

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

Injury No.: 00-163150

Employee: Oscar Graves
Employer: Roadway Express
Insurer: Old Republic Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: December 20, 2000

Place and County of Accident: Greene County, Missouri

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 associate 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 associate administrative law judge dated April 4, 2005. The award and decision of Associate Administrative Law Judge L. Timothy Wilson, issued April 4, 1005, is attached and incorporated by this reference.

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 9th day of August 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Oscar Graves

Injury No. 00-163150

Dependents: N/A
Employer: Roadway Express
Additional Party: Second Injury Fund
Insurer: Old Republic Insurance Company
Hearing Date: November 1, 2004

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: LTW/mp

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: December 20, 2000
5. State location where accident occurred or occupational disease was contracted: Greene 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:
While lifting a dock plate, Claimant injured his right shoulder.
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: right shoulder
14. Nature and extent of any permanent disability: 40 percent permanent partial disability referable to the right shoulder
15. Compensation paid to-date for temporary disability:
16. Value necessary medical aid paid to date by employer/insurer?
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages: \$686.08
19. Weekly compensation rate: \$457.34/314.26
20. Method wages computation: stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

The employer and insurer are ordered to provide the employee with future medical care, including orthopedic care, as may be causally related to the accident of December 20, 2000.

92.8 weeks of permanent partial disability from Employer at \$314.26 per week

\$29,163.33

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
\$143.08 weekly differential payable by SIF for 92.8 weeks beginning
September 1, 2001, and, thereafter, \$457.34 per week, for Claimant's lifetime

TOTAL:

23. Future requirements awarded: Future medical (see above)

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Paul F. Reichert

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Oscar Graves

Injury No: 00-163150

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Roadway Express

Additional Party Second Injury Fund

Insurer: Old Republic Insurance Company

Checked by: LTW/mp

The above-referenced workers' compensation claim was heard before the undersigned Associate Administrative Law Judge on November 1, 2004.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about December 20, 2000, Roadway Express was an employer operating under and subject to The Missouri Workers' Compensation Law and during this time was fully insured by Old Republic Insurance Company.
- (2) On the alleged injury date of December 20, 2000, Oscar Graves was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about December 20, 2000, the employee sustained an accident which arose out of and in the course and scope of his employment with Roadway Express.
- (4) The above-referenced employment and accident occurred in Greene County, Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section, 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the alleged accident, the employee's average weekly wage was \$686.08, which is sufficient to allow a compensation rate of \$457.34 for temporary total disability compensation, and a compensation rate of \$314.26 for permanent disability compensation.
- (8) Temporary disability benefits have been provided to the employee in the amount of \$1,386.27, representing 3 2/7 weeks in disability benefits, payable for the period of March 23, 2001 through April 15, 2001 at the weekly rate of \$404.33.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$33,350.41 in medical expenses.
- (10) The employer and insurer paid to the employee the sum of \$3,649.36, to be applied as an advance payment of permanent disability compensation, and is entitled to a credit against payment of permanent disability compensation. The employee is entitled to a reimbursement of \$159.74 as a credit for underpayment of temporary total disability compensation.

The sole issues to be resolved by hearing include:

- (1) Whether the employee has sustained injuries that will require future medical care in order to cure and relieve the employee of the effects of the injuries?
- (2) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, what is the nature and extent of the disability?
- (3) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

EVIDENCE PRESENTED

The employee, Oscar Graves, testified at the hearing in support of his claim. Also, the employee presented at the hearing of this case the testimony of two additional witnesses – Betty Graves (employee's wife) and Wilbur Swearingin (vocational consultant). In addition, the claimant offered for admission the following exhibits:

Exhibit A Deposition of Janie Vale, M.D. (with attachments)
 Exhibit B Medical Records from Cox Medical Center
 Exhibit C Daily Diary Log (02-25-04 through 03-02-04)
 Exhibit D Vocational Report from Wilbur T. Swearingin, CRC
 Exhibit E CV of Wilbur T. Swearingin, CRC

The exhibits were received and admitted into evidence.

The employer and insurer did not present any witnesses at the hearing of this case. The employer and insurer, however, offered for admission the following exhibit:

Exhibit 1 Deposition of P. Brent Koprivica, M.D.
Exhibit 2 Deposition of Michael Dreiling
Exhibit 3 Deposition of David Rogers, M.D.

