

Issued by THE LABOR AND INDUSTRIAL RELATIONS
COMMISSION

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

Injury No.: 05-123969

Employee: Gerald Gordon
Employer: City of Ellisville
Insurer: St. Louis Area Insurance Trust
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)
Date of Accident: October 21, 2005
Place and County of Accident: St. Louis

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 31, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued August 31, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21st day of February 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

Preliminaries

On October 21, 2005, employee fell on his outstretched right arm and injured his shoulder. On November 7, 2005, during a course of treatment provided by employer/insurer, Dr. Lehman began a surgery on employee's right shoulder with the intention of repairing a rotator cuff tear. Upon viewing employee's right shoulder, Dr. Lehman discovered employee had a massive rip and rotator cuff tear, subscapularis tear, and impingement syndrome. Dr. Lehman performed a repair of the subscapularis tear and a limited repair of the rotator cuff.

The parties agree that employee has a massive irreparable rotator cuff tear and loss of function of his shoulder. The parties have stipulated that employee sustained an injury by accident arising out of and in the course of his employment. Employer argues that employee sustained only a shoulder strain as a result of the work accident. Employee contends he sustained a rotator cuff tear necessitating surgery.

Complicating the determination of this claim is employee's right shoulder history. Employee had rotator cuff repair in 1993. After the 1993 repair, employee worked without restrictions with regard to the right shoulder until he suffered the work accident.

The administrative law judge concluded that, "[c]laimant failed to meet his burden of proving his work injury of October 21, 2005, was the prevailing factor in causing his massive rotator cuff tear, which necessitated surgical treatment and the resulting temporary disability." The administrative law judge found persuasive Dr. Lehman's explanation that employee's condition was chronic in nature and the work fall was not the prevailing factor in causing employee's rotator cuff tear. For reasons discussed below, I am not persuaded by Dr. Lehman's medical causation opinion. As will be discussed, I conclude the work fall was the prevailing factor in causing employee's injury, resulting medical condition and disability.

2005 Amendments to the Workers' Compensation Law

Section 287.800.1 RSMo (2005)[\[1\]](#) provides that, "[a]dministrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly."

Section 287.020.10 RSMo provides that, "[i]n applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of 'accident', 'occupational disease', 'arising out of', and 'in the course of the employment' to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases."

"The language in section 287.020.10...serves as clarification of the fact that any construction of the previous definitions by the courts was rejected by the amended definitions contained in section 287.020...[I]t appears from the plain language of the statute, the legislature ...intended to clarify its intent to amend the definitions and apply those definitions prospectively." *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349 (Mo.App. 2007).

Blank Slate

As to the phrases appearing in §287.020.10, the legislature created a blank slate effective August 28, 2005.

The primary role of courts in construing statutes is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent. In determining legislative intent, statutory words and phrases are taken in their ordinary and usual sense. § 1.090. That meaning is generally derived from the dictionary. There is no room for construction where words are plain and admit to but one meaning. Where no ambiguity exists, there is no need to resort to rules of construction.

Abrams v. Ohio Pacific Express, 819 S.W.2d 338 (Mo. banc 1991) (citations omitted).

In light of the directives of §287.800 and the Missouri Supreme Court, our primary role is to strictly construe the Workers' Compensation Law giving the words and phrases their ordinary and usual meaning.

Compensability

Section 287.120.1 RSMo provides:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

Employer is liable to employee for workers' compensation benefits if 1) employee sustained personal injury 2) by accident 3) arising out of and in the course of his employment. The parties have stipulated that employee sustained an injury by accident arising out of and in the course of employment. Employer asserts, however, that the condition for which employee seeks compensation is a chronic rotator cuff tear that was not caused by the accident. Employee asserts that the condition for which he seeks compensation is an acute rotator cuff tear or aggravation of a rotator cuff tear.

It has long been the rule in Missouri that aggravations of preexisting conditions may be compensable. Under the pre-2005 version of the Workers' Compensation Law, the claimant had to show a causal link between work and the aggravated condition (i.e. the employment was a substantial factor in causing the aggravated condition).^[2] That is because old §287.020 RSMo (2000), provides, among other things, that: an injury is compensable if it is clearly work related; the injury must be incidental to and not independent of the relation of employer and employee; it is reasonably apparent...that the employment is a substantial factor in causing the injury; the injury can be seen to have followed as a natural incident of the work; the injury can be fairly traced to the employment as a proximate cause.

