

**FINAL AWARD ALLOWING COMPENSATION**

Injury No.: 06-125432

Employee: Teresa Carkeek  
Employer: Hallmark Cards, Inc. (Settled)  
Insurer: Hallmark Cards, Inc. (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 26, 2010, as modified by this opinion. The award and decision of Administrative Law Judge Kenneth J. Cain, is attached and incorporated by this reference except as described herein.

We offer this opinion to explain our disagreement with one legal conclusion of the administrative law judge. At page 12 of his award the administrative law judge states:

The statute also provides that for the Second Injury Fund to be liable for permanent total disability benefits, the disability from the last injury or accident must combine with the employee's preexisting disability to render the employee permanently and totally disabled. See §287.220 RSMo. 2005. The statute must be strictly construed. §287.800.

Claimant's June 2006 accident was not her last injury or accident. Claimant alleged a December 2006 work-related injury and she settled that claim against her employer on January 5, 2010. The December 2006 injury was Claimant's last injury. Strictly construing the statute, the Second Injury Fund could only be liable for permanent total disability benefits in the December 2006 case and not the June 2006 case. Claimant, although initially alleging that she was permanently and totally disabled in the June 2006 case, conceded in her proposed award that permanent total disability benefits should not be awarded in that case.

At page 14 of the award, the administrative law judge reiterates the reasoning quoted above.

As noted above, the legislature has specifically stated that the Second Injury Fund can only be liable for permanent total disability benefits if the disability from the last injury combines with her preexisting disability. § 287.220 RSMo. 2005.

Employee: Teresa Carkeek

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The June 2006 injury was not Claimant's last injury. Claimant alleged a work-related injury in December 2006. She worked until August 2007 when she stopped working of her own volition. She settled her claim against her employer arising out of the alleged December 2006 injury on January 5, 2010. Claimant not only failed to prove that she was not permanently and totally disabled, the statute does not allow permanent total disability benefits to be awarded against the Second Injury Fund when the case does not involve the last work-related injury. Id.

The administrative law judge's statements quoted above are merely dicta but we write separately to specifically state we do not adopt the above statements of the administrative law judge as we believe they misstate the law.

In all other respects, we affirm and adopt the award of the administrative law judge.

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

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

Given at Jefferson City, State of Missouri, this 17<sup>th</sup> day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## FINAL AWARD

Employee: Teresa Carkeek Injury No: 06-125432

Employer: Hallmark Cards, Inc. (previously settled)

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

Insurer: Hallmark Cards, Inc.

Hearing Date: February 1, 2010

Final brief filed: March 9, 2010 Checked by: KJC/cy

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: June 5, 2006
5. State location where accident occurred or occupational disease was contracted: Liberty, Clay County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? 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: Employee, while in the course and scope of her employment with Hallmark Cards, Inc., placed a box on a conveyor belt. Employee alleged that the conveyor belt "caught" the box which "jerked" her arm and caused her left shoulder to pop.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: left upper extremity
14. Nature and extent of any permanent disability: 35 percent of left upper extremity at 232 week level
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$744.30
- 19. Weekly compensation rate: \$496.20/365.08
- 20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable

Unpaid medical expenses: None  
N/A weeks for permanent partial disability from employer  
N/A temporary total or temporary partial disability  
N/A weeks for disfigurement

- 22. Second Injury Fund liability: 27.05 weeks @ \$365.08 per week = \$9,875.41
- 23. Future requirements awarded: None

**TOTAL: \$9,875.41**

Said payments to begin as of date of the award 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 line in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Mr. Mark Kelly

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

Employee: Teresa Carkeek Injury No: 06-125432

Employer: Hallmark Cards, Inc. (previously settled)

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

Insurer: Hallmark Cards, Inc.

Hearing Date: February 1, 2010

Final brief filed: March 9, 2010

Checked by: KJC/cy

The Employee settled her claim against her Employer, Hallmark Cards, Inc., on January 5, 2010 based on a permanent partial disability of 35 percent of the left shoulder rated at the 232 week level. The remaining parties, the Employee and the State Treasurer as Custodian of the Second Injury Fund, entered into various admissions and stipulations. The only remaining issue involved whether the Second Injury Fund was liable for compensation.

At the hearing, Ms. Teresa Carkeek (hereinafter referred to as Claimant), testified that she was born on March 25, 1952 and that she had a high school education. She stated that she had no post-high school education or vocational training. She stated that she had no computer training.

Claimant testified that her first job was at a fast food restaurant. She stated that she next worked in day care at a fitness facility for about 5 years. She stated that in addition to her day care duties, she scheduled and fired employees. She stated that she was "pretty" much the manager.

