

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 05-142895

Employee: Sheryl Berend
Employer: Fasco Industries, Inc.
Insurer: Travelers Indemnity Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Introduction

Employee filed a claim for compensation alleging injury to both shoulders, both upper extremities, and her body as a whole caused by her hand-intensive and repetitive work for employer. The parties asked the administrative law judge to resolve the following issues: (1) the occurrence of an occupational disease; (2) whether the alleged occupational disease arose out of and in the course of employment; (3) causation of the injuries alleged; (4) whether appropriate notice was given; (5) the liability of employer for past medical treatment; (6) the liability of employer for temporary total disability benefits as of February 17, 2006; (7) the nature and extent of permanent disability; (8) the liability of the Second Injury Fund for second job wage loss benefits; (9) the liability of the Second Injury Fund for permanent disability benefits; and (10) the liability of employer for future medical treatment.

The administrative law judge rendered the following findings and conclusions: (1) employee met her burden of proving she sustained a compensable injury to her right shoulder as a result of her repetitive work for employer; (2) employee failed to meet her burden of proving she gave employer appropriate notice of her claimed injuries including her left shoulder, hands, wrists, feet, or depression; (3) employee failed to meet her burden of proof with regard to her past medical expenses related to the right shoulder, because it was difficult to ascertain from the list of medical bills provided by employee which expenses were attributable to and still owing as the result of the right shoulder injury; (4) employer is liable for temporary total disability from February 17, 2006, through August 30, 2007; (5) employer is liable for permanent partial disability of 25% of the right shoulder; (6) employee sustained her burden of proof that she is entitled to benefits from the Second Injury Fund for lost wages from secondary employment in the amount of \$71.79 per week for the weeks between February 17, 2006, and August 30, 2007; (7) employee failed to sustain her burden of proving Second Injury Fund liability for any combination of her preexisting disabilities and the effects of the work injury; and (8) employee failed to sustain her burden of proving she is entitled to future medical treatment for her right shoulder.

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Employee filed a timely Application for Review alleging the administrative law judge erred in her findings on the issues of notice, past medical expenses, Second Injury Fund liability, and future medical care.

Employer filed a timely Application for Review alleging the administrative law judge erred in her findings on the issues of temporary total disability benefits. While the case was pending before the Commission, employer filed a request to withdraw its Application for Review. The Commission, by order dated July 3, 2012, granted employer's request to withdraw its Application for Review.

Discussion

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact on the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings pertinent to our modifications herein.

Notice

We believe the administrative law judge erred as a matter of law in denying employee's left shoulder, bilateral upper extremity, and depression claims for lack of notice, because under relevant Missouri case law, employee unquestionably satisfied the statute's requirements. Section 287.420 RSMo sets forth the requirements for the notice employees must provide employers regarding a work injury, and provides, as follows:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice. No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.

Under the foregoing language, in the context of an injury resulting from an accident, the triggering event that begins the thirty-day notice period is the accident itself. But in the context of an injury resulting from occupational disease, the triggering event is "diagnosis of the condition," and the courts have explained this requirement, as follows:

Strictly construing Mo. Rev. Stat. § 287.420 (Cum. Supp. 2005), "the condition" is referring to the previously stated occupational disease or repetitive trauma. Therefore, the question then becomes, at what point is an occupational disease or repetitive trauma diagnosed? Looking to the plain, obvious, and natural import of the language, it follows that a person cannot be diagnosed with an occupational disease or repetitive trauma

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until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure.

Allcorn v. Tap Enters., 277 S.W.3d 823, 829 (Mo. App. 2009).

Pursuant to *Allcorn*, the thirty-day notice period did not begin to run for this employee until a diagnostician made a causal connection between her injuries and her work-related activity or exposure. The administrative law judge overlooked this aspect of the statutory analysis, and the parties have failed in their briefs to identify the date upon which a diagnostician first made a causal connection between employee's injuries and her work, so we turn to the record. Searching the medical evidence, we find no indication that any of employee's treating doctors identified a causal connection between employee's work and her bilateral upper extremity problems. Instead, it appears (and we so find) that the first diagnostician to make a causal connection between employee's underlying medical condition and her work-related activity or exposure was Dr. Volarich, who issued his report on November 17, 2008. We conclude that the thirty-day notice period runs from that date.

Employee filed her claim for compensation on October 10, 2006, more than two years prior to the date Dr. Volarich issued his report. In that filing, employee alleged injury to both shoulders, both upper extremities, and her body as a whole caused by her hand-intensive and repetitive work for employer. Employee's claim for compensation amounts to "written notice of the time, place, and nature of the injury, and the name and address of the person injured," and thus satisfies each element of the notice employee is required to provide employer under the statute. See § 287.420, *supra*. As the *Allcorn* court pointed out, "the statute does not require that the notice be given after the diagnosis, but only that it be given 'no later than thirty days after the diagnosis of the condition.'" 277 S.W.3d at 830 (emphasis in original). Far from failing to provide statutory notice to employer, employee actually provided it more than two years early.

We briefly address employer's argument that employee was required under § 287.420 RSMo to submit "a written request for treatment under workers compensation" to employer in connection with her left shoulder, bilateral upper extremities, and psychiatric conditions. Employer points to employee's testimony acknowledging she never asked employer to send her for treatment. Employer's argument fails because it finds no support in the statute, which, as the parties are undoubtedly aware, we are required to strictly construe. See § 287.800 RSMo.