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses at the hearing of this case. The Second Injury Fund, however, offered for admission the following exhibits:

Exhibit I Deposition of Michael Lala, M.A.
Exhibit II Work History Statement

The exhibits were received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File, which include: Report of Injury; Claim for Compensation; Answer of Employer & Insurer to Claim for Compensation; and Answer of Second Injury Fund to Claim for Compensation.

DISCUSSION

The employee, Oscar Graves, is 60 years of age, having been born on October 4, 1994. He and Betty have been married for more than 41 years and have four grown children. During their marriage he and Betty owned and lived on a farm, consisting of 26 acres, which allowed them to own and breed registered Missouri Fox Trotters. He and his wife, Betty, now reside in Marshfield, Missouri. Additionally, Mr. Graves is now retired from his employment with Roadway Express and is on social security disability.

Mr. Graves attended public schools in Laclede County, Missouri, graduating from high school in 1962. Following high school, Mr. Graves elected not to pursue or obtain any formal vocational education or job training; and he enjoys no college credit. However, he does possess a Missouri Commercial Drivers License (CDL), Class A, with HMPT endorsements.

Initially, upon graduating from high school, Mr. Graves pursued employment as a general laborer, working in construction. Thereafter, Mr. Graves pursued other employment; and in 1966 Mr. Graves obtained employment with Alcoa, working as a maintenance worker. In this employment Mr. Graves performed general laborer work such as mowing the grounds, pouring concrete, using a jackhammer to break up concrete, hauling off debris from the plant, and replacing wooden flooring. This work was physically demanding and required him to continuously stand, walk, lift, and bend. Mr. Graves continued in this employment until 1977, when he left this employment to secure other employment with Roadway Express.

In 1977 Mr. Graves obtained employment with Roadway Express, working primarily as a dockworker and, at times, as a delivery driver. As a dockworker, Mr. Graves was responsible for unloading freight from various trucks and loading freight onto other trucks. In performing this work on the dock, approximately 70 percent of the time Mr. Graves manually, using his physical strength, moved the merchandise and product; and the other 30 percent of the time he used a sit-down forklift. Additionally, Mr. Graves utilized two-wheelers and floor jacks to move the products on the dock. And, as a delivery driver, Mr. Graves would drive a delivery truck delivering products to, and picking up products from, customers in Springfield. This delivery work involved loading and unloading his freight.

Mr. Graves worked continuously for Roadway Express, performing the work of a dockworker or delivery driver until suffering an accident in December 2000. Following this accident, Roadway Express reassigned Mr. Graves to a position that allowed him to perform certain light-duty work, as assigned, such as answering the telephone, doing some filing, and some sorting of paper. Fortunately, in this employment setting, Roadway Express permitted him to work at his own pace and to get up, move around, and takes breaks when necessary. Mr. Graves continued in this employment until September 2001, upon being released from medical care by Dr. Rogers, who found him to be at maximum medical improvement on or about August 28, 2001.

Prior to the accident of December 20, 2000, Mr. Graves sustained several injuries. These injuries are summarized below.

Low Back

In March 1991 Mr. Graves sustained an injury to his low back, which was in the nature of a low back strain, and resulted in him receiving workers' compensation benefits (Injury No. 91-026913). He was treated conservatively with trigger point injections and work hardening. This injury resulted in him being temporarily and totally disabled and receiving temporary disability compensation for the period of March 19, 1991, to July 1, 1991. He and Roadway Express entered into a Stipulation and Agreement of Compromise Settlement and Release, which resulted in Roadway Express tendering, and Mr.

Graves receiving, a lump sum payment in the amount of \$2,981.25. The parties stipulated to the agreement being a compromise lump-sum settlement and identify a permanent partial disability compensation rate of \$198.75, but did not identify a percentage of disability suffered by Mr. Graves.

In September 1993 Mr. Graves sustained an injury to his low back, which was in the nature of a back strain to his mid-back, and resulted in him receiving workers' compensation benefits (Injury No. 93-115087). Mr. Graves was treated conservatively and was restricted from working for approximately one week. The injury did not result in Mr. Graves entering into a compromise settlement.