Claimant testified that afterwards she worked in the cafeteria for the Liberty School District. She stated that she worked as a cashier, on the line and in the salad department. She stated that she was in charge of the salad bar department for the last two years of her employment with the district.

Claimant testified that her job at Hallmark Cards was retail order processor. She stated that she had to pick up and fill orders. She stated that she had to do a lot of standing, lifting and walking. She stated that she had to pack, tape and ship boxes. She stated that she pushed a buggy to the various stations to pick up products for shipping.

Claimant testified that the boxes generally weighed 10 to 15 pounds. She stated that occasionally a box weighed 35 to 60 pounds. She stated that her June 5, 2006 injury occurred after she had placed a 40 to 60 pound box on the conveyor. She stated that the conveyor belt caught the box and it jerked her arm. She stated that she felt a pop in her shoulder.

Claimant described her initial pain as “breathtaking.” She stated that she could hardly move for about five minutes. She stated that her pain was on the top portion of her left shoulder and radiated down into her arm. She also stated that her biceps hurt. She stated that most of her pain was in her left shoulder.

Claimant testified that she continued working despite the alleged pain until the middle of July when she took a three-week vacation. She admitted that she had declined her employer’s offer to send her to a doctor during that period. She stated that after her vacation she developed problems with deep vein thrombosis (DVT’s) and later chest pains. She stated that while hospitalized with the chest pains, it was determined that she had gallbladder and not cardiac problems.

Claimant testified that she had gallbladder surgery in October 2006 and missed one to two weeks from work. She stated that when she returned to work, her coworkers helped her do her job. She stated that she then developed hemorrhoid problems, which the Coumadin made more serious. She stated that she had a hemorrhoidectomy. She stated that she remained off work until November 2006.

Claimant testified that when she returned to work following the hemorrhoidectomy, Hallmark changed her job to straight line selecting, which was essentially a light-duty job. She stated that on December 13, 2006 she sustained another injury at work. She stated that the injury occurred when she slipped on some boxes, packing foam and cables on the floor. She stated that she began to fall forward and at the same time, she was trying to keep from dropping the cards in her hands. She stated that as she fell forward, she jerked her whole body in a forward direction and felt as though an electric shock had gone through her back. She stated that she experienced stiffness and soreness in her back. She admitted that she did not fall to the floor. She admitted that she did not strike her head, neck, back or hip on any object. She merely stumbled in a forward direction.

Claimant admitted that she worked the remainder of the month. She stated that on January 7, 2007, she had an MRI of her left shoulder which she had injured in June 2006. She stated that Dr. Lingenfelter performed arthroscopic surgery on her shoulder on February 20, 2007. She stated that the surgery did not resolve her problems. She also stated that Dr. Lingenfelter wanted to treat her neck injury from the alleged December 2006 accident and recommended an MRI, which Hallmark refused to authorize. She stated that Hallmark also refused to authorize an injection in her neck as prescribed by Dr. Griffith in pain management.

Claimant admitted that she returned to work following the arthroscopic shoulder surgery and that she worked light duty during the summer of 2007. That was more than a year after the June 2006 accident. She stated that she worked the light duty for 90 days.

Claimant testified that she was re-examined by Dr. Lingenfelter in March 2008. She also stated that she was referred to Dr. Reintjes for her neck complaints. She stated that he told her that he would not do any neck surgery on her due to her obesity. She stated that he told her to come back after she had lost 100 pounds.

Claimant complained that she was still experiencing numerous problems as a result of her injuries at work. She stated that she could not lift her left arm past chest level. She stated that she did not have a lot of pain in her shoulder. She stated that she had numbness and tingling in her left hand. She stated that she had pain in the biceps area of her left arm. She stated that she had a loss of strength in her left arm. She stated that she did not have much grip strength in her left hand.

Claimant testified that she still had upper back and neck pain as a result of her December 2006 accident. She stated that she had occasional numbness. She stated that she could not turn her head. She stated that she could not look up. She stated that she had a lot of pain between her shoulder blades. She stated that it was difficult to sleep at night. She stated that she could not lie on her side for very long due to her back pain. She stated that she had numbness going down both arms to her fingertips. She stated that she had shooting pains.

Claimant testified that she was on pain medication for her neck and upper back. She stated that the pain medication had affected her concentration and her driving. She stated that she could not fully turn her head to the side while driving. She stated that her injuries had affected her ability to engage in recreational activities. She stated that she could no longer decorate cakes. She stated that on camping trips, her husband now had to do all the work to set up the camp. She stated that she could no longer sew due to her problems in sitting and standing. She stated that it now takes her two weeks to sew what she used to do in one day.

