

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

Injury No.: 05-029316

Employee: Judy A. Harder
Employer: Burlington Coat Factory (Settled)
Insurer: Zurich American Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 7, 2005
Place and County of Accident: St. Louis City, 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 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 April 29, 2008. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued April 29, 2008, 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 5th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Judy A. Harder

Injury No.: 05-029316

Dependents: N/A

Employer: Burlington Coat Factory (settled)

Additional Party: Second Injury Fund

Insurer: Zurich American Insurance Company (settled)

Hearing Dates: January 24, 2008

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

Checked by: KOB: ms

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: April 7, 2005.
5. State location where accident occurred or occupational disease was contracted: St. Louis City.
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: Claimant was unloading merchandise when she fell into the bed of the truck, and got stuck, hurting her left shoulder.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Left Shoulder
14. Nature and extent of any permanent disability: 25% of the left upper extremity at the shoulder.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$32,479.25

Employee: Judy Harder

Injury No.: 05-029316

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$345.34
- 19. Weekly compensation rate: \$230.23 /\$230.23
- 20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: (Employer settled)

22. Second Injury Fund liability: Yes

50 weeks of permanent partial disability from Second Injury Fund: \$11,511.50

Total: **\$ 11,511.50**

23. Future requirements awarded: None

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: Thomas Fagan

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Judy A. Harder	Injury No.: 05-029316
Dependents: N/A	Before the Division of Workers' Compensation
Employer: Burlington Coat Factory (settled)	Department of Labor and Industrial Relations of Missouri
Additional Party: Second Injury Fund	Jefferson City, Missouri
Insurer: Zurich American Insurance Company (settled)	Checked by: KOB: ms

PRELIMINARIES

The matter of Judy A. Harder (“Claimant”) proceeded to hearing to determine the liability of the Second Injury Fund. Attorney Thomas Fagan represented Claimant. Assistant Attorney General Jennifer Chestnut represented the Second Injury Fund. The claim against Burlington Coat Factory (“Employer”) and its insurer, Zurich American Insurance Co., previously settled.

The parties stipulated Claimant sustained an accidental injury on April 7, 2005 arising out of and in the course of her employment which resulted in injury to her left shoulder. At the time, Claimant earned an average weekly wage

of \$345.34, resulting in a rate of compensation of \$230.23 for both permanent total disability benefits and permanent partial disability benefits. Employer did not pay any temporary total disability benefits, but did pay medical benefits totaling \$32,479.25. Employment, venue, notice, timeliness of the claim, and coverage of the Act are not at issue.

The sole issue presented is the liability of the Second Injury Fund. Claimant seeks to recover permanent total disability benefits. Exhibits B through O, and Exhibits I through III were admitted without objection.^[1] Any marks on exhibits were present when the documents were admitted into evidence, and no marks were made by the Administrative Law Judge.

SUMMARY OF THE EVIDENCE

Claimant's Testimony and Records – Background & Primary Injury

Claimant is a 59 year old woman who lives with her brother in St. Louis City. She is right handed, approximately 5'4" tall, and weighs about 140 pounds. A smoker since the age of 16, Claimant has cut her four packs a day habit down to one a day. Claimant left high school after the eleventh grade to start working. She did not obtain her GED, enroll in college, or have any further training, other than to become a security guard. For most of her life, Claimant was a receiving clerk, but her other vocational experience is as a bus girl, and a lead person with a cleaning agency.

For three decades, Claimant worked full time as a receiving clerk, first at Venture, and since the 1990's with Employer. Her job duties involved unloading boxes from trucks, ticketing, and taking merchandise to the floor. Claimant used a cart to transport merchandise, and a scanning gun to check prices. She had to lift up to 80 pounds, sometimes with help. Other activities included sweeping the floor, performing SKU counts, and watching fitting rooms.

