

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
with Supplemental Opinion)

Injury No. 13-077896

Employee: Troy Brown  
Employer: Wal-Mart Associates, Inc.  
Insurer: New Hampshire Insurance Co.  
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. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

Medical causation

The administrative law judge determined that employee failed to meet his burden of proof as to the issue of medical causation based, in part, on findings that employee overstated the extent of repetitive motion involved in his job duties, and that employer's expert provided more credible and persuasive testimony. We agree with the result reached by the administrative law judge, but wish to provide our own comments and analysis.

With respect to employee's testimony about his duties, we accept employee's description of his work over the competing testimony from the manager James Thompson, and we are persuaded by employee's testimony that the performance of these duties caused him to experience pain. It is not enough, however, that employee prove that the performance of his job duties caused him to experience pain; instead, it was employee's burden to prove that his occupational exposures were the prevailing factor causing him to suffer a resulting medical condition and disability. See § 287.067 RSMo.

In our view, the problem with employee's case is not that he lacks credibility with regard to what percentage of his work involves stocking shelves, it's that employee's evaluating expert failed to identify a "resulting medical condition" for purposes of § 287.067. Specifically, Dr. Robert Paul opined for employee that "the prevailing factor in patient's current complaints to his left shoulder is his was [sic] exposure to the hazards of an occupational disease/illness while working at [employer] in the form of cumulative trauma to his upper extremities, in particular his left shoulder." *Transcript*, page 71. This is the extent of Dr. Paul's causation opinion. In a case where employee suffered a prior left shoulder injury followed by multiple surgeries, it is not enough for Dr. Paul merely to identify "patient's current complaints" as the resulting medical condition allegedly resulting from a new injury by occupational disease. Rather, we would expect

Employee: Troy Brown

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from employee's evaluating expert an explanation of the cumulative trauma employee sustained, as well as a specific identification of the new pathology that employee purportedly suffered as a result of this cumulative trauma. In our view, Dr. Paul did not sufficiently distinguish between the effects of employee's prior left shoulder injury of 2003 and the (alleged) more recent cumulative trauma.

Also, as noted by the administrative law judge, it is unclear whether Dr. Paul was sufficiently apprised of the relevant facts involved in this case, in that he appears to have been unaware that employee ceased working in the inventory control job in 2009 and began working thereafter as a sales associate in the sporting goods section. If Dr. Paul knew of this important circumstance, he failed to mention it anywhere in his report. Instead, in his *only* description of employee's duties, Dr. Paul indicated employee "was involved in sales, stocking, and inventory control" at the time he suffered his work injury. *Transcript*, page 67. Where it is unclear to us the extent that Dr. Paul properly understood employee's actual work duties, his opinions, however persuasive, are simply not relevant for our purposes.

### **Conclusion**

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued May 15, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 20<sup>th</sup> day of November 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Troy Brown

Injury No.: 13-077896

Dependents: N/A

Employer: Wal-Mart Associates, Inc.

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

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Insurer: New Hampshire Insurance Co. c/o  
AIG Claims, Inc./Claims Management Inc.

Hearing Date: April 8, 2015

Checked by: VRM/ps

### 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? Yes.
4. Date of accident or onset of occupational disease: Alleged September 25, 2013.
5. State location where accident occurred or occupational disease was contracted: Lebanon, 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 alleged an occupational injury due to repetitive trauma.
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 left shoulder.
14. Nature and extent of any permanent disability: None.

15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$649.07.
19. Weekly compensation rate: \$432.71.
20. Method wages computation: Stipulation.

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Troy Brown

Injury No.: 13-077896

Dependents: N/A

Employer: Wal-Mart Associates, Inc.

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

Insurer: New Hampshire Insurance Co. c/o  
AIG Claims, Inc./Claims Management Inc.