Claimant also testified that since 2001, or prior to her June and December 2006 injuries at work, she had been treated for back problems. She stated that she had epidural injections in her back prior to 2006. She stated that she had DVT problems prior to 2006. She stated that she had been hospitalized three times for blood clots in her left leg. She stated that she could not work when she experienced a flare up in her DVT problems. She stated that her DVT problems caused pain and her veins in her left knee and calf to swell. She stated that she was on Coumadin prior to 2006.

Claimant testified that prior to 2006 she had right carpal tunnel and right shoulder surgery. She stated that she had left thumb problems prior to 2006. She stated that she had a tremor in her right hand prior to 2006. She stated that she was prescribed Neurontin for the tremor on and as needed basis.

Claimant admitted that she had not applied for work since she left Hallmark. She stated that she could not do any of her past jobs. She stated that she was not aware of any job that she could do.

On cross-examination by the Second Injury Fund, Claimant testified that she had a tremor of unknown cause in her right hand for about 10 years. She stated that the tremor had gotten worse since 2006. She admitted that the tremor had never affected her ability to work.

Claimant testified that Dr. Haas had told her prior to 2006 that she was too young for a left knee replacement. She admitted that her left knee had gotten worse since 2006. She admitted that her back pain had gotten worse since 2006.

Claimant testified that her DVT problems had affected her at work. She stated that she did not recall Dr. Reintjes telling her that degenerative problems were the source of her neck pain.

Claimant testified that she was currently receiving \$900 per month in Social Security Disability benefits and \$1,100 per month in long-term disability.

### **Medical Evidence**

Claimant offered Dr. Koprivica's deposition and numerous medical reports and records into evidence. Claimant's Exhibit K was the deposition testimony of P. Brent Koprivica, M.D. Dr. Koprivica testified that he received his M.D. degree in 1980 and that he had practiced occupational medicine since 1992.

Dr. Koprivica testified that he examined Claimant on March 31, 2009. He stated that the examination took approximately four hours and 45 minutes. He stated that he spent an additional hour reviewing her records and writing his report.

Dr. Koprivica testified that Claimant provided a history of injuring her left shoulder at work on June 5, 2006 when she awkwardly lifted a box and felt a pop in her left shoulder which produced severe persistent pain. That history differed from her testimony at the hearing where she testified that she placed a box on a conveyer belt where it was caught and jerked her shoulder.

Dr. Koprivica also testified that Claimant provided a history of tripping on some empty cubes and foam on the floor in December 2006 and injuring her neck and upper back. He noted that Claimant's medical records showed that Dr. Reintjes had suggested non-operative management of Claimant's neck condition. He admitted that the MRI showed stenosis and other degenerative changes in Claimant's cervical spine.

In addition, Dr. Koprivica noted Claimant's injuries and impairments, which preexisted her alleged June and December 2006 injuries at work. He stated that only two of her preexisting impairments, a low back condition and her DVT problems had resulted in any permanent partial disability and which were also an obstacle or hindrance to her employment or reemployment.<sup>1</sup>

Dr. Koprivica testified that Claimant's preexisting low back impairment had resulted in a permanent partial disability of 15 percent to the body as a whole. He stated that her preexisting DVT problem had resulted in a permanent partial disability of 25 percent of the left lower extremity at the 207 week level. He stated that he rated her injuries from the June 2006 accident at 50 percent of the left upper extremity at the 232 week level. Claimant, however, settled her case against her employer involving the left upper extremity injuries on January 5, 2010, based on a permanent partial disability of 35 percent at the 232 week level. See Claimant's Exhibit B.

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<sup>1</sup> The statute provides that the Second Injury Fund is only liable for benefits if the preexisting impairments result in permanent partial disability and if the preexisting impairments are a hindrance or obstacle to the employee's employment or reemployment. See § 287.220 RSMo. 2005.

Dr. Koprivica testified that he rated Claimant's neck injury from the alleged December 2006 accident at 15 percent to the body as a whole. Claimant settled her case against her employer involving the alleged neck injury on January 5, 2010, based on a permanent partial disability of 12.5 percent to the body as a whole. See Claimant's Exhibit O.

Dr. Koprivica also stated that Claimant's disability which preexisted the June and December 2006 accidents combined with the disability she sustained in the accidents to cause a synergistic effect resulting in a 10 percent enhancement factor for purposes of Second Injury Fund liability.

Dr. Koprivica testified that on examination Claimant had a significant weakness in the left shoulder. He noted her rotator cuff repair and that the diagnoses included a severe biceps tear with synovitis or inflammation of the joint and an impingement syndrome.

Dr. Koprivica also testified that Claimant had a reduced range of motion of her cervical spine. He admitted that she had spondylosis of the cervical spine or a degenerative process. He stated that she did not have disabling symptoms prior to the December 2006 accident. He stated that her neck was asymptomatic prior to December 2006. He admitted that the December 2006 accident had only resulted in a sprain to her cervical spine.