We conclude that employee's claims for her left shoulder, bilateral upper extremities, and psychiatric (body as a whole) injuries are not barred by § 287.420 RSMo.

Medical causation

The parties advance competing expert medical opinions on the issue of medical causation of employee's injuries. Although she failed to render any affirmative findings as to which medical expert provided the more credible testimony on the issue of medical causation of employee's right shoulder injury, the administrative law judge's award of compensation referable to the right shoulder in the form of permanent partial disability benefits implies she found Dr. Volarich more credible than Dr. Milne. In any event, we

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have concluded that employee's claim of left shoulder, bilateral upper extremity, and psychiatric injuries are not barred by § 287.420 RSMo, so the question of medical causation of these conditions must now be resolved.

Dr. Volarich opined that employee's repetitive work with employer was the prevailing factor causing her to develop bilateral shoulder impingement with biceps tendon tear, as well as a labral tear on the right and a rotator cuff tear on the left, and also bilateral forearm and wrist tenosynovitis with symptoms of carpal tunnel syndrome. Dr. Milne, on the other hand, diagnosed employee with impingement syndrome and AC joint arthrosis, and opined that neither of these medical conditions resulted from employee's work, but instead "preexisted the time of the injury." It appears Dr. Milne believed "the time of injury" to be November 16, 2005, although he acknowledged he didn't know the significance of that date other than that employee used it on her intake form and that it was the date that Dr. Acosta examined employee for employer.

In a case where employee is alleging a slow-developing and cumulative injury to her bilateral upper extremities during years of exposure to repetitive hand-intensive work for employer, Dr. Milne's focus on November 16, 2005, as "the time of injury" renders his testimony less useful for our purposes. Dr. Milne also opined that employee's biceps tendon rupture occurred when she turned over in bed in October 2005, but we find this opinion lacking credibility, owing to Dr. Milne's candid admission that he doesn't know how such an injury could occur in bed, and that such an event would be very rare.

Ultimately, we agree with the administrative law judge's implied finding that Dr. Volarich's medical causation opinions are more persuasive, especially when we consider employee's credible testimony about the demanding and repetitive work she performed with her hands and arms for employer.

The parties provided expert medical testimony from Dr. Daniel and Dr. Stillings on the issue whether employee's work injuries caused her to sustain psychiatric injury and permanent disability in the form of depression. Both doctors agree that employee suffered from preexisting depression, but that employee's work injuries caused her to suffer some additional psychiatric injury resulting in permanent partial disability. Dr. Daniel opined that the work injury is a substantial factor in precipitating a recurrence of employee's depression following the work injury. Dr. Daniel opined that the work injury also caused employee to develop a pain disorder associated with psychological factors. Dr. Stillings believes the work injury was the prevailing factor in causing an aggravation to employee's preexisting major depressive disorder, with an associated 2.5% permanent partial disability of the body as a whole. We credit the uncontested opinion from both doctors that employee's work injuries caused her to suffer depression and permanent partial psychiatric disability, but in particular we find Dr. Stillings's opinion more useful for our purposes, as it conforms to the current statutory standards for medical causation.

Having rendered the foregoing credibility determinations, we turn now to the statutory analysis. Section 287.067 RSMo states, in relevant part:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the

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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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

We have credited Dr. Volarich over Dr. Milne on the question of causation of employee's claimed injuries and disabilities. We conclude employee's occupational exposure to repetitive hand-intensive work was the prevailing factor causing employee to suffer bilateral shoulder impingement with biceps tendon tear, as well as a labral tear on the right and a rotator cuff tear on the left, and also bilateral forearm and wrist tenosynovitis with symptoms of carpal tunnel syndrome, with resultant permanent disability. We also conclude the work injury was the prevailing factor causing both the resulting medical condition of a recurrence of major depression and associated permanent partial psychiatric disability.

Temporary total disability

The administrative law judge found that employee was temporarily totally disabled owing to her right shoulder injury, but denied any temporary total disability benefits after Dr. Marberry released employee from treatment for the right shoulder on August 30, 2007, as a result of her conclusions on the issue of notice (discussed above). We have reversed those conclusions and found that employee's bilateral shoulder, bilateral upper extremity, and psychiatric injuries are compensable. We turn now to the question whether employee is entitled to additional temporary total disability benefits in connection with these injuries.

The test for temporary total disability is whether, given employee's physical condition, an employer in the usual course of business would reasonably be expected to employ her during the time period claimed. *Cooper v. Medical Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997). Employee credibly testified (and we so find) that she hasn't worked since her last day with employer on February 17, 2006, although she did fill in for a couple hours one day getting sodas and candy bars for customers of her former employer, Versailles Livestock Auction, when she happened to be there at a time that they needed help. Employee also credibly described her limitations resulting from her upper extremity injuries. "A claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. 2003). We conclude that employer is liable for temporary total

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disability benefits from February 17, 2006, through November 17, 2008, the date that Dr. Volarich found her to be at maximum medical improvement.