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Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

**INTRODUCTION**

Troy Brown (Claimant) contends that the current problem in his left shoulder results from repetitive motion associated with his job duties for Wal-Mart Associates, Inc. (Employer). Tendering the opinion of his expert witness (Dr. Robert Paul), Claimant seeks a referral to an orthopedic specialist to determine the nature of his injury and to obtain a recommendation for treatment to address his left shoulder pain. Employer has refused to provide the same, defending on multiple bases, not the least of which is a stipulation for compromise settlement signed between these same parties on September 25, 2005. In that document, Claimant resolved a 2003 accidental work injury with Employer for 40 percent of the left shoulder. The written agreement specifically states that the parties intended to resolve all issues including future medical. Employer essentially avers that Claimant's new claim of injury by repetitive trauma to the same left shoulder (as opposed to the earlier injury by accident) is aimed at obtaining the treatment Claimant specifically waived a decade earlier. The undersigned Administrative Law Judge conducted the hearing on April 8, 2015.

Claimant appeared in person and with his attorney, Ryan Murphy. Attorney Jerry Harmison represented Employer and its insurer, New Hampshire Insurance Co., and its third party administrator. The Treasurer of Missouri, as Custodian of the Second Injury Fund, appeared by Assistant Attorney General Catherine Goodnight. Upon request of Employer/Insurer and the Second Injury Fund, the Administrative Law Judge agreed to issue a Final Award if she determined that the claim was not compensable.

**STIPULATIONS**

The parties stipulated to the following facts:

- (1) On or about September 25, 2013, Wal-Mart Associates, Inc., was an employer operating under and subject to the terms and provisions of the Missouri Workers' Compensation Law, and during this time was fully insured.
- (2) On September 25, 2013, Troy Brown was an employee of Employer in its store in Lebanon, Missouri, and was working under and subject to the Missouri Workers' Compensation Law.

- (3) There is no challenge to jurisdiction. The parties agreed to a change of venue to Springfield, Greene County, Missouri, for this hearing.
- (4) The Claim for Compensation was filed within the time prescribed by § 287.430 RSMo.
- (5) Claimant's average weekly wage was \$649.07, yielding a compensation rate of \$432.71.
- (6) Employer/Insurer provided no temporary total disability benefits and no medical benefits.

### **ISSUES**

The following are the issues identified by the parties at the hearing:

- (1) Did Claimant provide notice of his injury as required by law?
- (2) Did Claimant sustain an injury by occupational disease to his left shoulder, culminating on September 25, 2013?
- (3) Did the alleged injury arise out of and in the course of employment for Employer?
- (4) Is Claimant's injury medically and causally related to the work for this Employer?
- (5) Shall Employer and Insurer provide medical treatment for Claimant's alleged injury?
- (6) Is there any Second Injury Fund liability?

In addition to the above issues, Claimant's attorney seeks a 25 percent fee of any monies awarded.

### **EXHIBITS**

Claimant offered the following exhibits, which were admitted:

#### **Medical Report**

1. Dr. Paul – dated July 25, 2014
2. Addendum to Dr. Paul's Report – dated February 3, 2015

#### **Medical Records**

3. Mercy Hospital – Lebanon
4. Mercy Clinic
5. Mercy Clinic
6. Lake Orthopedic Group
7. Mid Missouri Orthopedic & Sports Medicine
8. Breech Regional Medical Center
9. Progressive Health Physical Therapy & Sports Medicine
10. Lourdes Medical Center and Rancocas Hospital

#### **Other Documents**

11. Final Evaluation Report and Addendum of Dr. Mather – 2003 Injury
12. Stipulation for Compromise Settlement – Injury No. 03-138313
13. "60 Day" Letter to Attorneys Harmison and Goodnight

Employer/Insurer offered the following exhibits, which were admitted into evidence:

**Deposition**

A. Troy Brown, dated October 6, 2014

**Medical Report**

B. Dr. Lennard, dated October 29, 2014

The Second Injury Fund offered no additional exhibits.