By the 2005 Amendments, the legislature changed the causal link necessary to give rise to compensation. Specifically, the legislature changed the primary focus away from whether the *employment* caused the injury ("the *employment* is a substantial factor in causing the injury") to whether the *accident* caused the injury ("the *accident* is the prevailing factor in causing" the injury or medical condition or disability). Under §287.020 RSMo (2005), an aggravation of a preexisting condition is compensable if claimant proves a direct causal link between the accident and the aggravated condition; that is, a claimant must prove that the accident was the prevailing factor in causing the aggravated condition. Employee has met this burden.

Arising Out of and in the Course of Employment -- §287.020.3(2)

The legislature established a two-prong test for determining whether an injury arises out of or in the course of employment. §287.020.3 RSMo (2005) provides that:

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

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

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

Section 287.020.3(2)(a) -- Prevailing Factor Test

The legislature defined the prevailing factor for us. "The prevailing factor" means, "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability." §287.020.3(1). The phrase "prevailing factor" appears in two different subsections of §287.020. The context of the subsections reveals that the phrase is used in two different ways.

- §287.020.3(1) provides that, "[a]n injury by accident is compensable only if the accident was the prevailing factor causing both the resulting medical condition and disability."
- §287.020.(2) provides that, "[a]n injury shall be deemed to arise out of and in the course of the employment only if: (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and,..."

Substituting the definition of "prevailing factor" for each occurrence of the phrase "prevailing factor" does not cut an easy path to a compensability determination. Substituting the definition in §287.020.3(1) produces the following redundant requirement:

An injury by accident is compensable only if the accident was *[the primary factor, in relation to any other factor, causing both the resulting medical condition and disability]* causing both the resulting medical condition and disability.

Substituting the definition in §287.020.3(2) produces the following somewhat unintelligible requirement:

An injury shall be deemed to arise out of and in the course of the employment only if: (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is *[the primary factor, in relation to any other factor, causing both the resulting medical condition and disability]* in causing the injury; and,...

The meanings of the amendments are far from clear. To be compensable, must the accident be the primary factor, in relation to any other factor, in causing the injury? In causing both the resulting medical condition and disability? In causing the injury, the resulting medical condition, and the disability? In the present case, employee has shown the accident caused all three so I will not ponder that ambiguity further.

Injury

The parties stipulate that employee sustained an injury by accident. "Injury" is variously defined in Chapter 287. The multiple definitions create ambiguities to be addressed on another day. For my analysis, I will use the definition of "injury" found in §287.020.3(5): "The terms 'injury' and 'personal injuries' shall mean violence to the physical structure of the body..."

Disability

"Disability" is defined as 'inability to do something'; 'deprivation or lack of esp. of physical, intellectual, or emotional capacity or fitness'; 'the inability to pursue an occupation or perform services for wages because of physical or mental impairment'; 'a physical or mental illness, injury, or condition that incapacitates in any way.' Webster's Third New International Dictionary (1976)." *Loven v. Greene County*, 63 S.W.3d 278, 284 (Mo.App. 2001). As to employee's disability, the evidence is undisputed that the accident was the primary factor, in relation to any other factor, in causing the disability. Although employee had a pre-existing shoulder condition, he worked without restriction until the October 2005 work accident. The preexisting

condition did not disable employee from working. The work fall (accident) disabled employee from working. The testimony of both Dr. Lehman and Dr. Poetz confirm that the accident caused a trauma resulting in employee's loss of function in his shoulder.

Resulting Medical Condition

What is employee's "resulting medical condition?" Was the accident the primary factor, in relation to any other factor, in causing employee's resulting medical condition?

"Result" means, "to proceed, spring or rise as a consequence, effect or conclusion: come out or have an issue: TERMINATE, END – used with *from* or *in* <an injury ~ing from a fall>"^[3] "Condition" means, "the physical status of the body as a whole <good ~><poor ~> or of one of its parts – usu. Used to indicate abnormality <a serious ~><a disturbed mental ~>."^[4]

The administrative law judge's conclusion that the "resulting medical condition" is the massive rotator cuff tear is erroneous. I do not doubt that some rotator cuff tear existed as of the time of the accident. But the physical status of employee's body as a whole was adversely affected by the work accident. Employee's post-accident physical status is the "resulting medical condition."