The evidence showed that Dr. Koprivica may not have read the numerous medical records Claimant offered into evidence. Claimant's medical records showed that on April 29, 2002 she complained to her family doctor at the Seaport Family Practice Clinic that she had neck pain that was getting worse. That contradicted Dr. Koprivica's conclusion that Claimant's neck was asymptomatic prior to the alleged December 2006 accident. It contradicted his conclusion that Claimant did not have disabling symptoms prior to the alleged December 2006 accident.

Claimant also complained in April 2002 that her neck pain was made worse by just standing. She complained in 2002 that her neck pain was made worse by looking in a downward direction. She complained that her neck pain was made worse by any type of jarring motion. Claimant clearly had degenerative problems in her cervical spine prior to December 2006 and contrary to Dr. Koprivica's assertion, her neck was symptomatic prior to December 2006.

Dr. Koprivica admitted that he believed that there were psychological issues involved in Claimant's presentation. He stated that Claimant came to tears during his interview. He stated that she was "very tremulous" during the examination, which he attributed to anxiety. He stated, however, that he believed that Claimant was genuine in her presentation and that her scores on the Waddell's testing were appropriate.

Finally, Dr. Koprivica testified that the disability Claimant sustained in neither the December nor the June 2006 accidents were totally disabling in isolation. He stated that none of Claimant's four "significant" injuries or disabilities were in isolation sufficient to render her permanently and totally disabled.

When asked whether Claimant was rendered permanently and totally disabled due to the combined effect of the disability Claimant sustained as a result of the four "significant" impairments, Dr. Koprivica refused to answer the question. He admitted that although he had

answered questions in other cases regarding whether a person was permanently and totally disabled, he was going to defer to a vocational expert to answer that question in Claimant's case.

Claimant's Exhibit A contained the records of Erich J. Lingenfelter, M.D. of Northland Bone & Joint Orthopedic Surgery. Dr. Lingenfelter noted on September 12, 2007 that Claimant was now complaining of chronic cervical trapezius and scapular pain. He noted that he had performed a rotator cuff repair on her left shoulder in February 2007. He stated that Claimant's pain was "way out of proportion to what I would expect with rotator cuff pathology." He stated that "I think there are other issues that need to be addressed."

On August 10, 2007, Dr. Lingenfelter, in a letter to Patrick Griffith, M.D. of Pain Management Clinic North Kansas City Hospital, noted that Claimant complained of pain with neck rotation and lateral bending. He stated that her CT scan did not show any "concerning" findings. He stated that on examination, Claimant's complaints seemed out of proportion to what he would expect for someone even with severe scapular bursitis and scapular dyskinesis. He stated that Claimant's shoulder pain had essentially resolved since her surgery. He stated that he did not believe that Claimant's neck complaints were related to her shoulder surgery.

On June 8, 2007, Dr. Lingenfelter noted that Claimant was complaining of chronic neck, posterior scapular and thoracic-cervical pain. He stated that I do not think "this" is related to her shoulder. He stated that "she keeps relating this back to an injury." He stated that he believed it was reasonable to proceed with a trigger point injection as well as possible cervical epidurals.

Dr. Lingenfelter's post-operative notes from February 20, 2007 showed that his diagnoses were left shoulder rotator cuff tear, severe biceps tear with synovitis and an impingement syndrome.

On February 4, 2009, Dr. Lingenfelter noted that Claimant's complaints of pain were out of proportion to the findings from his examination of her. He stated that she complained of almost hypersensitivity. He stated that although she complained of problems in raising her left shoulder, when he passively performed range of motion exercises on her shoulder, she had a full functional range of motion of her left shoulder and equal to that of her right shoulder.

Dr. Lingenfelter concluded that no further intervention was needed. He stated that Claimant had a healed rotator cuff. He stated that her pain was way out of proportion to the small tear she had in her shoulder. He stated that nothing on the examination suggested that her cuff had re-ruptured. He stated that Claimant had a significant amount of kyphosis (curvature) in her spine and that her body habitus could definitely be contributing to her complaints. He stated that he had no treatment recommendations for Claimant.

Claimant's Exhibit B contained the records of Stephen Reintjes, M.D. of the Kansas City Neurosurgery Group, LLC. In September 2008, Dr. Reintjes noted that a bone scan showed a significant uptake in the left AC joint consistent with degenerative changes. He also stated that there was an uptake associated with Claimant's feet and knees, greater on the left than the right.

Dr. Reintjes stated that Claimant continued to complain of pain, numbness and tingling across her left shoulder blade and around the left scapula and chronic neck pain. He stated that

Claimant's continuing left shoulder problems were due to degenerative changes. He stated that radiographic studies of her cervical spine showed foraminal stenosis (narrowing) on the left at C6-7. He stated that he would not consider her a surgical candidate due to the foraminal stenosis due to her size and body habitus. He did not even mention her alleged neck strain from December 2006 as any consideration for surgery or any other treatment.