**FINDINGS OF FACT**

**The 2003 Injury**

Claimant began working for Employer 17 years ago on October 4, 1998. On March 26, 2003, Claimant fell from a loading dock and suffered a complete tear of the rotator cuff. Employer provided medical care, including a left shoulder surgery on May 27, 2003, performed by Dr. Curtis Mather. While traveling in Brazil a few months later, Claimant reinjured his left shoulder. This incident resulted in a second left shoulder surgery performed by Dr. Mather on September 23, 2003.

On August 17, 2004, Dr. Mather placed Claimant at maximum medical improvement and provided a rating of 33 percent permanent partial disability at the shoulder (232-week level). As part of his final rating report, Dr. Mather stated that Claimant had exhausted all therapeutic and surgical modalities that were available to Claimant at that time. In an addendum report on December 23, 2004, Dr. Mather addressed future medical needs, as follows:

**DISCUSSION/PLAN:**

1. Troy and I had a long discussion today. He has been on anti-inflammatories in the past, Bextra, and it seemed to provide him significant relief. For these reasons, I feel that it is a good idea that we place him back on anti-inflammatory medications. He may only require these intermittently, but that most likely will be for the life of the patient. I wrote the patient a prescription for Bextra 10 mg, #30, with one refill. He is to take one tablet q.d.
2. The patient also asked me if there was the potential that he may have further surgical procedures. That certainly is a possibility, especially as emerging technologies occur, to give him more strength in his left shoulder. We briefly discussed the reverse shoulder with the patient today.
3. We will allow the patient to continue to do activities as outlined in his last work restriction note. I will not make any changes.
4. We will follow the patient in the office on an as needed basis.

(Exhibit 7).

Knowing that Dr. Mather had recommended ongoing treatment in the form of prescription medication and opined that surgery “certainly is a possibility,” Claimant settled his workers’ compensation case for the 2003 work injury, specifically waiving his right to future medical treatment. He did, however, negotiate the settlement for a significant increase over Dr. Mather’s 33 percent rating. Claimant testified that in 2005 when he settled his claim, his arm remained painful, but was tolerable. The pain, however, “never went away.” (Exhibit A, p. 42).

## **The Present Claim**

Sometime in 2007, Claimant transferred to a working supervisory position with Wal-Mart in Lebanon, Missouri. It was an inventory control job that involved 95 percent physical duties and only 5 percent supervisory duties. He held this inventory control position in the back room for 18 months before transferring to a less strenuous job in the sporting goods section.

In this current position as an associate in the sporting good section, Claimant provides customer service and stocks shelves. Claimant downplayed his duties of selling merchandise, and emphasized his duties of stocking shelves, pulling freight off of trailers, and resetting shelves, all done by hand by Claimant. These duties involve some overhead work and lifting up to 50 pounds.

James Thompson, the assistant store manager, testified live. He disagreed with Claimant's assessment that 40 percent of Claimant's duties involved stocking. Mr. Thompson explained that most of the stocking of shelves is performed by a team overnight. While Claimant may have to stock or straighten shelves, these daytime duties are periodic rather than continual, require the use of both hands, and involve items like fishing lures. He agreed that Claimant occasionally may have to go into a trailer to pull freight, but there is no repetitive lifting in Claimant's job. Mr. Thompson emphasized that any lifting is occasional and, by company policy, items weighing at 50 pounds or more must be lifted by at least two persons. Mr. Thompson indicated that 70 to 80 percent of Claimant's job duties involve customer service. Mr. Thompson was unaware of any report of a repetitive injury filed by Claimant, even though there are posters in the building requiring that all associates report injuries.

## **Medical Treatment**

### *2008 Treatment*

Less than three years after he settled his workers' compensation case for his 2003 work injury by accident, Claimant sought some additional treatment. X-rays had revealed the presence of osteoarthritis and degenerative joint disease (DJD). On October 29, 2008, Claimant saw Dr. Schwartzman, his family physician, with complaints of left shoulder pain. Claimant reported to Dr. Schwartzman a history of left rotator cuff injury with subsequent surgeries, but with current symptoms different than those he had experienced in the past. Dr. Schwartzman assessed bursitis of the left shoulder and performed an injection. He instructed the Claimant to return as needed.