Past medical bills

We have concluded the work injury caused employee to suffer injuries to her bilateral shoulders and wrists, and psychiatric injury in the form of major depression. Consequently, employer is liable under § 287.140.1 RSMo to pay employee's reasonable and necessary medical expenses referable to these injuries, so long as employee met her burden of providing the bills, the records from the treatment to which the bills relate, and testimony showing the expenses flowed from the work injury. *Martin v. Mid-Am. Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989).

Employee submitted some bills and medical records, and provided some general testimony linking the bills to her treatment for the work injuries. But the administrative law judge denied employee's claim for past medical expenses related to her right shoulder (even after finding a compensable injury) on the basis it was difficult to discern from employee's exhibit what bills were due in connection with which procedure, and what amounts employee ultimately claimed she owed. The transcript of the hearing suggests that the administrative law judge asked the parties for a stipulation regarding the amount of disputed medical, and when the parties couldn't reach one, informed employee's counsel that she would expect him, at the end of the hearing, to tell her what employee was claiming in past medical bills. See *Transcript*, pages 65, 66. Unfortunately, this never occurred.

Employee appealed the issue of past medical expenses, but makes no mention of the administrative law judge's actual rationale for denying those expenses in her brief. Turning to the record, we find included with the bills a one-page spreadsheet entitled "MEDICAL BILLS FOR: SHERYL BEREND." *Transcript*, page 123. After considerable review of this document in conjunction with the bills themselves, we share the administrative law judge's confusion as to what this spreadsheet is intended to show. Specifically, the summary page doesn't make clear whether employee is claiming the full amount of \$53,404.49, which is the amount she identifies as "Total Charges," or whether she believes employer's liability has been reduced by payments from "BCBS Group Insurance" in the amount of \$13,129.03, "Adjustments/Contractual write offs" in the amount of \$27,212.71, and "Unpaid or Bad Debt" in the amount of \$3,769.42.

At oral argument in this matter, employee's counsel identified total charges of \$47,033.59, less a credit to employer in the amount of \$13,129.03, for a final sum of \$33,904.56, as the amount of past medical expenses incurred by employee. We appreciate employee's counsel's attempt to identify a total amount of past medical expenses, but upon further review of the record, we were unable to determine the basis for identifying the amount of \$47,033.59, because not only does this diverge from the amount identified as "Total Charges" in the spreadsheet, but we were unable to reach this sum by deducting any of the identified write-offs or adjustments. Compounding this irksome situation was our discovery, when we attempted our own calculation of the total charges, that neither the newly identified total of \$47,033.59 nor the amounts reflected in the spreadsheet conform to the actual bills themselves. This may have been the result of employee's failure to include any of the charges incurred with Center of Orthopedic Excellence (Dr. Galbraith)

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from October 26, 2006, to March 9, 2007, in her calculations, or her failure to exclude charges related to treatment for employee's plantar fasciitis, a condition which she is not claiming as a workers' compensation injury. See *Transcript*, page 45. The charges referable to these treatments are found throughout the bills, and the medical record reveals that employee sometimes received treatment for plantar fasciitis during the very same visit during which a medical provider was also treating her compensable work injuries. This is precisely the sort of complex medical history where a clear delineation of the charges, with a consistently identified total amount claimed, would seem to be a fundamental aspect of employee's proof in the case.

But in the end, we find no assistance in the spreadsheet, in employee's brief, or in the statements by employee's counsel at oral argument. As a result, it appears that we are invited to comb the 370 pages of medical records in order to identify and segregate the treatment dates, providers, and procedures that are and are not referable to employee's compensable work injuries, take the data gleaned thereby, and apply it to a line-by-line audit of each of the medical bills, in order to determine which charges represent past medical expenses for which employer is liable. We are asked to perform this cumbersome task without even the benefit of a consistently identified total amount with which to compare our results.

We would be remiss if we failed to make clear the significant imposition employee's counsel makes upon this Commission in failing to clearly and consistently identify the amount of employee's past medical expenses. We are convinced employee suffered a compensable work injury and that she is entitled to her past medical expenses, but the confused and disorganized state of the evidence provided is so serious that to overcome it would require our becoming an advocate on behalf of the employee. This, of course, we are not permitted to do.

With that said, in the course of our review we were able to identify without considerable difficulty certain charges that are clearly referable to the work injury. We award those past medical expenses as follows: the shoulder surgeries performed by Dr. Galbraith on February 20, 2006, and on June 5, 2006, in the amounts of \$5,155.00 and \$5,615.00; the MRIs of employee's bilateral upper extremities taken on September 1, 2006, in the amount of \$2,920.00; and the surgeries performed by Dr. Marberry on April 4, 2007, and on September 12, 2007, in the amounts of \$4,580.00 and \$4,789.00, for a total of \$23,059.00. Otherwise, in light of the concerns identified above, and in order to avoid becoming an advocate for any party, we must conclude employee failed to meet her burden of proving any additional past medical expenses referable to the work injuries beyond the sum of \$23,059.00.

