. Under the pre-August 2005 statute, the employee only needed to prove that his work was "a" substantial factor in causing the injury and not that his work was "the prevailing factor" or most important factor as required by the August 2005 statute. Claimant's alleged accident occurred in April 2006. Thus, the August 2005 statute was applicable in his case.

Similarly, Dr. Parmet, who testified on Claimant's behalf, based his opinion on conjecture, surmise and speculation. Dr. Parmet too based his opinion on Claimant being exposed to muriatic acid when there was no credible or objective evidence showing that Claimant was in fact exposed to the substance. Also, Dr. Parmet, who is neither a cardiologist nor a pulmonologist, initially stated "I do not think that Mr. Poach had such a severe injury as to trigger pulmonary edema due to the absence of rapid onset of breathing difficulties. These should have developed within 24 hours if it was a direct toxic injury." Pulmonary edema is a buildup of excess fluid in the lungs.

Next, based on pure speculation, Dr. Parmet stated in his report that, "irritation from breathing fumes . . . could have contributed to and precipitated a myocardial infarction leading to the hypokinesis and widespread global dysfunction of the heart." Again, there was no evidence that Claimant's self-diagnosed myocardial infarction on May 18, 2006 was an accurate diagnosis. Claimant is not a physician. There was no credible evidence that an alleged exposure in April 2006, which the doctor admitted was not a direct exposure and did not result in a buildup of fluid in the lungs could have caused a myocardial infarction nearly a month later. The doctor was not even aware of the concentration level of the alleged substance Claimant used at work on the day of the alleged exposure.

Also, "could have contributed to and precipitated a myocardial infarction" does not mean that work was the prevailing or most important factor in causing the alleged myocardial infarction. Claimant had severe cardiovascular disease prior to the alleged exposure. He has

congestive heart failure. There was no credible evidence that some alleged exposure to some unknown substance at work was the prevailing or most important factor in causing his alleged condition given his medical history. See also Gordon and § 287.020 RSMo. 2005 which provides that an injury is not compensable if work was a triggering or precipitating factor in causing the resulting medical condition and disability.

Thus, Claimant clearly failed to prove that he sustained a compensable injury by accident as those terms are defined by the statute. Compensation must therefore be denied and all other issues raised at the hearing were rendered moot.

**Permanent total disability**

As noted above, Claimant failed to prove that he sustained a compensable injury by accident. Also, he failed to prove that he was permanently and totally disabled as defined by the Workers' Compensation Act. Total disability is defined in the statute as an inability to return to any employment and not merely . . .inability to return to the employment in which the employee was engaged in the time of the accident. See § 287.020 (6) RSMO.2005; Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. 1995); Crums v. Sachs Electric, 768 S. W. 2d 131 (Mo. App. 1989).

Claimant returned to employment after the alleged April 2006 accident at work. He admitted that he worked for more than two years after the alleged accident at work. Dr. Parmet examined Claimant on March 6, 2008. Dr. Parmet noted that Claimant was still working as of the examination. Dr. Parmet concluded that Claimant could continue to do sedentary work on a part time basis. Claimant hired Dr. Parmet to render the opinion. Dr. Gutovitz, Claimant's treating cardiologist, also concluded that Claimant could do part-time work. Initially, in July 2006, Dr. Gutovitz concluded that Claimant could work four hours per day. Claimant was doing maintenance work at the time. In August 2006, Dr. Gutovitz concluded that Claimant could work four to six hours per day.

Thus, neither Dr. Parmet nor Dr. Gutovitz concluded that Claimant was permanently and totally disabled from doing any work. The evidence clearly supported their opinions. Claimant even testified at the hearing in August 2010 that he worked until June of the previous year. Claimant clearly failed to prove an inability to return to any employment after the alleged accident at work.

Claimant also offered the testimony of Mr. Cordray, a vocational expert, in support of his position. Mr. Cordray did not examine Claimant until three and one-half years after the alleged accident at work. Mr. Cordray acknowledged that the medical evidence showed that Claimant could do sedentary work on a part time basis. Mr. Cordray failed to given sufficient weight to the medical restrictions by Drs. Parmet and Gutovitz which allowed Claimant to do sedentary work on a part time basis and up to 6 hours per day per Dr. Gutovitz's opinion in August 2006.