On December 22, 2008, Claimant presented to Dr. Mather with pain in the left shoulder. Claimant reported that he went to Dr. Schwartzman and received an injection at that time. The injection helped for two to three weeks but the pain returned. At the time, Claimant was working on the inventory team at Wal-Mart performing a substantial amount of lifting. Dr. Mather performed an examination of the left extremity, noting a Grade I weakness of the shoulder. Dr. Mather noted tenderness over the anterior aspect of the left shoulder and tenderness over the bicipital muscle all the way down into the left forearm, tenderness over the pronator musculature and the anterior aspect of the forearm, and tenderness over the radial tunnel. Following his examination, Dr. Mather recommended a subacromial injection to the left shoulder. The injection was performed and Claimant was instructed to return in one month.

### *2009 Treatment*

On January 19, 2009, Claimant returned to Dr. Mather for a recheck of his left shoulder after injection and medication, reporting that the injection provided temporary relief. He declined additional treatment.

### *2011 Treatment*

In March 2011, more than two years after the last injection, and after Claimant had changed jobs to the less physically stressful position in the sporting goods department, Claimant saw Dr. Mather for reevaluation of left shoulder pain. Claimant said the left shoulder pain had continued and was now worse at night. Dr. Mather, who recognized that the DJD was progressing, suggested a shoulder replacement surgery, but had reservations given Claimant's age. Dr. Mather prescribed a trial of Lodine and, if that did not provide relief, suggested a Euflexxa injection.

On May 11, 2011, Claimant reported to Dr. Mather that the Lodine had not helped, but his primary care physician had given him some Prednisone which provided him some relief. Dr. Mather advised if the pain returns, he would recommend a visco supplementation by radiology into the left shoulder.

On August 4, 2011, Claimant requested the previously discussed Euflexxa injections. Dr. Mather made the arrangements, but they provided no relief. Dr. Mather thereafter recommended trying different anti-inflammatories and performing an arthroscopy on the left shoulder.

### *2012 Treatment*

In December 2012, Claimant found that his medications were no longer helpful in addressing his pain. He again talked with Dr. Mather regarding a shoulder replacement, which Dr. Mather was reluctant to perform due to Claimant's age. Dr. Mather's records indicate advancing osteoarthritis (stage 3-4) of the gleno humeral joint. He referred Claimant to a specialist in Columbia, Missouri, who apparently offered no alternative treatment for the shoulder.

### *2013 Treatment*

Claimant returned to Dr. Mather on April 24, 2013. Dr. Mather injected Claimant's shoulder with Kenalog Marcaine, and Lidocaine and instructed Claimant to return as needed. He returned to Dr. Mather on September 23, 2013, stating that his current medical regimen was not controlling his pain and the pain continued to increase. Dr. Mather opined that Claimant needed a shoulder replacement. Nothing in any of Dr. Mather's records indicate that the need for the shoulder replacement was related to repetitive trauma at work, or that lifting caused the problem. In fact, Claimant specifically declined a total shoulder replacement so that he could continue lifting at work:

We discussed hemi, total, and reverse shoulder arthroplasty. Patient does not require a reverse arthroplasty. He lifts 50 pounds at his job, therefore, he would like to avoid the total shoulder replacement as long as possible.

We discussed the surgical procedure for the left shoulder hemi replacement....He would require PT for 6 weeks to 3 months following hemiarthroplasty.

(Exhibit B, Dr. Mather's record of September 23, 2013).

On October 10, 2013, Claimant filed a Claim for Compensation with the Division of Workers' Compensation alleging injury by repetitive trauma associated with his work for Wal-Mart. He obtained Dr. Paul's opinion nine months after he filed his Claim. Claimant agreed that Dr. Paul is the only physician to suggest that Claimant's current situation is work related due to repetitive trauma.