In May 1997 Mr. Graves sustained an injury to his low back which was in the nature of a back strain to his low back and resulted in him receiving workers' compensation benefits (Injury No. 97-413480). Mr. Graves was treated conservatively and was restricted from working for approximately 10 weeks. The injury did not result in Mr. Graves entering into a compromise settlement.

Left Knee

In April / May 1992 Mr. Graves sustained an injury to his left knee which resulted in him receiving workers' compensation benefits (Injury No. 92-047638). This injury necessitated receipt of medical care, including a surgical repair involving a partial medial meniscectomy and chondroplasty for chondromalacia. During the course of his receipt of medical care, Mr. Graves suffered a period of temporary total disability, which resulted in him receiving 12 weeks of temporary disability compensation. He and Roadway Express entered into a Stipulation for Compromise Settlement which resulted in Roadway Express tendering, and Mr. Graves receiving, a lump-sum payment in the amount of \$4,200.00, based upon an approximate disability of 12 percent of the left knee.

Left Shoulder

In October 1994 Mr. Graves sustained an injury to his left shoulder which was in the nature of glenoid labral tear and chronic impingement syndrome and resulted in him receiving workers' compensation benefits (Injury No. 94-154296). This injury necessitated receipt of medical treatment, including a surgical repair involving subacromial decompression. During the course of his receipt of medical care, Mr. Graves suffered a period of temporary total disability. He and Roadway Express entered into a Stipulation for Compromise Settlement which resulted in Roadway Express tendering, and Mr. Graves receiving, a lump-sum payment in the amount of \$8,681.90, based on an approximate disability of 15 percent of the left shoulder.

Heart

In 1999 Mr. Graves suffered a heart attack which resulted in him being diagnosed with coronary artery disease, aortic stenosis, dyspnea, hypertension, and hyperlipidemia. The course of treatment for this condition included multiple cardiac catheterizations with placement of a stent for occlusion in one of his coronary arteries. Mr. Graves is often short of breath during exertion and will have occasional chest pain.

On or about December 20, 2000, Mr. Graves sustained an injury to his right shoulder while attempting to lift a stuck doorplate with his foreman. This injury, which arose out of and in the course of Mr. Graves' employment with Roadway Express, resulted in Mr. Graves experiencing immediately a sharp burning pain down his right shoulder. Initially, Mr. Graves attempted to rest his arm, with the hope that the pain would work itself out. Unfortunately, the arm did not improve; and the employer referred Mr. Graves to a primary care provider for treatment. Eventually, following a period of unsuccessful conservative treatment, Mr. Graves received a referral to David Rogers, who is an orthopedic surgeon, and who previously treated Mr. Rogers for a subacromial decompression of the left shoulder.

On or about March 5, 2001, Dr. Rogers examined Mr. Graves and, upon examination, diagnosed Mr. Graves with rotator cuff tear, subacromial impingement, and possible labral pathology. In light of his examination and findings, Dr. Rogers prescribed work restrictions for Mr. Graves, permitting him to return to work, but with the restriction of working with his left hand only. Also, at the time of this examination, Dr. Rogers discussed with Mr. Graves the possibility of undergoing a surgical repair. Thereafter, on or about March 23, 2001, Dr. Rogers performed on Mr. Graves a Bankart repair of a superior labral tear on the right, an arthroscopic distal clavicle resection and an arthroscopic subacromial decompression.

Following the surgery of March 23, 2001, Dr. Rogers put Mr. Graves through post-operative rehabilitation. Additionally, Dr. Rogers provided Mr. Graves with follow-up care and treatment for continuing complaints of pain, stiffness, and catching in the shoulder. On August 28, 2001, Dr. Rogers examined Mr. Graves and determined that, while Mr. Graves continued to present with symptomology and to be governed by limitations and restrictions, Mr. Graves had reached maximum medical improvement and should be released from his care. Notably, in rendering an evaluation and diagnoses of Mr. Graves on this date, Dr. Rogers propounded the following comments:

Oscar Graves has a diagnosis of:

1. Superior labral tear, right shoulder, status post arthroscopic Bankart repair, 10%

permanent physical impairment and loss of physical function to the right upper extremity at the level of the shoulder.