The aggravated shoulder condition and disability sprang from the accident wherein employee sustained violence to the physical structure of his body when he fell off the equipment. In other words, the aggravated shoulder condition and disability are the product of employee's injury by accident. The resulting medical condition is the aggravated shoulder condition. Dr. Poetz testified that the fall was the prevailing factor in causing employee's resulting shoulder condition. Dr. Poetz considered employee's functional changes and limitations and employee's full clinical picture when forming his opinion. Employee's shoulder progressed from functional and relatively free of pain to functionally impaired and extremely painful as a consequence of falling on his outstretched arm on October 21, 2005. Employee's body progressed from not needing a surgical repair to function to needing a surgical repair. Even after the surgery, employee's shoulder function is impaired. The accident was the most important influence – the primary factor – in bringing about the change from a fully functional shoulder to a shoulder with impaired function.

I am not persuaded by Dr. Lehman's testimony. Dr. Lehman testified that employee had no rotator cuff yet somehow employee was able to compensate such that he could work without restrictions. Dr. Lehman's diagnosis that employee had no rotator cuff is contrary to Dr. Lehman's operative report wherein he discusses repairing the subscapularis and describes the rotator cuff tissue in the subacromial space. In addition, I have considered many rotator cuff tears over the years and I suffered one myself. I simply do not believe that employee performed the duties of his job using his right shoulder with no rotator cuff at all.

Even if I accept Dr. Lehman's opinion that the work injury was not the prevailing factor in causing the large full thickness tear, my determination of the claim is not at an end. The opinion fails to take into account employee's overall clinical picture; that is, the physical status of employee's body as a whole (see the definition of "condition" above). Dr. Lehman acknowledges that the work accident caused weakness in employee's shoulder and altered the mechanics of employee's shoulder yet Dr. Lehman ignores these injurious effects as if they were not attributes of employee's "resulting medical condition."

§287.020.3(2)(b) – The Related Hazard Test

There is no dispute that employee's injury came from a hazard or risk related to employment. As discussed above, the aggravated shoulder condition and disability sprang from the work accident wherein employee sustained an injury when he fell off the equipment. Such injuries are never denied compensability under subparagraph §287.020.3(2)(b). Of course, by proving that his injury came from a hazard or risk related to employment, employee necessarily proved that his injury did not come from a hazard or risk unrelated to

employment. Employee has satisfied his burden under each prong of §287.020.3(2). His injury must be deemed to have arisen out of and in the course of employment.

Medical Treatment

Section 287.140. 1 RSMo (2005) provides, in part:

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.

Before the accident, employee was not in pain and could use his arm. After the accident, employee was in pain and could not use his arm. The pain and loss of function were clearly effects of the injury he sustained in the work accident. By the plain language of the statute, employee was entitled to treatment to cure and relieve those effects. Dr. Lehman testified that the accident traumatized employee's shoulder and that the accident prompted employee's treatment with Dr. Lehman. Dr. Poetz was of the opinion that the treatment was medically necessary to treat the injury. The need for surgery clearly flowed from the accident.

Employee's Shoulder Injury and Condition are Compensable under 287.120.1 RSMo.

Based upon the foregoing, I conclude that employee has established that he suffered a personal injury by accident arising out of and in the course of employment. Section 287.120.1 dictates that employer is liable to employee for workers' compensation benefits including medical expenses for treatment of his shoulder, temporary total disability benefits for the period of recovery therefrom, and permanent partial disability benefits.

John J. Hickey, Member

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

[2] "[A]ggravation of a pre-existing condition is a compensable injury if the claimant establishes a direct causal link between her job duties and the aggravated condition." *Rono v. Famous Barr*, 91 S.W.3d 688, 691 (Mo.App. 2002) (citations omitted). "If substantial evidence exists from which the Commission could determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties, there is sufficient competent evidence to warrant a finding that the claimant's condition was aggravated by a work-related injury." *Loven v. Greene County*, 63 S.W.3d 278, 284 (Mo.App. 2001) (citations omitted).

[3] Webster's Third New International Dictionary 1937 (2002).

[4] Webster's Third New International Dictionary 473 (2002).