While Claimant testified that his job duties increased the pain in his left shoulder beyond that which existed when he was released from a prior shoulder surgery in 2004, he clearly stated that the pain from the 2003 injury had never resolved. When asked "what changed," Claimant responded:

- Q. If you were rocking along in 2008, 2009, 2011 getting medical treatment with Dr. Mather, using you health insurance plan with the –with your employer, what changed?
- A. What changed is if I have to have something major done like a surgery, I cannot afford to be off work for 12 weeks.
- Q. Okay. And that – that concern – if I remember from the records, that concern there surfaced when you were having a conversation with Dr. Mather about –
- A. How long it takes to be off.
- Q. Right.
- A. Especially –
- Q. From a total replacement.
- A. When it got down to this is the only option that's left. We've tried everything else. Plus my – I don't know how much you know about Wal-Mart insurance, but it sucks. I have a \$5,000 deductible. I have no income coming in and a \$5,000 deductible.

(Exhibit A, pp. 46-47).

Claimant has continued to work for employer. Claimant experiences continued pain, tenderness, and spasticity in the left shoulder and rotator cuff.

### **Expert Opinions**

On July 25, 2014, Claimant saw Dr. Robert Paul for an independent medical evaluation. Dr. Paul opined that the prevailing factor in patient's current complaints to his left shoulder was his exposure to the hazards of an occupational disease/illness while working at Wal-Mart in the form of cumulative trauma to his left shoulder. Dr. Paul believed that Claimant was "involved in sales, stocking, and inventory control." He acknowledged the 2003 work accidental injury, but said Claimant's condition had worsened since as he "continues to work at Walmart in the same capacity..." (Exhibit 1). He recommended that Claimant receive a referral to an orthopedic surgeon to determine the nature and extent of the left shoulder injury. On August 7, 2014, Claimant provided the complete medical report of Dr. Paul to the attorney for Wal-Mart, along with the demand for the orthopedic referral as recommended by Dr. Paul.

On October 29, 2014, Claimant saw Dr. Ted Lennard for an independent medical evaluation. Dr. Lennard noted Claimant's clear history of two prior left shoulder surgeries with residual chronic post operative pain that has required intermittent physician evaluations, medications and injections. He concluded that

Claimant has no additional repetitive-related strain or accident culminating on September 25, 2013. Dr. Lennard said the need for treatment is the progressive underlying DJD in the shoulder and prior surgeries. He said Claimant required a left shoulder MR-arthrogram and orthopedic consultation for surgery including arthroplasty. Dr. Lennard found the work is not the prevailing factor in the onset of Claimant's left shoulder symptoms.

### **Credibility Assessments**

Having reviewed the live testimony of both Claimant and the assistant store manager, and reviewed Claimant's deposition testimony, I find the store manager, Mr. Thompson, to be more credible as to Claimant's job duties. I find that Claimant's job duties in the sporting goods department do not involve repetitive motion. I do not accept Dr. Paul's causation opinion as credible.

## **CONCLUSION OF LAW**

### **Notice Is Sufficient**

Section 287.420 RSMo, prescribes that an employee must provide his employer with notice of an occupational disease or repetitive injury:

No proceedings from 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 the failure to received the notice.

As noted in this statute, the triggering event in the context of an injury by occupational disease is the "diagnosis of the condition." The 30 day period does not begin to run for this employee until the diagnostician has made a causal connection between his injuries and some work related activity or exposure. *Allcorn v. Tap Enterprises*, 277 S.W.3d 823, 829 (Mo. App. S.D. 2009). "[T]he 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. Claimant filed his claim for compensation with the Division of Workers' Compensation before a diagnostician made the causal connection. Claimant has provided notice as required by the statute.

### **No Compensable Occupational Disease**

The definition of a compensable injury by occupational disease is set forth in § 287.067 RSMo, and provides in applicable part, as follows:

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 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 the normal activities of day-to-day living shall not be compensable.