On April 7, 2005, while unloading a truck, Claimant picked up a box, tripped over a cart, fell into the bed of the truck, and got stuck between the truck and the cart, hurting her left shoulder. On April 11, 2005, she began receiving conservative treatment at Barnes Care. Following an abnormal MRI, Employer authorized treatment with Dr. Haupt, who performed arthroscopic shoulder surgery on July 12, 2005, with physical therapy following at Pro-Rehab. His diagnosis was left shoulder impingement, acromioclavicular joint inflammation and fraying of various tendons. Dr. Haupt released Claimant to light duty in July, and full duty in late September 2005. He placed Claimant at MMI on October 17, 2005 with a forty pound lifting restriction, and rated her disability at 6% of the left arm at the shoulder.

Following her shoulder surgery, Claimant worked for three months as a receiving clerk, although she said she did not perform as well. In late November 2005, Claimant stopped working to undergo a low back fusion for a condition unrelated to the April 7, 2005 accident.

Claimant's complaints with respect to her left shoulder include constant, "toothache like pain" that becomes worse when weather changes. Occasionally, Claimant experiences "pins and needles." Claimant cannot lift any significant weights, her range of motion is limited, and she cannot lie on her left side at all. Claimant reports her average pain is five on the ten-point scale, although the pain level fluctuates. Claimant takes Aleve up to four times per day, which relieves, but does not remove, the pain. Claimant is limited in activities of daily living. For example, she cannot reach for dishes in her cabinet, lift a gallon of milk or a bottle of soda, or do anything overhead. She has paresthesia and pain with extreme motions. Claimant settled her primary claim with Employer for 25% of the left arm at the shoulder.

Claimant's Testimony and Records – Preexisting Disabilities

Claimant's history of injuries prior to April 7, 2005 includes back problems. She hurt her back in the 1980's. Epidural injections and pain pills helped, but she feels her back never returned to normal. After a hard day of work, Claimant used Icy Hot patches for pain. The symptoms got worse with time, and Claimant eventually developed shooting pain in her left leg. She did not have bilateral complaints leg prior to April 2005.

On March 25, 2004, Claimant went to SLUCare for back pain, and Dr. Hood diagnosed probable sciatica, prescribed medications, and limited her lifting at work. The next mention of back pain in the SLUCare records was on August 31, 2004, but it was in the context of diffuse, generalized pain that did not keep Claimant from working. In November and December, SLUCare doctors saw Claimant more than once for back pain, ordered an MRI that was abnormal, and ultimately referred her for an orthopedic evaluation.

Claimant testified she first sought treatment for back pain with Dr. Place in 2001. However, records indicate Claimant did not see Dr. Place until January 10, 2005, when he diagnosed degenerative lumbar spondylolisthesis with stenosis. Although potential treatment options included decompression and fusion, Claimant was not a surgical candidate at that time due to her smoking habit, and Dr. Place referred her for injections. As of March 3, 2005, Dr. Place indicated Claimant needed to address her nicotine abuse, or he would have to consider a more complex surgery. It was not until May 2, 2005, following another CT myelogram, that Dr. Place discussed the surgical options in detail. Claimant wanted time to consider the options, and did not follow up with Dr. Place until after her shoulder injury and treatment.

Before Claimant's shoulder injury, she had several chronic conditions. She was diagnosed with and experienced the symptoms of arthritis throughout her body, particularly in her back and knees. When she could, Claimant took Celebrex. In 2004, Claimant fell, hit her head, and continues to have headaches once or twice a week. More than 10 years ago, Claimant was diagnosed with a hiatal hernia which causes her swallowing problems, and requires her to take Prevacid. Claimant has also taken various blood pressure medications for more than 10 years, but recently her pressure is not in control. While Claimant was working, she sometimes felt lightheaded due to her blood pressure. Claimant also had symptoms of chronic obstructive pulmonary disorder before April 7, 2005, which limits her mobility and requires the use of two different inhalers. There are multiple records reflecting evaluation of cardiovascular complaints and problems.