2. Degenerative joint disease, right glenohumeral joint, 10% permanent physical impairment and loss of physical function to the right upper extremity at the level of the shoulder.
3. Degenerative joint disease, acromioclavicular joint, right shoulder, status post arthroscopic distal clavicle resection, 10% permanent physical impairment and loss of physical function to the right upper extremity at the level of the shoulder.
4. Subacromial impingement syndrome, right shoulder, status post arthroscopic subacromial decompression, 5% permanent physical impairment and loss of physical function to the right upper extremity at the level of the shoulder for a total of 35% permanent physical impairment and loss of physical function to the right upper extremity at the level of the shoulder.

.... I would expect him to have permanent physical restrictions with the use of the shoulder with regard to no overhead use of the arm, no repetitive use of the arm, and limited ability to lift with the arm as detailed in the functional capacity assessment that has been done previously. This condition should be considered permanent and stationary.

Also, at the time of determining that Mr. Graves had reached maximum medical improvement, Dr. Rogers evaluated Mr. Graves' continuing medical needs and opined that Mr. Graves should be afforded future medical care. In this regard, Dr. Rogers stated,

I think that he will probably need the TENS unit on an indefinite basis and I think that there is a likelihood that at some point in the future he will require shoulder replacement surgery.

Subsequent to reaching maximum medical improvement and being released from treatment, Roadway Express informed Mr. Graves that it did not have a job available for him to perform within the permanent work restrictions imposed by Dr. Rogers. Consequently, Mr. Graves retired from his employment with Roadway Express, and, thereafter, pursued and obtained social security disability.

At the hearing Mr. Graves acknowledged that prior to December 20, 2000, he had suffered several injuries that resulted in him suffering disability; and while he performed his duties, he did so a little differently. Yet, Mr. Graves testified that, since suffering the injury to his right shoulder, he has been unable to do a lot of work that he used to do. Exhibiting tears, Mr. Graves indicated that he is no longer able to raise and breed horses, which he and his wife had planned to do in their retirement years. Also, he cannot play ball; he cannot throw with his right arm; and he cannot ride horses. And, while he is able to continue to fish and hunt, he must do these activities differently than he did before the December 2000 injury. For example, when fishing he no longer casts; and, when hunting he no longer carries a gun or actually participates in the hunting. Also, according to Mr. Graves, in a normal day he must lay down for an hour.

Similarly, Mrs. Graves testified that, since he suffered the December 2000 injury, Mr. Graves has experienced a significant change in lifestyle. According to Mrs. Graves, her husband is in constant pain and is able to get little sleep at night. Further, Mrs. Graves noted that her husband is unable to perform the work necessary to allow them to raise and breed horses; and he is no longer able to perform other work that he used to perform around the farm, such as building and repairing fences. On cross-examination, Mrs. Graves acknowledged that, prior to the December 2000 injury, her husband had suffered several injuries, which had resulted in him suffering some disability; but she did not believe these preexisting injuries kept him out of work or prevented him from working.

Janie R. Vale, M.D., who is a physician practicing in the specialty of occupational medicine, testified by deposition on behalf of the employee, Oscar Graves. Dr. Vale performed an independent medical examination of Mr. Graves on September 30, 2003. At the time of this examination, Dr. Vale took a history from Mr. Graves, reviewed various medical records, and performed a physical examination of him. In light of her examination and evaluation of Mr. Graves, Dr. Vale opined that, as a consequence of the accident of December 20, 2000, Mr. Graves sustained a "significant overload injury of the dominant right shoulder." Dr. Vale further opined that, as a consequence of this injury, Mr. Graves sustained a permanent partial impairment of 40 percent referable to the right shoulder.

Also, in considering the limitations and restrictions imposed on Mr. Graves as a consequence of this December 2000 injury, Dr. Vale propounded the following opinion:

He is basically limited to work between the mid thigh to mid chest level directly in front of the torso. He is unable to perform rotational / throwing motions of the right shoulder and would be unable to handle weights on a frequent or occasional basis over 10 to 12 pounds. He should also avoid impact, torque, and vibrational exposures to the right upper extremity.

Taking into consideration the above-referenced restrictions, together with Mr. Graves' age, education, and vocational employment history, Dr. Vale is of the opinion that Mr. Graves is permanently and totally disabled. Dr. Vale is of the additional opinion that this vocational disability is "most substantially related to [the] incident of December 20, 2000."