AWARD

Dependents: N/A
Employer: City of Ellisville
Additional Party: Second Injury Fund
Insurer: St. Louis Area Insurance Trust
Hearing Date: August 2, 2007

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: MDL: al

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
 - 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
 - Date of accident or onset of occupational disease: October 21, 2005
 - State location where accident occurred or occupational disease was contracted: St. Louis
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
 - 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 slipped and fell on his right arm.
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 arm
 - Nature and extent of any permanent disability: -0-
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? \$27,639.87

Employee: Gerald Gordon

Injury No.: 05-123969

17. Value necessary medical aid not furnished by employer/insurer? -0-

- Employee's average weekly wages: \$606.36

19. Weekly compensation rate: \$404.24/\$365.08

20. Method wages computation: Stipulation of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

22. Second Injury Fund liability: No

Total: \$0

23. Future requirements awarded: None

Said payments to begin 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gerald Gordon

Injury No.: 05-123969

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: City of Ellisville

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

Additional Party: Second Injury Fund

Insurer: St. Louis Area Insurance Trust

Checked by: MDL: al

PRELIMINARIES

A hearing was held on August 2, 2007 at the Division of Workers' Compensation in the City of St. Louis. Gerald Gordon (Claimant) was represented by Mr. James Ochs. The City of Ellisville (Employer) and its insurer, St. Louis Area Insurance Trust, were represented by Ms. Peggy Hecht. Pursuant to the agreement of the parties, the claim

against the Second Injury Fund shall remain open.

The parties stipulated that on or about October 21, 2005, Claimant sustained an accidental injury arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis; Employer received proper notice of the injury; and the claim was timely filed. The parties further stipulated Claimant was earning an average weekly wage of \$606.36 resulting in rates of compensation of \$404.24 for Temporary Total Disability benefits, and \$365.08 for Permanent Partial Disability benefits. Employer paid no Temporary Total Disability benefits, but paid medical benefits of \$27,639.87.

The issues for resolution are: medical causation with respect to Claimant's surgery and post operative treatment; whether Claimant is entitled to Temporary Total Disability benefits of 20 ½ weeks from October 21, 2005, to March 14, 2006; and nature and extent of Permanent Partial Disability sustained by Claimant.

Brown and Crouppen who previously represented Claimant, and has withdrawn, asserted a lien in the amount of \$128.72 which Claimant agreed to pay from the proceeds of any award.

SUMMARY OF EVIDENCE

On October 21, 2005, Claimant was working for Employer as a public works maintenance worker, when he was climbing out of a tub, and he slipped and fell on his right arm with his arm extended. Claimant had immediate pain and reported the accident. Claimant went to the emergency room for X-rays, and was initially treated conservatively. Following a course of physical therapy and MRI was performed, which revealed a massive rotator cuff tear, and Claimant was scheduled for surgery.

On November y, 2005, Dr. Lehman performed a right shoulder arthroscopy, attempted rotator cuff and subscapularis repair, and acromioplasty. The post-operative diagnosis was massive rotator cuff tear, irreparable; subscapularis tear, and impingement syndrome. Following Claimant's surgery he underwent physical therapy until he was returned to work on March 14, 2006.

Claimant now has difficulty lifting with his arm. He is right handed and has difficulty lifting to his side or in front of him. He can lift very little with his right hand. With his thumb up, he is able to lift higher than with his thumb down. He is unable to work above his head, and it is painful. Washing his hair is difficult. He is unable to move his arm behind his back. He has lost size in his right biceps, and has sleeping problems. Although Claimant can still do his job, he obtains assistance from co-workers.

Claimant had a previous right shoulder injury. On March 12, 1993, Claimant underwent an open right rotator cuff repair with subacromial decompression and distal clavicle resection. Claimant testified after being released from his 1993 surgery, his right shoulder was 99.5% back to normal. Claimant testified before the accident he had no trouble performing his job, and no limitations with regard to his right shoulder. He testified he had no problems with pain, lifting, or doing overhead work before October 21, 2005. Claimant testified before his 2005 accident, he played softball, bowled, and golfed, all without problems to his right arm. Before his accident he had no problems doing overhead work. Claimant testified all of his problems occurred after the accident.

Dr. Robert Poetz testified on behalf of Claimant. Dr. Poetz diagnosed a right rotator cuff tear, and status post open repair from 1992 . He diagnosed a massive irreparable right rotator cuff tear, subscapularis tear, and impingement syndrome as a result of the October 21, 2005, injury. He also diagnosed status post right shoulder arthroscopy, attempted rotator cuff repair, subscapularis repair, and acromioplasty also as a result of the October 21, 2005, injury. Dr. Poetz testified Claimant sustained 55 percent PPD of the right shoulder directly resulting from the October 21, 2005, work related injury. Dr. Poetz testified Claimant's injury of October 21, 2005, is a substantial and prevailing factor in causing Claimant's permanent partial disability.