Claimant did not sustain an occupational disease arising out of and in the course of his employment at the Lebanon Wal-Mart store culminating in September 2013. Claimant’s deposition is most persuasive. He was hurt in a work accident in 2003. He had two surgeries to his left shoulder. He developed degenerative joint disease. The pain flared occasionally, after which he received injections and medication, but the pain was there at the time he was released in 2004 and never went away. The thing that changed is that surgery has become a real possibility and Claimant dislikes the financial strain of being off work for several weeks while having to pay a \$5,000 deductible.

Claimant’s admissions in his sworn testimony are bolstered by the medical report of Dr. Ted Lennard wherein he indicated that Claimant’s work in 2013 is not the prevailing factor in the onset of Claimant’s left shoulder pain. Dr. Lennard found no additional disability directed at the left shoulder as a result of any work accident on September 25, 2013, or resulting from work related repetitive strain.

Dr. Lennard’s opinion is more credible and persuasive than that of Dr. Paul who was under the false impression that Claimant had continued to work in “inventory control.” Moreover, the credible evidence is that Claimant’s job, which he has held since sometime in 2009, is not repetitive in nature. It primarily is customer service. Most stocking is performed by the overnight stocking crew. Dr. Lennard’s opinion that the need for the current surgery is due to the prior 2003 injury and surgeries is accurate. Claimant’s shoulder pain never completely resolved. Claimant even discussed future medication needs and the possibility of future surgery with his surgeon before he settled his 2003 workers’ compensation case.

#### *Future Medical Treatment*

Section 287.140, RSMo, requires Employer to provide medical treatment as may be required to cure and relieve an employee from the effects of the work related injury. To “cure and relieve” means treatment that will give comfort, even though restoration to soundness is beyond avail. *Landman v Ice Cream Specialties, Inc.*, 107S.W.3d 240, 249 (Mo. banc 2003). Claimant must prove the need for treatment by “reasonable probability” rather than “reasonable certainty”. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo App. W.D. 1995), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). “Probable” means founded on reason and experience, which inclines the mind to believe, but leaves room for doubt. *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo. App. S.D. 1995), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

In this case, the need for treatment flows from the original 2003 work injury and related surgeries. Claimant specifically resolved future medical as a part of his settlement of the 2003 case. That his discomfort has worsened does not flow from any purported repetitive trauma at work. Claimant’s current job does not involve repetitive trauma. Employer/Insurer are not responsible for future medical treatment as a result of any purported occupational disease culminating in September 2013.<sup>1</sup>

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<sup>1</sup> Exhibit 12 (Stipulation for Compromise Settlement), might not preclude future medical under § 287.140.8 RSMo. *See Pierce v. Zurich American Ins. Co.*, 441 S.W.3d 208 (Mo. App. W.D. 2014), pertaining to new prosthetic devices. Applicability of that statutory section was not made an issue in this case.

## **Second Injury Fund**

Absent a compensable work injury, the Second Injury Fund has no liability. § 287.220 RSMo. Given that I have found no compensable work injury culminating in 2013, the claim against the Second Injury Fund is denied.

All other issues not addressed are moot.

### **Summary**

The credible and persuasive evidence leads to the conclusion that Claimant's current need for left shoulder treatment is due to his progressive underlying shoulder DJD resulting from a 2003 work accident and related surgeries. Claimant settled the 2003 work injury, including future medical treatment, for a lump sum on September 26, 2005. Claimant has failed in his burden of proving he sustained a new injury by work related repetitive trauma requiring medical attention. Employer and its Insurer and the Second Injury Fund have no liability. This is a Final Award as the decision on causation is determinative.

*Made by: /s/ Victorine R. Mahon  
Victorine R. Mahon  
Administrative Law Judge  
Division of Workers' Compensation*

Employee: «EMPLOYEE»

Injury No. «INJURY\_NO»