On cross-examination Dr. Vale acknowledged that, prior to December 20, 2000, Mr. Graves had sustained several injuries, including a heart attack. And, prior to December 20, 2000, Mr. Graves presented with conditions that would have merited imposition of restrictions and limitations. Namely, she would have imposed, referable to Mr. Graves' left shoulder, the restriction of limiting weighted work above shoulder to occasional and of weights at or below 15 to 20 pounds. Additionally, Dr. Vale acknowledged that, considering only the injury of December 20, 2000, there would be a limited number of jobs in the open labor market available for an individual, who is governed by the restrictions she imposed on Mr. Graves.

Wilbur Swearingin, CRC, who is vocational rehabilitation consultant, testified at the hearing in support of Mr. Graves. Mr. Swearingin performed a vocational evaluation of Mr. Graves on June 23, 2004, which included the administering of several vocational tests. Additionally, at the time of this examination, Mr. Swearingin took a medical and work history, and reviewed various medical records. In light of his examination and evaluation of Mr. Graves, Mr. Swearingin opined that Mr. Graves is unemployable in the open and competitive labor market. Also, Mr. Swearingin opined that, while the combination of the preexisting injuries and the injury of December 20, 2000, clearly render him permanently and totally disabled, the injury of December 20, 2000, considered alone, render him permanently and totally disabled.

David Rogers, who is an orthopedic surgeon and was the physician responsible for treatment of the injuries to Mr. Graves' upper extremities, testified by deposition on behalf of the employer, Roadway Express. Notably, in addressing the issue of Mr. Graves' employability and the restrictions imposed on him, Dr. Rogers opined that the injury of December 20, 2000, considered alone, does not preclude Mr. Graves from gainful employment. In speaking specifically to this issue, Dr. Rogers propounded the following comments:

It is my opinion that if we consider Mr. Graves' right shoulder condition in isolation, that he is not unable to return to substantial and gainful employment in the open labor market in some capacity. However, because of the injury to his right shoulder, he would likely have significant limitations with regard to repetitive use, overhead use, and heavy lifting involving the right shoulder. And I feel that it is unlikely that he would be able to return to his previous occupation at Roadway Express working on the loading dock because of the limitations the right shoulder imposes upon him.

Also, Dr. Rogers acknowledged that, prior to December 20, 2000, Mr. Graves had sustained an injury to his left shoulder which necessitated surgical repair and caused Mr. Graves to be governed by certain residual symptoms. And, in light of this continuing symptomology, Mr. Graves received from Dr. Rogers a hunting disability certificate which would have allowed him to use a crossbow instead of longbow or a compound bow. Further, Dr. Rogers opined that any self-imposed restriction of no sitting or no walking would not be causally related to the right shoulder injury of December 20, 2000.

P. Brent Koprivica, M.D., a physician practicing in the specialty of occupational medicine, testified by deposition on behalf of the employer, Roadway Express. Dr. Koprivica performed an independent medical examination of Mr. Graves on July 22, 2004. At the time of this examination, Dr. Koprivica took a history from Mr. Graves, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of the employee, Dr. Koprivica opined that, as a consequence of the accident of December 20, 2000, Mr. Graves sustained a permanent partial disability of 40 percent referable to the right shoulder. Dr. Koprivica further opined that the injury of December 20, 2000, causes Mr. Graves to be governed by restrictions. The restrictions imposed by Dr. Koprivica, relative to the right shoulder and the injury of December 20, 2000 is as follows: Mr. Graves is not to engage in activities above shoulder girdle level of the right shoulder; he is to avoid repetitive use of the right arm; and he is to restrict his below mid chest level activities with the right arm to 10 pounds as a maximum.

Also, Dr. Koprivica opined that, prior to the accident of December 20, 2000, Mr. Graves suffered several injuries, which resulted in him suffering certain permanent disability and caused him to be governed by restrictions and limitations. In assessing the disability applicable to the preexisting injuries, Dr. Koprivica opined that, the prior left shoulder presented Mr. Graves with a permanent partial disability of 15 percent referable to the shoulder; the prior left knee presented Mr. Graves with a permanent partial disability of 15 percent referable to the knee, which takes into consideration a progression of degeneration occurring subsequent to the settlement and prior to injury of December 2000; the prior low back condition presented Mr. Graves with a permanent partial disability of 15 percent to the body as a whole; and the prior cardiac condition presented Mr. Graves with a permanent partial disability of 20 percent to the body as a whole.