Claimant also alleges preexisting problems with her right arm, knees and neck. In the 1990's, Claimant suffered a bad cut to her right forearm. Claimant recovered, with scarring, and still has weakness and trouble gripping items, but reports no restrictions. Prior to April 7, 2005, Claimant's right knee locked, occasionally at work, and her left knee popped and crackled. On February 3, 1993, Dr. Markinson performed an arthroscopic partial lateral meniscectomy on Claimant's right knee, and she was later diagnosed with degenerative joint disease. Her knees are aggravated with activity. In 2002, Claimant underwent a CT of the cervical spine, but her neck exam in 2007 was unremarkable.

Claimant's Testimony and Records - Events Subsequent to Date of Accident

After she recovered from her shoulder surgery, Claimant returned to work, at first with post-operative restrictions, and then at full duty. When she went to her SLUCare doctors in the Summer and Fall of 2005, she complained of back pain, stating it was "the same or worse" with more radiating pain on August 29, and reporting pain down the back of her legs^[2] on October 4. On October 10, Claimant called for a return to work statement after missing some work due to back pain. On November 14, Claimant went to her doctor for treatment of an acute exacerbation of her low back pain. She reported the exacerbation occurred approximately one week prior when she felt a pop in her low back and experienced constant pain (10/10) with leg aches. She doubled her narcotic medication to deal with the pain, and had numbness and pain radiating to the bottom of her feet. Soon after this discreet event where she experienced the pop and pain, Claimant stopped working for Employer, and decided to undergo surgery.

Dr. Place performed a lumbar laminectomy, decompression and fusion with instrumentation on December 16, 2005. Although it helped her symptoms in the beginning, pain similar to what she had prior to surgery returned. Claimant lost feeling on the left side of her foot, which sometimes swells. At her last visit on March 20, 2006, Dr. Place wanted to follow up in three months, but Claimant could not afford a return visit. As a result of her back problems, Claimant cannot bend, sit, lie, or stand for any period of time. On exam, Claimant demonstrated limited range of motion, weakness, and left lower extremity atrophy. As of May 2006, Claimant still reported pain to her doctor and wanted him to complete disability papers.

Claimant's typical day involves a subdued morning routine, laying on the couch and sleeping. Although

Claimant is able to read the paper, it takes her a while. Claimant's ability to walk is declining: she recalled no walking limitations before 2005, could walk four blocks a year ago, and now can only walk one block. Since 2005, Claimant cannot clean house, vacuum, mop, or cook using the oven. Her brother does most of the laundry, although she does it herself every few weeks, and she handles her own finances. Claimant's ability to get a good night's sleep is limited because she cannot sleep on her back or left side due to pain. Her knees pop and lock, which limits her ability to walk, and she uses a cane. Claimant's current medications include blood pressure medicines, Prevacid, inhalers, Aleve for pain, and Amitriptyline. Claimant feels she cannot return to work at full duty, and the limitations due to her back are she cannot bend, sit, stand or lay for a long time.

Other Fact Witnesses

The testimony of **Ms. Marilyn Meyer**, Claimant's co-worker, echoed Claimant's testimony regarding her job duties, back complaints, and pain.

Opinion Evidence

Thomas R. Musich, M.D. examined Claimant on January 18, 2007, reviewed medical documents, prepared a report, and testified by deposition. It was his impression Claimant's acute left shoulder pathology, surgery, and ongoing symptoms are substantially and causally related to her April 2005 injury, which resulted in permanent partial disability of 35% of the left shoulder.

With respect to the low back and sciatica, Dr. Musich stated, "It is my medical opinion that [Claimant] suffered symptomatic degenerative spondylolisthesis, spinal stenosis, and degenerative disk disease of the lumbrosacral spine before April 2005 which has continued to produce chronic residual symptoms." Dr. Musich acknowledged degenerative conditions such as Claimant's worsen over time. He also agreed the acute exacerbation of low back pain Claimant felt in early November 2005 following a pop in her back could cause an increase in her overall low back pain and sciatica. He felt the lumbar pathology that preexisted April 2005 resulted in permanent partial disability of 45% of the body as a whole. He also rated Claimant's prior right knee injury at 25% permanent partial disability.