With regard to the "credit" identified by employee's counsel, we take it that employee believes the \$13,129.03 in payments by "BCBS Group Insurance" reduced employer's liability for past medical expenses. But neither party provided evidence to demonstrate what kind of insurance policy this was or why the payments were made under this policy. It appears employee's counsel tried to advance a stipulation that employer "provided" Blue Cross/Blue Shield insurance, but employer's counsel never weighed in on this issue, and thus a stipulation was never reached. These questions are important because the terms of § 287.270 RSMo would prevent us from reducing an award of

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compensation on the basis of payments from employee's insurance policy, or from any other source other than employer or employer's workers' compensation insurer, so if employee is claiming her liability was reduced by payments of this kind, she is simply incorrect. *Shaffer v. St. John's Regional Health Ctr.*, 943 S.W.2d 803, 807 (Mo. App. 1997). These circumstances leave us with a troubling ambiguity: is employee conceding employer is entitled to a credit on the basis of a misunderstanding of applicable law? Or does she simply know something that we don't (and which is not reflected in the record) about the payments by BCBS Group Insurance policy? These questions are emblematic of the needless confusion surrounding the issue of past medical expenses in this case.

Ultimately, though, nothing prevents employee from conceding that employer is entitled to a credit for past payments of workers' compensation benefits. Accordingly, we deduct \$13,129.03 and reach the final sum of \$9,929.97 as our award of past medical expenses to employee.

Finally, we briefly return to employer's argument that it is not liable for benefits because employee didn't provide "a written request for treatment under workers' compensation" to employer. Where an employer has notice of an employee's need for medical treatment but fails or refuses to provide it, the employee is entitled to seek treatment on her own, while later pursuing an award holding employer liable for her medical expenses. *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 844 (Mo. App. 2007). We are persuaded that employer cannot now seriously claim ignorance regarding employee's significant bilateral upper extremity problems and the fact she was receiving treatment for them.

We acknowledge the testimony from Sherry Haynes, employer's safety administrator, who testified that employee specifically told her that her right shoulder "was not work comp" and that she wanted to see her own doctors; we adopt the administrative law judge's implied finding that Ms. Haynes's testimony lacks credibility in this regard. We find it unlikely employer would send employee to Dr. Acosta for an evaluation in such circumstances. Instead, we find more credible employee's testimony (and so find) that employee made multiple complaints to her supervisors about the aches and pains resulting from her work. We find that these complaints prompted employer on November 16, 2005, to send employee to Dr. Acosta, who examined her and opined that her right arm and shoulder injuries were not caused by her work, and that her upper extremities were otherwise normal. Relying on the opinions of Dr. Acosta, employer declined to provide medical care to employee. At that point, medical care became a disputed issue.

Employer asks us to ignore the reality of the circumstances involved in this case when it suggests employee's failure to submit a written request for treatment had the effect that employer was wholly ignorant of employee's treatment. To the contrary, the record reveals that employer was unquestionably on notice that employee's complaints manifested in a bilateral fashion, that she required medical treatment, and that she ultimately had to leave her work and pursue disability benefits because of these injuries. Ms. Haynes acknowledged that employee kept employer apprised of her medical treatment and that employer even had access to the medical records generated in connection with such treatment.

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Given these circumstances, we conclude employer is not relieved of liability for employee's past medical expenses, because employer knew that employee was in need of medical care but failed to provide it.

Future medical care

Section 287.140.1 RSMo provides: "In addition to all other compensation paid to the employee under this section, 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." Dr. Volarich identified a need for ongoing treatment to manage employee's pain syndrome in the form of medications, physical therapy, and other treatments, and Dr. Daniel opined that employee will need psychotherapy and continued use of antidepressants. We credit their testimony and conclude that employer is obligated to provide future medical treatments that may reasonably be required to cure and relieve from the effects of employee's work injuries.

Lost wages from secondary employment

Our findings with respect to the compensability of employee's left shoulder and bilateral extremity injuries, as well as our finding that employee reached maximum medical improvement on November 17, 2008, impacts the administrative law judge's award holding the Second Injury Fund liable for employee's lost wages from secondary employment. As the Second Injury Fund did not file an Application for Review challenging this award, we discern no reason to disturb the administrative law judge's findings as to employee's secondary employment or her average weekly wage. Accordingly, we modify the award to conform to our findings as follows. The Second Injury Fund is liable for lost wages from secondary employment at the Versailles Livestock Auction in the amount of \$71.79 per week from February 17, 2006, until November 17, 2008.

Permanent total disability

In her brief, employee argues she is permanently and totally disabled and that the Second Injury Fund is liable for permanent total disability benefits. For the Second Injury Fund to be liable for permanent total disability benefits, employee must establish that: (1) she suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

The Second Injury Fund's vocational expert James England opined that if we accept Dr. Volarich's findings, employee is permanently and totally disabled due to the work injury considered alone; Mr. England explained that because of employee's age and the fact she "has no skills," she is limited to entry level kinds of jobs that will require extensive use of the upper extremities. On the other hand, Mr. England opined that if we accept Dr. Milne's restrictions, employee could work light duty jobs. Meanwhile, employee's vocational expert Gary Weimholt testified employee is permanently and

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totally disabled as a result of her bilateral upper extremity and psychiatric injuries resulting from her work for employer in combination with her preexisting conditions of ill, which include chronic headaches, depression, and plantar fasciitis.

Employee credibly testified she feels as if she is a 90-year-old woman in a 60-year-old body, and that she doesn't do much other than watch TV, sit outside, or look at magazines anymore. Employee can perform some small chores around her home such as doing a few dishes or a small load of laundry, but not on an everyday basis, or she suffers from pain. Employee attributes most of her limitations to the effects of the work injury to her bilateral upper extremities. Employee explained that simple motions like using a TV remote or shampooing her hair cause employee to experience pain in her upper extremities. Employee has difficulty sleeping due to shoulder pain, which leaves her tired during the day.