In examining the limitations and restrictions governing Mr. Graves, caused by the preexisting injuries, Dr. Koprivica propounded the following comments:

In reference to his left shoulder, I would advise Mr. Graves to avoid repetitive above shoulder lifting activities. He should avoid sustained activities above shoulder girdle level as well based on that condition. In general, for his left shoulder, I would advise him to restrict above

shoulder lifting to 30 pounds or less.

In terms of the permanent partial disability involving the left knee, I would limit him from doing activities which require frequent or constant squatting, crawling, kneeling or climbing.

In terms of his prior chronic mechanical low back pain, I would advise Mr. Graves to avoid constant bending at the waist, pushing, pulling or twisting activities. Ideally, he would avoid sustained or awkward postures of the lumbar spine.

Finally, for his cardiac condition, avoidance of environmental extremes as well as heavy aerobic demand metabolic activities would be generally advised.

Finally, in considering the question of Mr. Graves' employability, Dr. Koprivica opined that the accident of December 20, 2000, and the resulting injury to Mr. Graves' right shoulder, considered alone, renders him unable to work as a dockworker, but does not render him unemployable in the open and competitive labor market. According to Dr. Koprivica, in addition to the right shoulder "there are other disabling conditions that would contribute in terms of restrictions and limitations to access of the open labor market." Dr. Koprivica thus opines that, if Mr. Graves is deemed to be permanently and totally disabled, he is permanently and totally disabled as a consequence of the combination of injuries and disabilities, attributable to both the preexisting injuries and the injury of December 20, 2000.

Michael Dreiling, who is vocational rehabilitation consultant, testified at the hearing in support of the employer and insurer. Mr. Dreiling performed a vocational assessment of Mr. Graves on September 29, 2004, which involved a telephone interview of Mr. Graves. Additionally, at the time of this vocational assessment, Mr. Dreiling took a medical and work history, and reviewed various medical records. In light of his examination and evaluation of Mr. Graves, Mr. Dreiling noted that, prior to the accident of December 20, 2000, Mr. Graves suffered from several injuries, which involved his left shoulder, left knee, low back, and heart (cardiovascular / coronary artery disease). And, while these injuries did not prevent Mr. Graves from returning to work, Mr. Dreiling opined that each preexisting injury was an industrial disability constituting a hindrance and an obstacle to employment or potential employment. Similarly, Mr. Dreiling opined that the December 20, 2000, injury to Mr. Graves' right shoulder was an industrial disability constituting a hindrance and an obstacle to employment or potential employment.

In assessing the vocational impact caused by the injury of December 20, 2000, considered in isolation to the preexisting injuries and the vocational impact caused by the preexisting injuries, Mr. Dreiling opined that Mr. Graves is employable in the open and competitive labor market. Notably, according to Mr. Dreiling, if he assumes the restrictions imposed by Dr. Rogers relative to the right shoulder only, or if he assumes the restrictions imposed by Dr. Koprivica relative to the right shoulder only, Mr. Graves is capable of returning to substantial and gainful employment in the open and competitive labor market. Further, according to Mr. Dreiling, if Mr. Graves is found to be permanently and totally disabled, he is unemployable as a consequence of the combination of injuries and disabilities, which include the injuries and disabilities predating the injury of December 20, 2000.

On cross-examination Mr. Dreiling acknowledged that, in consideration of the restrictions caused by the injury of December 20, 2000, considered alone, Mr. Graves is precluded from returning to work with Roadway Express as a dockworker and is limited to sedentary employment. Further, on cross-examination Mr. Dreiling acknowledged that, in addition to the restrictions imposed by Dr. Rogers, if he considers Mr. Graves' education, work history, and limitations associated with sitting, standing, and walking, he is of the opinion that Mr. Graves is not employable in the open and competitive labor market.

Michael Lala, who is vocational rehabilitation consultant, testified at the hearing in support of the Second Injury Fund. Mr. Lala performed a vocational assessment of Mr. Graves on or about October 22, 2004. At the time of this vocational assessment, Mr. Lala took a medical and work history, and reviewed various medical records. In light of his vocational assessment of Mr. Graves, Mr. Lala noted that, consideration of the restrictions imposed by the accident of December 20, 2000, relating to the right shoulder only, together with consideration of Mr. Graves' age, education and work history, Mr. Graves is unemployable in the open and competitive labor market.