Dr. Musich testified Claimant needed to avoid overhead activities, lifting more than ten pounds, bending below waist level or lifting below waist level, prolonged positions, climbing ladders or stairs, and operating commercial machinery. Of all the restrictions, only avoiding overhead activities was *not* related to the back, and each back-related restriction, as well as Claimant's self-reported limitation of being unable to lift over five pounds, would be inconsistent with her job for Employer. Dr. Musich did not ask if Claimant's back condition changed following her shoulder injury. It was his medical opinion the combination of Claimant's past and present disabilities is significantly greater than the simple sum. Considering several factors, including the past and present disabilities, he opined Claimant is "most likely totally and permanently disabled."

Sherry Browning, a vocational expert, testified live, and submitted a written report regarding Claimant's employability. At Claimant's request, she performed a comprehensive review of records, and considered evidence consistent with the record. Her conclusion was the last injury to the left shoulder alone may have required Claimant to make a job change, but it did not prohibit her from working in the open labor market in positions such as a cashier, counter attendant, or security guard. However, in combination with her degenerative disc disease and lumbar spine, she felt Claimant cannot work in any capacity. It is the combination of chronic daily pain, functional limits, age, and limited education that renders Claimant totally disabled. Ms. Browning's ultimate conclusion is the combination of Claimant's chronic lumbar pain and functional limitations associated with the degenerative joint disease and left shoulder injury preclude Claimant from any employment in the open labor market (Exhibit D).

James England is a vocational rehabilitation counselor who works predominantly for claimants in workers compensation cases, but who in this case performed a records review and testified for the Second Injury Fund. Mr. England did not have the opportunity to meet with and interview Claimant, but he had access to the relevant medical records and Claimant's discovery deposition, so he felt he had adequate background information from other sources to conduct a thorough and reliable vocational assessment. Regarding Claimant's functional restrictions and limitations, Mr. England found significant information from four sources. First, Dr. Haupt imposed no restrictions on account of

the shoulder injury he treated.[3] Second, Dr. Place noted as of February 2006, Claimant's back pain was nearly nonexistent, and he imposed no restrictions. Third, Dr. Musich imposed restrictions of no lifting over 10 pounds, no activity over shoulder or below waist levels, no prolonged positions, and no ladders, stairs, or commercial machinery operation. Finally, Claimant testified in her deposition she cannot stand or sit for long periods.

Considering the medical and self-reported limitations, and Claimant's age, education and experience, Mr. England concluded within a reasonable degree of medical certainty Claimant was employable in the open labor market. Even when Mr. England applied Dr. Muisich's most limiting restrictions, he was able to identify jobs for Claimant. Specifically, he felt there was nothing preventing Claimant from doing certain security positions or other service employment such as alarm monitor, cashier, customer service, or some other position offering freedom of movement. She could also benefit from vocational rehabilitation to develop additional skills. When asked to speculate as to the cause if Claimant were permanently and totally disabled, Mr. England refused, but did note Claimant was working and doing fairly heavy work for Employer up to the primary injury (and afterwards as well), and currently her back seems to be the primary limiting factor.

FINDINGS OF FACT AND RULINGS OF LAW

Based on the substantial and competent evidence of record and specified above, including Claimant's testimony, the expert medical and vocational evidence I find most credible, and the documentary evidence, as well as the Law of the State of Missouri, I find and rule as follows:

1. **Liability of the Second Injury Fund for Permanent Total Disability.**

Under § 287.220,[4] liability may be imposed upon the Second Injury Fund in two instances: (1) when the combination of a preexisting disability with a compensable disability results in a greater disability than the sum of the two disabilities considered independently, ..., or, (2) if the compensable disability is partial but when combined with the preexisting disability results in total permanent disability *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo.App. E.D. 1985). In this case, Claimant seeks permanent total disability. Total disability is defined as the "inability to return to any employment and [does] not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." §287.020.7. In determining if claimant is totally disabled, the [fact finder] must decide whether, in the ordinary course of business, any employer would reasonably be expected to hire him in his present physical condition and reasonably expect him to perform the work for which he is hired. *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 694 (Mo.App. E.D. 1992).