Dr. Reintjes further stated that Claimant was not having a true C7 radicular pain, numbness or tingling. He stated that he would reassess her radicular complaints after her weight loss. In his June 2008 notes, Dr. Reintjes noted that although Claimant complained of injuring her neck in a fall at work in December 2006, that she did not "hit her neck or her low back" in the accident. He stated that she complained that her neck felt stiff and sore the day after the alleged incident at work. He stated that she stood 5 foot 4 inches tall and weighed 285 pounds.

Claimant's Exhibit C contained physical therapy records. Exhibit D contained Claimant's records from Northland Family Care. On November 8, 2006, Claimant complained of left leg pain. On May 17, 2006 she complained of ankle and heel pain.

On February 17, 2006 Claimant complained of left shoulder and calf pain. Dr. Roney's diagnosis was left shoulder pain with an impingement syndrome. He indicated that an orthopedic consultation might be necessary. He noted that Claimant had indicated that her shoulder was better since she resumed the use of Celebrex. The diagnosis of a left shoulder impingement syndrome was made less than four months prior to Claimant's allegation of a left shoulder injury at work.

There were several notations in the records from 2005 showing that Claimant complained of left knee pain. There were records showing that she had a Baker's cyst and right middle finger trigger pain. In November 2004, Claimant complained of ankle pain, hand numbness and dizziness. Her doctor noted that findings were suggestive of carpal tunnel syndrome.

In September 2004, Claimant complained of dizziness. In May 2004 she complained of persistent low back pain. She complained of excessive perspiration. She complained of a sharp shooting pain into her right hip and buttock area. In April 2004 she complained of back and left hip pain. In January 2004 she complained of heart palpitations. It was noted that she had a tremor. She complained of hand numbness. She alleged that her job had aggravated her hand problems and numbness.

On May 6, 2003, Claimant had a lesion removed from her left shoulder. In March 2003 she complained of back pain. In November 2002 she complained of Bell's palsy and facial pain. She was taking Percocet and Neurontin. In August 2002 Claimant complained of back pain and wrist tendonitis. An MRI showed a broad base disk bulge slightly symmetric to the left. In April and July 2002 Claimant complained of back pain.

Claimant's medical records also contained post 2006 notations. A June 2007 imaging of her lumbar spine showed mild degenerative spurring at L4-L5. A January 2007 MRI of her left shoulder showed a small rotator cuff tear. She also had a mild impingement at the time. A December 20, 2006 MRI of her cervical spine showed no acute abnormalities.

Claimant's records from Seaport Family Practice showed that on April 29, 2002 she complained of back pain, toenail discoloration and pain in her neck and upper and mid back. She told the doctor that she noticed the pain when she looked in a downward direction. She told the doctor that her neck was becoming increasingly painful by just standing. She told the doctor that her neck pain was made worse by any kind of jarring-type motion such as riding in a vehicle when it rolled over a bump in the road.

Claimant's Exhibit E also contained medical records. The records noted that she had significant osteoarthritis. She had knee surgery in 2008. She complained of ankle pain and right foot pain. Of note was that on September 6, 2006, prior to the December 2006 accident at work, Claimant complained of right hip pain of several months duration increased with lying on her hip. Also of note was that in 1999, Claimant had a right rotator cuff repair.

Claimant's Exhibit I contained records showing that she had a right carpal tunnel release in January 2005. Exhibit P contained her Hallmark personnel records. The records were primarily medical and they were cumulative and duplicative of the other medical records.

### **Vocational Testimony**

Mr. Terry Cordray, a vocational rehabilitation counselor, testified at the hearing on Claimant's behalf. He stated that he had worked in the field for 35 years. He stated that about 65 percent of his referrals were from the defense in workers' compensation, personal injury and FELA cases and that about 35 percent of his cases were from plaintiffs' law firms. He stated that he examined Claimant on November 24, 2009.

Mr. Cordray testified that his evaluation of Claimant lasted four hours. He stated that he reviewed Claimant's medical records and considered her education, age, employment history, and her lack of any transferrable job skills. He stated that her age was significant because it became more difficult to learn new skills past the age of 50 to 55. He stated that Claimant had no schooling since she graduated from high school in 1970.

Mr. Cordray outlined Claimant's work history. He stated that she scored in the average range on intelligence testing in reading, spelling and arithmetic. He stated that she scored slightly below average on the Wonderlic Intelligence Test, but noted that in taking the test she had a slight tremor in her right hand.