Notably, on cross-examination Mr. Lala interpreted "disability" or "hindrance to employment" similar to the interpretation provided by Dr. Vale. Namely, "If you can find a job, there's no hinderance (sic)." However, he did acknowledge that, if a person can find an entry level job, but the condition prevents that person from finding other jobs that he or she might have been qualified to perform, then such condition constitutes a hindrance. In considering this additional concept of hindrance, Mr. Lala evaded the question of whether the limitations imposed by Dr. Koprivica, such as the inability to put up sheetrock, would have constituted a hindrance, by repeatedly stating that Mr. Graves lacked the skills to do sheetrock work.

In addition, on cross-examination Mr. Lala acknowledged that, in rendering his opinion that Mr. Graves is unemployable in the open and competitive labor market, he considered not only Mr. Graves' age, the restrictions relating to the right shoulder, but he also considered the restrictions and limitations relating to Mr. Graves ability to sit, stand, and walk. Further, on cross-examination Mr. Lala acknowledged that, if he considered the restrictions imposed by Dr. Rogers in isolation to other restrictions, he would be of the opinion that Mr. Graves would be capable of engaging in employment and

there would be employment opportunities for him.

FINDINGS AND CONCLUSIONS

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo.App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo.Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo.App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Bruflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo.App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575, 577 (Mo.App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo.App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo.App. W.D. 1993).

I. Future Medical Care

The employee does not seek or claim payment for past medical expenses, but does seek future medical care in order to cure and relieve the effects of the injuries caused by the accident of December 20, 2000. The evidence is supportive of a finding that the employee is entitled to future medical care.

The accident of December 20, 2000, causes Mr. Graves to suffer pain, which, Dr. Rogers believes will necessitate receipt and use of a TENS unit on an indefinite basis. Additionally, Dr. Rogers is of the opinion that, in all likelihood at some point in the future, Mr. Graves will need to undergo a right shoulder replacement surgery. The parties do not offer any medical opinion to the contrary. Accordingly, the employer and insurer are ordered to provide the employee with future medical care, including orthopedic care, as may be causally related to the accident of December 20, 2000.

II. Nature & Extent of Permanent Disability

The accident of December 20, 2005, caused Mr. Graves to sustain an injury in the nature of a superior labral tear and subacromial impingement syndrome of the right shoulder. Additionally, following surgery, this injury resulted in Mr. Graves suffering degenerative joint disease of the glenohumeral joint and the acromioclavicular joint, both of the right shoulder. Also, while the surgery provided Mr. Graves with some relief, the surgery was not wholly successful; and Mr. Grave continued to present with disability pain and symptomology.

While under active treatment and care of Dr. Rogers, and prior to reaching the point of being at maximum medical improvement, Roadway Express reassigned Mr. Graves to a position that allowed him to return to work and perform certain light duty work, as assigned, such as answering the telephone, doing some filing, and some sorting of paper. Fortunately, in this employment setting, Roadway Express permitted him to work at his own pace, and to get up, move around, and takes breaks when necessary. Mr. Graves continued in this employment until September 2001, upon being released from medical care by Dr. Rogers, who found him to be at maximum medical improvement on or about August 28, 2001. Thereafter, Mr. Graves retired from his employment with Roadway Express. Additionally, believing that he could no longer work, he sought and obtained social security disability compensation.

Notably, in considering the nature and extent of Mr. Graves' overall disability, the parties do not readily dispute that Mr. Graves is permanently and totally disabled. The primary issue is whether the accident of December 20, 2000, considered alone, renders Mr. Graves permanently and totally disabled; or, whether he is permanently and totally disabled as a consequence of the injury of December 20, 2000, in combination with the preexisting injuries. This issue is not easily or readily resolved as the parties offer differing medical and vocational opinions, which support different findings and

conclusions.