Degree of Disability from Last Injury Alone.

In computing permanent and total disability in the situation where claimant suffers from a previous disability, the ALJ ... first determines the degree of disability as a result of the last injury. *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D. 1995). Percentage of disability is a finding of fact for the Commission (or ALJ) and it can consider all the evidence in arriving at the percentage. *Malcom v. La-Z-Boy Midwest Chair Co.*, 618 S.W.2d 725, 728 (Mo.App. S.D. 1981)(citations omitted). The [fact finder] is not bound by the percentage estimates of medical experts. *Id.*

In this case, I find there is substantial and credible evidence to establish Claimant has permanent partial disability of the left shoulder equivalent to 25%. This finding is based on Claimant's complaints, medical records, the settlement stipulation, and the expert opinions of Drs. Musich and Haupt, who provided ratings of 35% and 6% respectively. The shoulder injury, in and of itself, is not totally disabling. The disability from the last injury is equal to 25% of the left upper extremity at the level of the shoulder.

Preexisting Disability at the Time of the Last Injury.

After establishing the disability from the last injury, the ALJ ... then determines "the degree or percentage of employee's disability that is attributable to *all injuries or conditions existing at the time the last injury was sustained....*"

§ 287.220.1. Cases have repeatedly held the nature and extent of the preexisting disability is measured as of the date of the primary injury. *See, i.e. Gassen v. Lienbengood*, 134 S.W.3d 75, 80 -81 (Mo.App. W.D. 2004), citing §287.220.1 and *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo.App.1997)(“In order to calculate Fund liability, the [fact finder] must determine the percentage of the disability that can be attributed solely to the preexisting condition *at the time of the last injury.*”) [T]he claimant must establish that an actual or measurable disability existed at this time. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App.1999); *see also Tidwell v. Kloster Co.*, 8 S.W.3d 585, 589 (Mo.App. 1999)(“ In order to compute the total disability compensation to which an employee is entitled from the Second Injury Fund, the Commission must determine not only the existence of a preexisting permanent partial disability, but also the degree or percentage of the employee's disability that is attributable solely to the preexisting condition at the time of the last injury.”).

Thus, it is crucial to consider the nature and extent of Claimant’s disability on April 7, 2005, not as of any subsequent time to the date of injury. The Second Injury Fund ... is not liable for the progression of a claimant's preexisting disability if such progression is not caused by the last work-related injury. *Highley v. Von Weise Gear*, ___ S.W.3d___ (Mo.App. E.D. 2008) citing *Garcia at 266* and *Frazier v. Treasurer of Missouri as Custodian of Second Injury Fund*, 869 S.W.2d 152, 155 (Mo.App.1993). Post-accident worsening of pre-existing disability preventing reasonable employment is not a compensable injury entitling a claimant to total disability benefits. *Lingerfelt v. Elite Logistics, Inc.*, 2008 WL 1733721, 6 (Mo.App. S.D.2008), citing *Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 717 (Mo.banc 2004); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793-94 (Mo.App.1992).

Claimant argues she has many preexisting disabilities, but concentrated her evidence on the right knee, body as a whole on account of several chronic conditions, and low back. In a workers' compensation case, the claimant carries the burden of proving all essential elements of the claim. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195, 198 (Mo.App. E.D. 1990). Regarding her knee, Claimant presented medical records documenting her February 3, 1993 right knee surgery by Dr. Markinson and subsequent treatment, the opinion of Dr. Musich she suffers from permanent partial disability of 25% of the right knee, and testimony her knees are aggravated with activity. I find the preexisting disability of the right knee as of April 7, 2005 was equal to 20% of the right knee, and that such disability was serious enough to have constituted a hindrance or obstacle to employment. As for the multiple chronic conditions of which Claimant complains, including cardiovascular, cervical, breathing, and gastric problems, Dr. Musich provides no disability rating, and there is otherwise a paucity of evidence to establish the chronic conditions were physically or vocationally disabling. I find Claimant’s chronic medical conditions, such as heart disease, high blood pressure, neck, and gastroesophageal disease, were not preexisting disabilities causing a hindrance or obstacle to employment as of April 7, 2005.