Especially in light of employee's testimony emphasizing her upper extremities as the major factor keeping her from being active, we find Mr. England's testimony most credible. As we have credited Dr. Volarich over Dr. Milne, we credit that portion of Mr. England's testimony assigning permanent total disability to the work injury, considered alone. We conclude that the effects of the primary injury, considered in isolation, render employee permanently and totally disabled. Employer is liable for permanent total disability benefits.

Award

We modify the award of the administrative law judge on the issues of notice, medical causation, temporary total disability, past medical bills, future medical care, lost wages from secondary employment, and the nature and extent of employee's disability referable to the work injury. In all other respects, we affirm the award of the administrative law judge.

Employer is liable for temporary total disability benefits from February 17, 2006, until November 17, 2008, the date employee reached maximum medical improvement.

Employer is liable for employee's past medical expenses in the amount of \$9,929.97.

Employer is liable for future medical care that may reasonably be required to cure and relieve from the effects of employee's injuries.

Employer is liable for permanent total disability benefits beginning November 17, 2008, the date on which employee reached maximum medical improvement, in the amount of \$298.27 per week for employee's lifetime, or until modified by law.

The Second Injury Fund is liable for lost wages from secondary employment in the amount of \$71.79 per week from February 17, 2006, until November 17, 2008, the date employee reached maximum medical improvement.

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.

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The award and decision of Administrative Law Judge Hannelore D. Fischer, issued January 30, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 8th day of November 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Sheryl Berend

Injury No.: 05-142895

Dependents: N/A

Employer: Fasco Industries, Inc.

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

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

Insurer: Travelers Indemnity Company

Hearing Date: November 21, 2011

Checked by: HDF/scb

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: November 2005.
5. State location where accident occurred or occupational disease was contracted: Miller 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? See award.
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:
See award.
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 shoulder.
14. Nature and extent of any permanent disability: 25% right shoulder.
15. Compensation paid to-date for temporary disability: - 0 -
16. Value necessary medical aid paid to date by employer/insurer? - 0 -
17. Value necessary medical aid not furnished by employer/insurer? - 0 -

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- 18. Employee's average weekly wages: ----
- 19. Weekly compensation rate: \$298.27 per week for all benefits.
- 20. Method wages computation: By agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

TTD – 79 weeks, 6 days from February 17, 2006 through August 30, 2007 =	\$23,818.98
PPD – 25% right shoulder = 58 weeks =	\$17,299.66

- 22. Second Injury Fund liability:

Lost Wages at \$71.79 for 79 weeks, 6 days =	\$5,732.70
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- 23. Future Requirements Awarded: - 0 -

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: Truman Allen.

Employee: Sheryl Berend

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Sheryl Berend

Injury No: 05-142895

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Fasco Industries, Inc.

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

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

Insurer: Travelers Indemnity Company

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on November 21, 2011. Memoranda were filed by December 16, 2011.

The parties stipulated that on or about November 30, 2005, the claimant, Sheryl Berend was in the employment of Fasco Industries, Inc. (Fasco). The employer was operating under the provisions of Missouri's workers' compensation law; workers' compensation liability was insured by Travelers Indemnity Company. A claim for compensation was timely filed. The agreed upon rate of compensation is \$298.27 per week for all benefits.

No temporary disability benefits have been paid. No medical aid has been provided.

The issues to be resolved by hearing include 1) the occurrence of an occupational disease, 2) whether the alleged occupational disease arose out of and in the course of employment, 3) the causation of the injuries alleged, 4) whether appropriate notice was given, 5) the liability of the employer/insurer for past medical treatment, 6) the liability of the employer/insurer for past temporary total disability benefits as of February 17, 2006, 7) the nature and extent of permanent disability, 8) the liability of the Second Injury Fund for secondary employment wage loss benefits, 9) the liability of the Second Injury Fund for permanent disability benefits, and 10) the liability of the employer/insurer for future medical treatment.

FACTS

The claimant, Sheryl Berend, was 58 years old as of the date of hearing. Ms. Berend worked for Fasco from 1996 through 2006. In 2003, Ms. Berend worked in production for Fasco, including work as a skew press operator for Fasco. Ms. Berend described hand intensive and repetitive work involving weights of 10 to 15 pounds when handling logs of lams or rotors, weights of 25 to 35 pounds when handling buckets of pins, 10 to 30 pounds when packing motors, and three to seven pounds when handling castings. Ms. Berend testified that in November of 2005, her shoulders, hands and feet bothered her and she sought a transfer to another department from the die casting department she was working in at the time.

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Ms. Berend testified that her shoulders began hurting in 2003 or 2004. Ms. Berend said that when her shoulders started hurting she saw her family doctor. Medical records document Ms. Berend's complaint of right shoulder pain "getting worse over the past several days. [Ms. Berend] denies any specific injury, but she does do a lot of physical labor" during a visit to Dr. Gibson on March 8, 2005. On October 11, 2005, Dr. Griswold's medical records reflect Ms. Berend's complaint of right shoulder pain, including "[Ms. Berend] has had it off & on over the past x 1 yr. or so. She lifts a lot at work and it has just been uncomfortable over the past few days. She could not even go to work last PM it was so painful. She has pain just deep down in the shoulder & into the arm area. ... It is pretty much the same as when she saw Dr. King back in April; not a whole lot different than at that time." Dr. King's notes of April 28, 2005 refer to left shoulder pain; however, it appears that it is the right shoulder that is complained of and it was the right shoulder that was examined by Dr. King and found to have "point tenderness over the anterior shoulder & the bicipital tendon; to a lesser extent over the subacromial bursa.... She had positive impingement sign."