Dr. Poetz's opinion is based upon the entire picture of the patient's clinical history, the history of his injury, the state of his shoulder just prior to the injury and for the last 10 or 12 years, the findings on MRI, the onset of symptoms that were lacking the day before this injury, the findings of massive tear, and the patient's history.

Dr. Richard Lehman, a board certified orthopedic surgeon, testified on behalf of Employer. Dr. Lehman testified when he operated on Claimant, he found a massive rip and rotator cuff tear, subscapularis tear, and impingement syndrome. Dr. Lehman concluded that based upon the severity of Claimant's cuff tear and the fact that there was no rotator cuff remaining, he felt Claimant had a chronic situation, and his current rotator cuff tear was probably referable to his 1992 pathology. Dr. Lehman testified the work injury of October 21, 2005 was not the cause of the rotator cuff tear he found during surgery. He thought Claimant injured his shoulder and had a strain, but the massive rotator cuff tear was chronic.

Dr. Lehman testified if a person had a rotator cuff tear that was a month or two old, or six months old, you would see a tear. He testified you would see food rotator cuff tissues. He testified you would see acute changes, but no chronic changes. He testified when he got into Claimant's shoulder there was no rotator cuff left at all. There were some chronic changes in the joint that appeared to be long term in nature.

Dr. Lehman testified although initially he thought there would be some chronicity to Claimant's injury, he also believed there would be an acute component. When he actually operated, he did not find any acute component to the injury.

Dr. Lehman testified based upon a reasonable degree of medical certainty he believed the work injury of October 21, 2005, was not the prevailing factor in the large, full thickness tear he found. Dr. Lehman believes Claimant hurt himself, and he diagnosed a strain of his right shoulder which caused some inflammation in his shoulder, but he does not believe it had any effect on the rotator cuff, that the rotator cuff pathology was long term in nature. Dr. Lehman found Claimant had no disability from his work injury.

Dr. Lehman testified the severity of Claimant's cuff tear in 1992, and what transpired over 15 years, created a situation where he was able to compensate. Dr. Lehman testified he believes if he had operated on Claimant two days before his work injury he would have had no rotator cuff tissue. He thought the strain and swelling were related to his work injury, and created some weakness, and altered the mechanics of his shoulder, but because of the acute nature of the injury, he did not think it in any way impacted the real issue in this case, which is his rotator cuff.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon my observations of Claimant at hearing, a review of the evidence, and the application of Missouri Law, I find:

Claimant failed to meet his burden of proving his work injury of October 21, 2005, was the prevailing factor in causing his massive rotator cuff tear, which necessitated surgical treatment and the resulting temporary disability.

§287.020.3(1) RSMO 2005 states:

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

I find the testimony of Dr. Lehman to be more persuasive than Dr. Poetz. Dr. Poetz is a Family Practice doctor who does not perform shoulder surgeries. Dr. Lehman is a board certified orthopedic surgeon who devotes forty percent of his practice to shoulder surgery. Dr. Lehman also had the benefit of performing this surgery on Claimant, and actually viewing the damage to his shoulder. Dr. Lehman testified he initially thought Claimant's accident was the cause of his rotator cuff tear, but when he actually was inside Claimant's shoulder he saw no acute injury whatsoever.

I find Dr. Lehman's explanation to be persuasive. Dr. Lehman testified he believes Claimant's condition was chronic in nature and was not the prevailing factor in causing Claimant's need for surgery. Dr. Poetz testified Claimant's injury was the prevailing factor in causing Claimant's rotator cuff tear. He based his opinion on a number

of factors, but did not reconcile why the arthroscopic findings did not reveal any acute injury. Dr. Lehman gave clear and cogent explanations on how he arrived at his expert opinion.

Although Sr. Lehman diagnosed a shoulder strain, he did not find any disability resulted from that sprain. Dr. Poetz assigned his 55 percent permanent partial disability rating to his diagnosis of rotator and subscapularis tear, and impingement syndrome, and does not diagnose a sprain at all. There is no medical evidence upon which an award of permanent partial disability can be made with regard to a sprain, since the only medical opinion with respect to the sprain assesses no permanent disability.

Based upon the opinion of Dr. Lehman, I find Claimant has failed to meet his burden of proof, and the claim is denied. The lien of Brown and Crouppen is denied. The claim against the Second Injury Fund is dismissed.

Date: _____

Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

Dr. Poetz and Dr. Lehman refer to Claimant's previous shoulder injury as a 1992 injury but the medical records reflect the surgery was performed in 1993.