The issue of the preexisting permanent partial disability associated with Claimant’s low back is more complicated because while Claimant had low back symptoms and treatment prior to her April 2005 shoulder injury, the condition of her back changed significantly after the work injury. Claimant’s testimony, medical records, and the experts speak to the preexisting back disability. Claimant said she hurt her back in the 1980’s, and had general aches and pains thereafter. Records reflect she had temporary work restrictions. She did not accurately recall the date her more recent problems started, but the records establish she complained of sciatica to her personal physician in March 2004, had complaints, treatment, and an abnormal MRI in late 2004, and on January 10, 2005, first saw Dr. Place, who diagnosed degenerative lumbar spondylolisthesis with stenosis. Although Dr. Place’s records mention surgery as a potential treatment option in January and March, it was not until May 2005, after her work injury, that Dr. Place discussed the surgical options in detail. It is important to note Claimant had no permanent restrictions on account of her back on April 7, 2005.

After the work injury of April 2005, the surgery, and the recovery, Claimant returned to work for several months. In November, after feeling a pop, her back pain and symptoms were significantly aggravated, and a fusion surgery resulted in December 2005. Following back surgery, Claimant experiences pain, has lost the feeling in the left foot, and cannot bend, sit, stand or lay for long periods because of her back. By its very nature, the fusion surgery caused a reduction in Claimant’s spinal motion. Her level of overall functioning has declined.

The expert medical evidence is not particularly helpful because it appears Dr. Musich did not answer the correct

question. In assigning 45% PPD of the body for the low back, Dr. Musich appears to have improperly considered Claimant's back disability to all be preexisting – he did not opine as to the degree of disability on April 7, 2005. By taking into account the disability which arose after the work injury, Dr. Musich has given an invalid opinion for degree of disability. However, his opinion does show some degree of preexisting permanency.

Based on the substantial and competent evidence, including Claimant's testimony, medical records, and opinion evidence, I find the permanent partial disability to Claimant's low back on April 7, 2005 was equal to 25% of the body as a whole due to her degenerative lumbar spondylolisthesis with stenosis.

*Evidence of Combination of Last and Preexisting Disabilities
To Result in Permanent Total Disability.*

Having determined the extent of disability from the last injury, as well as the disability existing as of the date of the last injury, it is now necessary to address the allegation of permanent total disability. For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo.App. W.D.2007); § 287.220.1. Total disability preventing reasonable employment cannot be due to post-accident worsening of preexisting disabilities not caused or aggravated by the primary injury. See, *Lawrence v. Joplin R-VIII School Dist.*, at 793 (Mo.App.1992); *Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, at 717-718 (Mo.banc 2004). Thus, the specific inquiry in this case is whether the disability of the left shoulder from Claimant's last compensable injury combines with the pre-April 2005 permanent partial disabilities of the knee and low back to result in total permanent disability. Having given careful consideration to all the evidence, based on the applicable law, and bearing in mind the expert opinions, I find Claimant's permanent total disability, if any, is not the result of the combination of the last compensable injury with the prior permanent partial disabilities.