Ms. Berend testified that she was referred by her family physician to Dr. Sloan. Dr. Sloan sent a letter to Dr. Griswold on October 31, 2005, in which he states that "[Ms. Berend] relates that this has been going on for three or four months. She denies any specific trauma or injury. She reports she got up one morning and her shoulder was sore...." Dr. Sloan's "impression" is "1) Right long-head biceps tear. 2) Right rotator cuff tear, partial versus full."

Ms. Berend was sent to Dr. Acosta by Fasco. Dr. Acosta saw Ms. Berend on November 16, 2005. According to Dr. Acosta's records, Ms. Berend reported "that she was in bed sleeping and that she suddenly woke up because she felt a snapping or popping in her shoulder and she had severe excruciating pain. [Ms. Berend] has been in pain since that time. She was able to go back to work immediately thereafter and over the course of the next several weeks was developing progressive shoulder pain in other areas remote from the original site...." Dr. Acosta's "assessment" was "1. Ruptured biceps tendon, most likely old. 2. Rotator cuff tendonitis secondary to #1 above. The biceps tendon itself was soft and atrophied and I doubt that this is a recent injury. ...the fact that she said she awoke with this pain seems to confirm that this is something that may have happened just because of her sleeping position...." Dr. Acosta's "recommendations" included a follow up with Ms. Berend's family doctor "since this is not going to be likely covered under workmen's comp since the primary injury occurred while she was off work at home asleep. I do not find that her job that she does on an every day basis or the job she was doing at the time would likely have contributed to any of this disease process."

Dr. Galbraith's records reflect Ms. Berend's history of right shoulder pain "going on for some time" on November 22, 2005. On February 20, 2006, Dr. Galbraith performed surgery on the right shoulder; the postoperative diagnosis was "1. Outlet impingement, 2. Acromioclavicular arthritis. 3. Rule out cuff tear. 4. No evidence of full thickness cuff tear." On June 5, 2006, Dr. Galbraith operated on Ms. Berend's left shoulder; the postoperative diagnosis was "1. Rule out rotator cuff tear, left shoulder, with outlet impingement, no evidence of any cuff tear. 2. Acromioclavicular arthritis. 3. Nonrepairable biceps tendon tear."

On April 4, 2007, Dr. Kevin Marberry performed a right shoulder arthroscopy labrum debridement and subacromial decompression and on September 12, 2007, Dr. Marberry

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performed a left shoulder arthroscopy and subacromial decompression and lysis of adhesions on Ms. Berend. Dr. Marberry last saw Ms. Berend for her right shoulder on August 30, 2007, and issued his "final report" regarding the right shoulder stating "Sheryl is now nearly five months status post right shoulder arthroscopy, limited debridement of the anterior and inferior capsule/labrum and revision subacromial decompression. She is doing quite well; in fact , she is completely pain free with regard to the right shoulder. She has had no injury or insult. She reports the only activity that occasionally bothers her is driving. She takes Relafen for pain relief."

Ms. Berend last worked at Fasco on February 17, 2006. According to Ms. Berend they had no light duty work for her at Fasco.

Ms. Berend also testified to problems with her hands and feet while working at Fasco, dating the hand problems to 2002 and 2003 and the foot problems back to 2003. Ms. Berend testified to migraine headaches dating back to 1996 and 1997. Ms. Berend testified that she suffers from depression because she can no longer work. Ms. Berend also testified that she suffered from depression prior to 2005 and that her depression "probably" started in her childhood.

Ms. Berend testified that her only medications at present are for her blood pressure and her cholesterol.

Ms. Berend testified that she reported no injury to her left shoulder, her hands or wrists, her feet or depression to any one at Fasco and sought no medical treatment from any one at Fasco for these conditions. Ms. Berend said that the only injury she reported to Fasco was the injury to her right shoulder.

Ms. Berend testified that in addition to her work at Fasco, she also worked as a cook at the Versailles Sale Barn one day a week; Versailles Sale Barn records document an average weekly wage of about \$107.69 per week. Ms. Berend said that she did not work at the sale barn after she left Fasco with the possible exception of helping out one afternoon at the Sale Barn when they were short handed.

Dr. David Volarich, M.D., a certified independent medical examiner, testified by deposition that he evaluated Ms. Berend on November 17, 2008. Dr. Volarich opined that "the repetitive nature of Ms. Berend's work ... leading up to 11/05 while working for Fasco are the substantial contributing factors as well as prevailing or primary factors causing the bilateral shoulder impingement with biceps tendon tear as well as a labral tear on the right and a rotator cuff tear on the left each of which required 2 separate arthroscopic repairs. As a result of these repetitive activities she also developed bilateral forearm and wrist tenosynovitis with symptoms of carpal tunnel syndrome (NCV normal)." Dr. Volarich defined the cause of impingement syndrome as the narrowing of the subacromial space caused by swelling in the subacromial space that makes it difficult for the rotator cuff tendons to pass through, causing a "nutcracker effect" on the rotator cuff tendons when the humeral head is rotated. Dr. Volarich said that either overuse or direct trauma cause the impingement to become symptomatic.