Mr. Cordray testified that due to Claimant's age, she was not a candidate for retraining to do sedentary work. He stated that based on her restrictions, she was limited to sedentary work which required a sit/stand option. He stated that Claimant was unemployable. He stated that no employer would hire Claimant.

Mr. Cordray did not mention whether he had considered the restrictions given by Dr. Lingenfelter, Claimant's treating orthopedic surgeon, in August 2007. Dr. Lingenfelter did not restrict Claimant to sedentary work. Dr. Lingenfelter noted in August 2007 that Claimant could do waist level activities. He stated that she could do chest level activities with her elbows flexed. He stated that she should not do overhead activities. He stated that she could push and pull up to 25 pounds.

Finally, Mr. Cordray concluded that Claimant was permanently and totally disabled due to her June 2006 shoulder injury combining with her prior impairments. He stated that her December 2006 neck injury at work was just “icing” on the cake.

On cross-examination by the Second Injury Fund, Mr. Cordray admitted that Claimant had some supervisory experience due to her job at the day care center. He stated that Claimant could be retrained to operate a cash register. He stated that she could not do dispatcher work due to her neck injury which would preclude her from constantly looking down at a monitor.

Mr. Cordray testified that he was unaware that Claimant was a cake decorator. He stated that she could not work as a baker due to the bending required to do the job and the tremor in her right hand. He stated that the light duty program at Hallmark was not a “real job.” Claimant had testified earlier that her salary on what she termed the light duty job remained the same as in her previous position. She stated that in the job she characterized as light duty there was less pressure to work as quickly as in other jobs.

## LAW

After considering all the evidence, including the testimony at the hearing, Dr. Koprivica’s deposition, Dr. Lingenfelter’s reports, Dr. Reintjes’ reports, the other medical reports and records, the other exhibits, and observing Claimant’s appearance and demeanor, I find and believe that Claimant did not prove that she was rendered permanently and totally disabled due to the disability she sustained in the June 2006 accident at work combining with her preexisting disability. Therefore, she did not prove the Second Injury Fund’s liability for permanent total disability benefits. Claimant did prove the Second Injury Fund’s liability for compensation. Claimant proved that the Second Injury Fund was liable for 27.05 weeks of compensation. At a rate of \$365.08 per week for 27.05 weeks, the Second Injury Fund is liable for \$9,875.41. The Second Injury Fund is ordered to pay that amount to Claimant.

## Burden of Proof

Claimant had the burden of proving all material elements of her claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2<sup>nd</sup> 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3<sup>rd</sup> 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant, as noted above, did not prove the Second Injury Fund’s liability for permanent total disability benefits.

## PERMANENT TOTAL DISABILITY

Section 287.020 (6) RSMo. 2005 defines total disability as an inability to return to any employment and not merely . . . inability to return to the employment in which the employee was engaged at the time of the accident. The terms “any employment” means “any reasonable or normal employment or occupation.” Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. 1995); Crums v. Sachs Electric, 768 S.W.2d 131 (Mo. App. 1989).

The statute also provides that for the Second Injury Fund to be liable for permanent total disability benefits, the disability from the last injury or accident must combine with the employee's preexisting disability to render the employee permanently and totally disabled. See §287.220 RSMo. 2005. The statute must be strictly construed. §287.800.

Claimant's June 2006 accident was not her last injury or accident. Claimant alleged a December 2006 work-related injury and she settled that claim against her employer on January 5, 2010. The December 2006 injury was Claimant's last injury. Strictly construing the statute, the Second Injury Fund could only be liable for permanent total disability benefits in the December 2006 case and not the June 2006 case. Claimant, although initially alleging that she was permanently and totally disabled in the June 2006 case, conceded in her proposed award that permanent total disability benefits should not be awarded in that case.

The most credible competent evidence also clearly showed that the disability Claimant sustained in the June 2006 accident did not combine with her preexisting disability to render her permanently and totally disabled. Claimant's primary injury in the June 2006 case was a small rotator cuff tear in her left shoulder. She also sustained a biceps tear and was diagnosed with an impingement syndrome in the left shoulder. The evidence showed that less than four months prior to the June 2006 accident she had been diagnosed with an impingement syndrome in the left shoulder. Her doctor indicated that she might need to see an orthopedic surgeon.

The rotator cuff tear as noted above was not a severe or major tear. Dr. Lingenfelter, the treating orthopedic surgeon, noted during the surgical procedure that it was a small tear and that a "very" small incision was made to perform the arthroscopic procedure. Dr. Lingenfelter subsequently noted that Claimant's rotator cuff had healed. He noted that she had not re-torn her rotator cuff. He had no explanation for Claimant's continuing complaints of severe pain and disability.