Three experts opine to Claimant's total disability. I find a fatal flaw in the opinion of Dr. Musich, who reports Claimant is most likely totally and permanently disabled due to the combination of her "past and present disabilities." Dr. Musich improperly takes into consideration the subsequent deterioration of the low back, rendering his PTD opinion invalid. Likewise, Mr. England does not differentiate between preexisting and subsequent back disabilities, and assumes Claimant has no restrictions related to the back or shoulder. In fact, Claimant stopped seeing Dr. Place before she reached MMI, and Dr. Haupt provided lifting restrictions of 40 pounds. Ms. Browning makes the best effort to separate the prior and subsequent disabilities, yet her opinion too is flawed. I cannot believe that despite engaging in an in-depth analysis of Claimant's subsequent deterioration, exacerbation (the "pop" incident) and post-surgical problems, Ms. Browning was able to disregard the disability caused thereby when reaching her conclusion. Furthermore, Ms. Browning bases her PTD opinion on Claimant's chronic lumbar pain and functional limitations associated with the degenerative joint disease, yet there were no permanent functional limitations associated with Claimant's back as of April 2005, as all prior restrictions were temporary and had been lifted as of the day of the accident. Finally, she acknowledges but downplays the fact Claimant returned to work following her shoulder injury. Thus, each expert has a flawed opinion on the issue of permanent total disability.

I find the condition of Claimant's low back deteriorated significantly subsequent to her last work injury. By definition, the disease of her back is progressive in nature, and all evidence supports a finding her back disability got worse after, but not as a result of, the primary shoulder injury. As reflected in her testimony and the medical records, Claimant's symptoms grew in frequency, scope and intensity after her shoulder surgery. In November, there was a discrete event (the "pop") which caused a marked change for the worse in Claimant's symptoms and led to surgical intervention. According to Claimant, she did not experience lasting relief from the surgery. Her stamina and abilities are less now than as of the day of the accident. Post-accident worsening of pre-existing disability preventing reasonable employment is not a compensable injury entitling a claimant to total disability benefits.

Given all the evidence, I find Claimant has not provided sufficient competent evidence to prove she is permanently and totally disabled due to the combination of her preexisting disabilities as of April 7, 2005, with her primary shoulder injury disability.

2. Liability of the Second Injury Fund for Permanent Partial Disability

The liability of the Second Injury Fund is not limited to total disability benefits, but may include partial disability benefits where appropriate. To recover permanent partial disability benefits from the Second Injury Fund, an employee must show that his present compensable injury combines with the preexisting permanent partial disability to cause a greater overall disability than the sum of the disabilities considered independently. *Cartwright v. Wells Fargo Armored Serv.*, 921 S.W.2d 165, 167 (Mo. App. 1996); *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 177-78 (Mo. App. 1995). Proper proof also requires a showing the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent PPD. § 287.220.1. *Conley v. Treasurer Of Missouri*, 999 S.W.2d 269, 274 (Mo.App. E.D. 1999). As with total benefits, there must also be evidence that claimant's preexisting disability constituted a hindrance or obstacle to employment or to obtaining reemployment. § 287.220.1. Claimant has met her burden of proof to recover permanent partial disability benefits.

The nature and extent of the individual qualifying disabilities were determined above. I find that the combination of Claimant's primary left shoulder disability with the preexisting disabilities to her low back and right knee is greater than the simple sum. I find Claimant's overall disability as of the last injury is equivalent to 240 weeks, from which the primary and preexisting disabilities totaling 190 weeks should be subtracted, leaving a balance of 50 weeks to be paid by the Second Injury Fund.

CONCLUSION

The challenges presented by this case were significant. Claimant is a pleasant woman who I believe to be genuinely disabled. She pursued her case vigorously. However, the law and facts of the case are such that Claimant is entitled to recover permanent partial disability, not permanent total disability.

This award is subject to a lien in the amount of 25% in favor of Attorney Thomas Fagan.

Date: _____

Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

[1] Claimant withdrew Exhibit A, and submitted a duplicate set of records marked Exhibit F. Second Injury Fund Exhibit IV, Claimant's discovery deposition, was marked but not admitted.

[\[2\]](#) It was not until after April 2005 that Claimant began to complain of bilateral leg complaints.

[\[3\]](#) Actually, Dr. Haupt imposed lifting restrictions of 40 pounds.

[\[4\]](#) All statutory references are to RSMo 2000.