In addition, the evidence indicated that Claimant's health had deteriorated by the time Mr. Cordray performed the evaluation more than three years after the alleged exposure at work. Claimant, by his own testimony admitted that he had suffered two medically diagnosed myocardial infarctions after the alleged exposure at work and prior to the evaluation by Mr. Cordray. His cardiovascular problems were degenerative. He has congestive heart failure. His diabetes was degenerative. At one point it was noted in his medical records that he had failed to adhere to his diabetic diet and that his medications were increased. His bilateral cataract surgeries were subsequent to the alleged accident at work.

Mr. Cordray also based his opinions on Claimant's test results from his evaluation of Claimant. He acknowledged that Claimant's scores were average in reading, spelling and arithmetic, but "not high" on the aptitude test which measured general ability. He also admitted, however, that Claimant was ill on the day of the evaluation. He admitted that Claimant told him that Claimant was too ill to even drive to the evaluation.

The statute provides that Second Injury Fund liability must be based on the disability from the injury on the job combining with the employee's preexisting disability. § 287.220 RSMo. 2005. Nothing in the statute provides that Second Injury Fund liability may be premised on the disability from the injury on the job combining with a subsequent deterioration in the employee's preexisting disability. Id. Lingerfelt v. Elite Logistics, Inc. 255 S.W.3d 1 (Mo. App. S.D. 2008).

Mr. Cordray's opinions were clearly contrary to the evidence. The evidence did not show that Claimant was permanently and totally disabled due to a combination of the disability Claimant allegedly sustained in the accident at work and his preexisting disability as of April 2006.

## Permanent partial disability

The evidence failed to show that Claimant was entitled to any permanent partial disability benefits from the Second Injury Fund. Again, Claimant failed to prove a compensable injury by accident. Moreover, the evidence showed that Claimant settled his case with his employer and that the disability represented by the settlement did not meet the threshold amount of disability as set out in the statute for establishing Second Injury Fund liability for permanent partial disability benefits.

The statute provides that in permanent partial disability cases the Second Injury Fund can only be liable for benefits if the disability from the injury on the job results in a permanent partial disability of at least 12.5 percent to the body as a whole for body as a whole injuries and a minimum of 15 percent of a major extremity for extremity injuries. §287.220. Claimant allegedly sustained a body as a whole injury in the alleged April 2006 accident at work.

Claimant argued at the hearing that the settlement stipulation he voluntarily entered into with his employer was irrelevant and therefore inadmissible into evidence. Claimant's objection to the admission into evidence of the settlement stipulation was overruled and the stipulation for settlement was admitted into evidence. See Conley v. Treasurer of Missouri, 999 S.W. 2d 269 (Mo. App. E.D. 1999 where the Court addressed that issue. In Conley the Court noted that a settlement was relevant as proof of the employee's percentage of disability and that to find the settlement inadmissible would permit the employee to relitigate his percentage of permanent partial disability and to defeat the finality of the settlement.

Thus, based on Conley, Claimant cannot relitigate the percentage of permanent partial disability he agreed that he had sustained as a result of the alleged exposure at work in April 2006. Claimant is bound by the settlement agreement he voluntarily entered into with his employer. The stipulation for settlement Claimant voluntarily entered into with his employer showed that he agreed that he had sustained a permanent partial disability of 11 percent to his body as a whole as a result of the injuries he allegedly sustained in the alleged April 2006 accident.

Thus, as noted above Claimant is bound by the agreement. He cannot relitigate that issue. Claimant sustained a permanent partial disability of 11 percent to his body as a whole

due to the disability he allegedly sustained in the April 2006 accident at work. Therefore, his disability from the alleged accident at work did not meet the minimum threshold amount of 12. 5 percent permanent partial disability to the body as a whole as required by the statute to establish Second Injury Fund liability. See also Gassen v. Leinbengood, 134 S.W. 3d 75 (Mo. App. W.D. 2004; and, Totten v. Treasurer of State of Missouri, 116 S.W. 3d 624 (Mo. App. 2003) where the Courts noted that the Second Injury Fund was not bound by the terms of a settlement between the employee and the employer to which it was not a party. Neither Court found that the employee who was a party to the settlement and who had agreed to the amount of disability as reflected in the settlement could relitigate that issue in a subsequent proceeding to determine any possible liability of the Second Injury Fund. Gassen; Totten. Claimant failed to prove the Second Injury Fund's liability for compensation.

Date: _____ Made by: _____
Kenneth J. Cain
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this ____day of _____

2010 by:

_____
Naomi Pearson
Division of Workers' Compensation