In fact, the evidence showed that Claimant's testimony and her complaints were not credible. Her subjective complaints of pain were not supported by the objective evidence. Her allegations of severe pain and disability were not supported by the evidence. Claimant did not prove that her injuries from the June 2006 accident resulted in severe pain and disability.

Dr. Lingenfelter, as noted above, described Claimant's injury as a small full thickness rotator cuff tear. He noted that the surgery was done arthroscopically with a "very" small anterolateral incision. His subsequent treatment records clearly showed that he did not believe Claimant's subjective complaints of pain and disability.

Dr. Lingenfelter noted in August 2007, six months after the rotator cuff repair, that "when I barely touch her scapula, she about comes off the table with significant hypersensitivity to minimal palpation." He stated that on examination, her complaints of pain were out of proportion to her injury. He stated that he did not believe that her complaints of pain were related to her shoulder injury.

In September 2007, Dr. Lingenfelter stated that Claimant's complaints of pain were "way out of proportion to what I would expect." On February 4, 2009, Dr. Lingenfelter stated that

Claimant's rotator cuff tear had healed. He stated that on examination, Claimant's complaints of pain were out of proportion to the findings from the examination. He indicated that she was almost hypersensitive. He stated that although she complained of pain and problems in raising her left shoulder, when he passively performed range of motion exercises on her shoulder, she had a full range of motion equivocal to the other non-injured shoulder.

Thus, when Claimant knew that her range of motion of her left shoulder was being tested, she complained of severe pain and problems. When she did not know that her range of motion was being tested, she did not complain of severe pain and problems and she had an appropriate range of motion.

Dr. Lingenfelter reiterated on February 4, 2009 that Claimant had a small rotator cuff tear. He stated "This was a small tear and this pain is way out of proportion to this size of tear." He stated that no findings from the examination suggested a re-rupture or tear of the rotator cuff. At no point did Dr. Lingenfelter indicate any belief that he considered Claimant's complaints of pain as valid.

Dr. Lingenfelter made a credible witness. Dr. Reintjes, the neurosurgeon whom Claimant was referred to in June and September 2008 for her neck complaints, also found degenerative problems, but nothing to account for Claimant's numerous subjective complaints of neck and shoulder pain. Dr. Reintjes made a credible witness.

There was no objective evidence to support Claimant's complaints of severe pain and disability. Claimant did not prove that she had the severe pain and disability she alleged. The evidence did not show that the small rotator cuff tear she sustained in the June 2006 accident combined with her prior disability to render her permanently and totally disabled.

Claimant's prior disability which was a hindrance or obstacle to her employment or reemployment, according to her own expert, Dr. Koprivica, consisted of a low back impairment and a history of DVT problems.<sup>2</sup> Claimant's low back impairment consisted of degenerative problems. She did not have a herniated disk. She did not have any fractures or tears. She had no radiating pain. She did not have any surgery. Dr. Koprivica's rating of a 15 percent permanent partial disability to the body as a whole was not challenged by the Second Injury Fund.

Claimant's DVT problem had resulted in three blood clots in her left lower extremity. The DVT problem did not result in any internal derangement to Claimant's hip, knee or ankle. Dr. Koprivica's rating of 25 percent of the left lower extremity at the 207 week level was unchallenged by the Second Injury Fund.

Claimant did not prove that the small healed rotator cuff tear and other injuries she allegedly sustained in the June 2006 accident combined with her preexisting low back and DVT problems to render her permanently and totally disabled. The evidence did not show that Claimant could not work. Claimant stopped working of her own accord. No doctor told her to

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<sup>2</sup> The statute provides that the Second Injury Fund is only liable for benefits if the preexisting disability results in permanent partial disability and constitutes a hindrance or obstacle to employment or reemployment. 287.220 RSMo. 2005.

stop working. Her employer did not terminate her employment. There was no evidence that her employer ever disciplined her or took any type of negative job action against her due to her alleged injury or inability to do the work subsequent to June 2006. Her treating orthopedic surgeon released her to return to work in August 2007 with relatively minor restrictions. Claimant of her own volition chose not to follow his instructions and to quit her job.

What the evidence showed was that Claimant was hypersensitive to alleged pain. The record showed that from essentially 2002 to 2006, Claimant sought treatment on numerous occasions for colds and respiratory problems, alleged back pain on numerous occasions, neck pain, hip pain on numerous occasions, bilateral shoulder problems on numerous occasions, thumb problems, finger pain, ankle pain on numerous occasions, calf pain, tremors, excessive perspiration, bilateral knee problems on numerous occasions, carpal tunnel syndrome, toenail discoloration, ingrown toenails, bunions, foot pain, heel pain, facial numbness and pain, hemorrhoids, dizziness on several occasions, heart palpitations, a "racing" heart, chest pains, digestive problems, DVT problems, numbness, tingling, gallbladder problems, rashes, excessive bleeding, and a finger injury from a non-work related fall which occurred subsequent to her June and December 2006 accidents and prior to her disability rating.