The adjudication of this principal issue is troublesome and not without doubt. However, after consideration and review of the evidence, I resolve the differences in medical opinion in favor of the opinions of Dr. Rogers, Dr. Koprivica, and Mr. Dreiling. I find and conclude that, as a consequence of the accident of December 20, 2000, the employee Oscar Graves, sustained an injury to his right shoulder which causes him to be governed by the following restrictions: no overhead use of the right arm; no repetitive use of the right arm; and no heavy lifting with the right arm. I further find and conclude that, as a consequence of the accident of December 20, 2000, the employee Oscar Graves sustained a permanent partial disability of 40 percent referable to the right shoulder (92.8 weeks).

In addition, I find and conclude that the accident of December 20, 2000, considered alone, does not render the employee permanently and totally disabled. The vocational opinion of Mr. Dreiling notes that the restrictions imposed by Dr. Rogers, together with consideration of Mr. Graves' age, education, and work history, but without consideration of additional restrictions pertaining to sitting, standing, or walking, does not render Mr. Graves unemployable in the open and competitive labor market. Rather, he is capable of engaging in sedentary, full time gainful employment. According to Dr. Rogers, the restrictions relating to no sitting, no standing, or no walking are not causally related to the right shoulder injury of December 20, 2000. And, even Mr. Lala acknowledges that, if he considered the restrictions imposed by Dr. Rogers in isolation to other restrictions, he would be of the opinion that Mr. Graves would be capable of engaging in employment and there would be employment opportunities for him.

Therefore, in light of the foregoing, the employer and insurer are ordered to pay to the employee, Oscar Graves, the sum of \$29,163.33, which represents payment of 92.8 weeks of permanent partial disability compensation, payable at the applicable rate of \$314.26.

III. Second Injury Fund Liability

The accident of December 20, 2000, considered alone, does not render the employee permanently and totally disabled. Yet, prior to the accident of December 20, 2000, Mr. Graves suffered from preexisting injuries involving his left shoulder, left knee, low back, and heart; and these injuries, caused Mr. Graves to suffer certain disability and to be presented with hindrances and obstacles to employment or potential employment. Although he did not have such restrictions imposed on him at the time of the injury, and he did return to work, Mr. Graves suffered injuries that merited issuance of limitations and restrictions similar to those given by Dr. Koprivica. These preexisting injuries caused Mr. Graves to slow down, and to work through pain. Additionally, while Mr. Graves was able to continue working with Roadway Express following the injuries and his heart attack, prior to December 20, 2000, these injuries would have likely prevented him from performing or engaging in other types of employment, and thus constitute a hindrance or obstacle to employment or potential employment.

The disability caused by the accident of December 20, 2000, combines with the preexisting industrial disabilities to cause Mr. Graves to be governed by additional restrictions and limitations, including restrictions and limitations associated with sitting, standing and walking. The restrictions resulting from the accident of December 20, 2000, together with the preexisting injuries, considered as a whole, render Mr. Graves permanently and totally disabled. Notably, all of the physicians and vocational experts appear to agree that, with consideration of all the restrictions imposed on Mr. Graves, he is permanently and totally disabled. This conclusion is consistent with the vocational opinion of Mr. Dreiling, who opines that, taking into consideration Mr. Graves' age, education, work history, the limitations, and restrictions imposed by Dr. Rogers or Dr. Koprivica relative to the accident of December 20, 2000, together with consideration of the limitations and restrictions caused by the preexisting injuries, including the limitations associated with sitting, standing, and walking, Mr. Graves is not employable in the open and competitive labor market.

Accordingly, after consideration and review of the evidence I find and conclude that, as a consequence of the accident December 20, 2000, in combination with the preexisting industrial disabilities, Mr. Graves is permanently and totally disabled. Therefore, the Second Injury Fund is ordered to pay to the employee, Oscar Graves, the sum of \$457.34 per week for the employee's lifetime. The payment of permanent total disability compensation by the Second Injury Fund is effective as of September 1, 2001 (when Mr. Graves reached maximum medical improvement and cease to work for the employer), and shall take into consideration 92.8 weeks of permanent partial disability, which is attributable to the employer and insurer. Accordingly, the Second Injury Fund shall pay the difference between permanent total disability compensation and permanent partial disability compensation (\$143.08) for 92.8 weeks, and thereafter the payment of \$457.34 per week, for life.

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Date: April 4, 2005

Made by: /s/ L. Timothy Wilson
L. Timothy Wilson
Associate Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secrest
Patricia "Pat" Secrest
Director
Division of Workers' Compensation