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Dr. Volarich testified that a bicep tear without a traumatic event would be unusual, although he later clarified that the trauma can be repetitive trauma. When questioned about whether the bicep tendon tears that Ms. Berend had were caused by her repetitive work at Fasco, Dr. Volarich responded that "it was somewhere along the way. I don't know when exactly, but, you know the ... She has had problems for many years going on four or five years." Dr. Volarich further testified that a bicep tear would usually cause pain. When asked about the pain, Dr. Volarich referred to the pain in Ms. Berend's shoulder as "more due to the impingement and the other problems she was having as opposed to the bicep tendon that was very ... It was shown to be a chronic tear." Dr. Volarich went on to say that the popping sensation and pain that Ms. Berend had when she turned over in bed "was probably part of the impingement at the AC joint that she felt." Dr. Volarich acknowledged that Ms. Berend had arthritis in both shoulders at the AC joint and that the arthritis was an underlying condition. When asked about the lack of documented pain complaints in Ms. Berend's upper extremities, Dr. Volarich responded by saying "Well, you know, the story. All I can do is tell you what she told me, and what she told me made sense from a repetitive trauma standpoint. You know, people work. They do a lot of different things to make a living. They are not going to go in everyday and complain that this hurts or that hurts or whatever cause they're going to lose their job. If they can't do the work, somebody else is back there to take over for them. I just have to believe that she was doing the best she could. This is a repetitive wear and tear situation that happened from the work she was doing and gradually her shoulders broke down."

Dr. Volarich opined that as a result of her injuries sustained while employed at Fasco Ms. Berend has a permanent disability of 50 percent of the right shoulder, 50 percent of the left shoulder, 20 percent of the right wrist, and 20 percent of the left wrist as well as a 15 percent of the body "as a multiplicity factor due to the combination of injuries to both upper extremities." With regard to preexisting disabilities, Dr. Volarich opined to a 20 percent disability of each foot due to plantar fasciitis and 5 percent permanent disability as the result of chronic headaches. Dr. Volarich deferred to a psychiatric assessment of permanent disability due to depression.

Dr. A. E. Daniel, M.D., a psychiatrist, testified by deposition that he evaluated Ms. Berend in October of 2009 and prepared an October 30, 2009 report pertaining to that evaluation. Dr. Daniel opined that Ms. Berend has a psychiatric disability associated with her November 2005 work injury of 30 percent of the person; Dr. Daniel defined the November 2005 work injury as including the "pain in her shoulders, her wrists, and her feet." Dr. Daniel also opined to a ten percent permanent psychiatric disability preexisting the 2005 injury. Dr. Daniel recommended management of Ms. Berend's use of Prozac and stated that "psychotherapy to address her depression and somatization would be beneficial to restore her psychosocial functioning."

Mr. Gary Weimholt, vocational rehabilitation consultant, testified by deposition that he evaluated Ms. Berend and authored a report regarding that evaluation dated February 5, 2009. Mr. Weimholt opined that Ms. Berend is incapable of employment as the result of her physical "limitations related to her shoulders, elbows/foreman (sic)/wrist/hand and lower extremities, in combination have resulted in her inability to participate in the open competitive labor market. This, in my opinion, would be associated with the injury to her shoulders while working with Fasco as of 11/05 and previous to that time."

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Dr. Michael Milne, M.D., orthopedic surgeon, testified by deposition that he evaluated Ms. Berend on February 22, 2010. Dr. Milne opined that Ms. Berend “likely had impingement syndrome, AC joint arthrosis and a biceps tendon tear on the right side. [Dr. Milne] felt the impingement syndrome and AC joint arthrosis likely preexisted the time of the injury and the biceps tendon rupture likely occurred in the patient’s bed, as described in her medical records.” Dr. Milne felt that the impingement syndrome and AC joint arthrosis “are often long standing findings that take years or decades to develop.” Dr. Milne opined that Ms. Berend’s work was not the “primary prevailing factor” causing Ms. Berend’s shoulder conditions.

Dr. Wayne Stillings, M.D., physician and psychiatrist, testified by deposition that he evaluated Ms. Berend on April 22, 2010. Dr. Stillings opined that there was no prevailing causal relationship between the work occurrence in November of 2005 and Ms. Berend’s psychiatric state. However, Dr. Stillings did find that the November 2005 work occurrence “is a prevailing factor in aggravating her preexisting major depressive disorder, with an associated two point five percent psychiatric ppd of that BAW, based on her subjective report only.”

Mr. James England, rehabilitation counselor, testified by deposition that he reviewed records and information regarding Sheryl Berend and authored a June 30, 2010 report summarizing the results of his evaluation. Mr. England testified that taking Dr. Volarich’s findings Ms. Berend is permanently and totally disabled as the result of her upper extremity problems which Dr. Volarich relates to the primary injury.

APPLICABLE LAW

RSMo Section 287.063.1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 8 of section 287.067.

2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease prior to evidence of disability, regardless of the length of time of such last exposure, subject to the notice provision of section 287.420.