Finally, even Dr. Koprivica when asked whether the disability from Claimant's two alleged accidents at work, June and December 2006, combined with her preexisting disability to render her permanently and totally disabled, refused to answer the question. He admitted that he had answered questions in other cases about whether other individuals were permanently and totally disabled. He stated that in Claimant's case he would defer to a vocational expert to answer the question. That he admitted that he had answered that questions in other cases, but would not answer it in Claimant's case was telling. Claimant did not prove that she was permanently and totally disabled.

Also, Mr. Cordray's opinions were not credible. He relied exclusively on Dr. Koprivica's restrictions and Claimant's subjective complaints. Neither was credible. He gave no weight to the restrictions rendered by Dr. Lingenfelter, the treating orthopedic surgeon and a specialist. Dr. Lingenfelter's opinions were credible.

Mr. Cordray also concluded that Claimant was permanently and totally disabled due to the disability she sustained from the small rotator cuff tear and her injuries from the June 2006 accident combining with her minor preexisting disability. As noted above, the legislature has specifically stated that the Second Injury Fund can only be liable for permanent total disability benefits if the disability from the last injury combines with her preexisting disability. § 287.220 RSMo. 2005.

The June 2006 injury was not Claimant's last injury. Claimant alleged a work-related injury in December 2006. She worked until August 2007 when she stopped working of her own volition. She settled her claim against her employer arising out of the alleged December 2006 injury on January 5, 2010. Claimant not only failed to prove that she was not permanently and totally disabled, the statute does not allow permanent total disability benefits to be awarded against the Second Injury Fund when the case does not involve the last work-related injury. *Id.*

### **Second Injury Fund's liability for Compensation**

Claimant did prove the Second Injury Fund's liability for compensation. Claimant's June 2006 injury on the job involved a left shoulder rotator cuff tear, a biceps tear and possibly an impingement syndrome, although she was diagnosed with that condition in February 2006. An impingement syndrome over time may result in muscle weakness resulting in a rotator cuff and biceps tendon tear.

Dr. Lingenfelter performed a rotator cuff and biceps tendon repair on Claimant in February 2007. Claimant settled her claim against her employer arising out of the alleged June 2006 accident on January 5, 2010 based on a permanent partial disability of 35 percent of the left upper extremity at the 232 week level. The Second Injury Fund offered no evidence to challenge the settlement. Based on the evidence presented, Claimant proved that she sustained a permanent partial disability of 35 percent of the left upper extremity at the 232 week level.

Claimant, as noted earlier, proved that her preexisting disability which constituted a hindrance or obstacle to her employment or reemployment so as to meet the requirements of the statute involved a low back impairment and a history of DVT problems in her left lower extremity. Based on the evidence presented, she proved that her preexisting low back impairment resulted in a permanent partial disability of 15 percent to the body as a whole, while her DVT problem resulted in a permanent partial disability of 25 percent of the left lower extremity at the 207 week level. She proved that both conditions constituted a hindrance or obstacle to her employment or reemployment per the unchallenged and uncontroverted opinion of Dr. Koprivica.

Thus, Claimant's preexisting impairments resulted in 111.75 weeks of compensation or 27.9 percent to the body as a whole. (15 percent to the body as a whole equals 60 weeks of compensation; 25 percent at the 207 week level equals 51.75 weeks). Per the unchallenged opinion of Dr. Koprivica, Claimant proved that the disability from the two preexisting impairments combined with the disability from Claimant's June 2006 accident to result in a greater overall disability to her body as a whole than the simple sum of the disability from the impairments considered individually.

The simple sum of the disability from the impairments considered individually equaled a permanent partial disability of 48.2 percent to the body as a whole. (35 percent of the left shoulder at the 232 week level equals 81.2 weeks; 81.2 weeks plus 111.75 weeks equals 192.95 weeks, which equals 48.2 percent to the body as a whole). Claimant proved that the disability from her June 2006 accident combined with her preexisting disability to result in a permanent partial disability of 55 percent to the body as a whole, or 220 weeks of compensation.

Thus, the Second Injury Fund is liable for 27.05 weeks of compensation representing the difference between 48.2 and 55 percent to the body as a whole. See §287.220. (220 weeks minus 192.95 weeks equals 27.05 weeks). At a rate of \$365.08 per week for 27.05 weeks, the Second Injury Fund is liable for \$9,875.41. The Second Injury Fund is ordered to pay that amount to Claimant.

Made by: \_\_\_\_\_  
Kenneth J. Cain  
*Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated, attested to and transmitted to the parties this \_\_\_\_\_ day of \_\_\_\_\_, 2010 by:

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*