3. The statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure, except that in cases of loss of hearing due to industrial noise said limitation shall not begin to run until the employee is eligible to file a claim as hereinafter provided in section 287.197.

RSMo Section 287.067.1. In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be

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compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

2. An injury by occupational disease is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

4. "Loss of hearing due to industrial noise" is recognized as an occupational disease for purposes of this chapter and is hereby defined to be a loss of hearing in one or both ears due to prolonged exposure to harmful noise in employment. "Harmful noise" means sound capable of producing occupational deafness.

5. "Radiation disability" is recognized as an occupational disease for purposes of this chapter and is hereby defined to be that disability due to radioactive properties or substances or to Roentgen rays (X-rays) or exposure to ionizing radiation caused by any process involving the use of or direct contact with radium or radioactive properties or substances or the use of or direct exposure to Roentgen rays (X-rays) or ionizing radiation.

6. Disease of the lungs or respiratory tract, hypotension, hypertension, or disease of the heart or cardiovascular system, including carcinoma, may be recognized as occupational diseases for the purposes of this chapter and are defined to be disability due to exposure to smoke, gases, carcinogens, inadequate oxygen, of paid firefighters of a paid fire department or paid police officers of a paid police department certified under chapter 590 if a direct causal relationship is established, or psychological stress of firefighters of a paid fire department if a direct causal relationship is established.

7. Any employee who is exposed to and contracts any contagious or communicable disease arising out of and in the course of his or her employment shall be eligible for benefits under this chapter as an occupational disease.

8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

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RSMo Section 287.420. No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice. No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.

RSMo Section 287.220.1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section

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provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

RSMo Section 287.220.9. Any employee who at the time a compensable work-related injury is sustained is employed by more than one employer, the employer for whom the employee was working when the injury was sustained shall be responsible for wage loss benefits applicable only to the earnings in that employer's employment and the injured employee shall be entitled to file a claim against the second injury fund for any additional wage loss benefits attributed to loss of earnings from the employment or employments where the injury did not occur, up to the maximum weekly benefit less those benefits paid by the employer in whose employment the employee sustained the injury. The employee shall be entitled to a total benefit based on the total average weekly wage of such employee computed according to subsection 8 of section 287.250. The employee shall not be entitled to a greater rate of compensation than allowed by law on the date of the injury. The employer for whom the employee was working where the injury was sustained shall be responsible for all medical costs incurred in regard to that injury.

AWARD

The claimant, Sheryl Berend, has sustained her burden of proof that she sustained a compensable injury to her right shoulder as the result of her repetitive work for Fasco. Ms. Berend testified with regard to the onset of her complaints consistent with her work at Fasco. While the November 16, 2005 medical record of Dr. Acosta alludes to the onset of pain after Ms. Berend awoke from her sleep with a popping sensation in her shoulders, the records most contemporaneous with the onset of pain refer to a more gradual onset and reference Ms. Berend's lifting responsibilities at Fasco. While Dr. Volarich is somewhat vague in his statement that Ms. Berend's onset of pain is "somewhere along the way" in her employment at Fasco, when taken as a whole with the contemporaneous treatment records there is sufficient evidence of damage to Ms. Berend's right shoulder as the result of her work at Fasco.

Ms. Berend has failed to sustain her burden of proof that she gave appropriate notice to her employer of injuries other than to the right shoulder. Ms. Berend testified that she neither notified Fasco of her other alleged work related injuries including her left shoulder, hands, wrists, feet or depression nor sought medical treatment from Fasco for those injuries.

Ms. Berend has failed to sustain her burden of proof with regard to the liability for the medical bills due for treatment as the result of the right shoulder treatment only. It is difficult to ascertain from the list of medical bills provided which are attributable to and are still due and owing as the result of the right shoulder injury.

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The employer/insurer is liable for temporary total disability from February 17, 2006, through August 30, 2007. Dr. Marberry released Ms. Berend from treatment on her right shoulder on August 30, 2007.

The employer/insurer is liable for permanent partial disability of 25 percent of the right shoulder. This finding is based on Ms. Berend's complaints as well as the opinions of Dr. Marberry, Dr. Stillings, and Dr. Volarich. Dr. Daniel's opinion is of little value in this case where he rated disability for injuries in addition to the right shoulder injury.

Ms. Berend has sustained her burden of proof that she is entitled to benefits from the Second Injury Fund for lost wages from secondary employment at the Versailles Livestock Auction in the amount of \$71.79 per week for the weeks between February 17, 2006 and August 30, 2007.

Ms. Berend has failed to sustain her burden of proof that the Second Injury Fund is liable for the combination of her disabilities from her work injury with her preexisting disabilities where there is no evidence of preexisting disability of such seriousness as to constitute a hindrance or obstacle to employment or reemployment. Ms. Berend was able to simultaneously work two physically demanding jobs prior to her treatment for her right shoulder injury. The medical records document only episodic complaints of headaches and depression prior to 2005 and there are no documented complaints regarding disability to the feet prior to 2005.

Ms. Berend has failed to sustain her burden of proof that she is entitled to future medical treatment for her right shoulder where there is no evidence of any need for additional treatment specifically for the right shoulder.

Claimant's Exhibit F is admitted into evidence and made a part of the record of proceedings in this case.

Made by: _____
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation