

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

Injury No.: 04-142112

Employee: Valerie Hasenbeck

Employer: AA & L Enterprises, Inc.
d/b/a Bahr Discount Foods

Insurer: American Home Assurance Company
c/o AIG Domestic Claim Services, Inc.

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 11, 2008, as supplemented herein.

The administrative law judge made the following determinations:

Medical Causation

Employee's cervical strain and left shoulder girdle strain were medically causally related to the December 2, 2004, incident. Employee's cubital tunnel syndrome and the resulting surgery were also medically causally related to the work-related accident. Employee's alleged cervical instability was not medically causally related to the work incident, nor were any alleged leg complaints, low back complaints, or any other complaints.

Past Medical Expenses

Employee is entitled to an award for past medical expenses related to the cubital tunnel syndrome and the treatment thereof.

Temporary Total Disability Benefits

Employee is entitled to an award for 8 and 5/7 weeks of TTD benefits.

Nature and Extent

Employee sustained the following permanent partial disabilities as a result of the December 2, 2004, work-related accident: 12.5% of the body as a whole (neck), 10% of the left shoulder, and 19% of the left elbow.

Employee: Valerie Hasenbeck

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Future Medical

Employee is not entitled to an award for future medical care.

Second Injury Fund Liability

The Second Injury Fund has no liability in this case.

We agree with the administrative law judge's conclusions. We offer this supplemental opinion in further support of said conclusions and to address issues raised by employee in her briefs.

The findings of fact and stipulations of the parties were accurately recounted in the award of the administrative law judge and are adopted by the Commission.

The claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. W.D. 2002) (citations omitted). With regard to employee's cervical condition and subsequent surgery of December 6, 2005, employee failed to meet her burden that the work-related accident of December 2, 2004, caused the condition and need for surgery.

The medical records of Drs. Lange, Kitchens, Dooley and Randolph, which were cited by the administrative law judge, make clear that the cervical fusion performed by Dr. Kennedy was neither necessary, nor related to the December 2, 2004 incident.

Based upon the totality of the evidence we find the following: 1) the cervical condition pre-existed the accident; 2) the pre-existing cervical condition was not caused or aggravated by the accident; 3) the pre-existing cervical condition was not disabling prior to the accident; 4) the pre-existing cervical condition is independent of the accident; and 5) the pre-existing cervical condition progressed and/or blossomed after the accident and that this progression and/or blossoming was entirely unrelated to the accident. For the foregoing reasons, we find that employee is denied past medical expenses relating to her cervical condition.

Employee argued in her briefs that the instability of her cervical spine has caused her to be permanently totally disabled. First of all, as stated above, we agree with the administrative law judge's conclusion that employee's cervical instability was not medically causally related to the work incident. Likewise, we also agree with the administrative law judge's conclusion that employee is not permanently totally disabled.

Permanent and total disability is defined by section 287.020.7 RSMo (2004), as the "inability to return to any employment"

The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition,

Employee: Valerie Hasenbeck

reasonably expecting the employee to perform the work for which he or she is hired.

Gordon v. Tri-State Motor Transit Company, 908 S.W.2d 849, 853 (Mo. App. 1995) (citations omitted).

Employee is 49 years old, has a college degree, and scored well in vocational testing in reading and mathematics. She has many years of experience in retail management, and has skills in supervising, training, bookkeeping and inventory control. Both vocational experts, Mr. James England and Mr. Bob Hammond, agree that based on employee's academic ability she would be able to compete for a number of sedentary jobs in the open labor market. Both experts also testified that employee had transferable knowledge and skills from her previous employment. Mr. Hammond credibly testified that employee was able to compete and maintain employment in the open labor market. In addition to the facts listed above, the administrative law judge's aforementioned permanent partial disability ratings assigned to employee are fully supported by competent and substantial evidence and, even when combined, do not amount to permanent total disability.

In sum, employee's age, academic record, and transferable skills support the administrative law judge's finding that employee is merely permanently partially disabled, not permanently and totally disabled. For the foregoing reasons, the Commission agrees with the administrative law judge's determination that employee is merely permanently partially disabled as a result of the December 2, 2004, work-related accident. Thus, employee's claim that she be awarded past medical expenses relating to the treatment of her cervical condition and permanent total disability benefits, is denied.

The award and decision of Administrative Law Judge Vicky Ruth, issued December 11, 2008, is affirmed, and is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 15th day of September 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Valerie Hasenbeck

CONCURRING 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 Worker's Compensation Law, I agree with the reasoning and conclusions of the administrative law judge and I would affirm the award and decision of the administrative law judge without supplementation.

John J. Hickey, Member

AWARD

Employee: Valerie Hasenbeck

Injury No. 04-142112

Dependents: N/A

Employer: AA & L Enterprises, Inc.
d/b/a Bahr Discount Foods

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

Additional Party: Second Injury Fund

Insurer: American Home Assurance Company,
c/o AIG Domestic Claim Services, Inc.

Hearing Date: September 11, 2008

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 2, 2004.
5. State location where accident occurred or occupational disease was contracted: Franklin 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: The employee was lifting the edge of a pallet when she sustained injuries to her neck, left shoulder, and left elbow.
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: Neck, left shoulder, and left elbow.
14. Nature and extent of any permanent disability: 12.5% of the body as a whole (referable to the neck), 10% of the left upper extremity at the level of the shoulder, and 19% of the left elbow.
15. Compensation paid to-date for temporary disability: \$8,124.56.
16. Value necessary medical aid paid to date by employer/insurer? \$9,422.43.

Employee: Valerie Hasenbeck

Injury No. 04-142112

- 17. Value necessary medical aid not furnished by employer/insurer? See Award.
- 18. Employee's average weekly wages: \$789.88.
- 19. Weekly compensation rate: \$526.59 for PTD and TTD; \$354.05 for PPD.
- 20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses:	\$ 197.42 (for elbow)
113.1 weeks of permanent partial disability benefits:	\$40,043.06
8 and 5/7 weeks of temporary total disability benefits:	<u>\$ 4,588.86</u>
TOTAL:	\$44,829.34

- 22. Second Injury Fund liability: No.
- 23. Future medical awarded: No.

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: Kurt C. Hoener.

Employee: Valerie Hasenbeck

Injury No. 04-142112

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Valerie Hasenbeck

Injury No: 04-142112

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: AA & L Enterprises, Inc.
d/b/a Bahrs Discount Foods

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

Additional Party: Second Injury Fund

Insurer: American Home Assurance Company
c/o AIG Domestic Claim Services, Inc.

On September 11, 2008, the claimant, the employer/insurer, and the Second Injury Fund appeared before Administrative Law Judge Vicky Ruth for a final award hearing. Pursuant to an order by Administrative Law Judge Dinwiddie, Injury Number 06-058679 was tried along with this claim. This Award addresses Injury No. 04-142112; a separate Award will be issued in Injury No. 06-058679. The claimant, Valerie Hasenbeck, was represented by Kurt Hoener. The employer/insurer in Injury No. 04-142112 was represented by Kenneth Alexander. The employer/insurer in Injury No. 06-058679 was represented by Patrick Patterson. The Second Injury Fund was represented by Jennifer Sommers. One witness, Valerie Hasenbeck, testified in person at the hearing. The parties submitted briefs on or about September 25, 2008.

STIPULATIONS

The parties stipulated to the following:

1. On December 2, 2004, the date of the accident, the claimant was an employee of the employer.
2. The employer was operating under the provisions of Missouri's Workers' Compensation law.
3. The employer's liability for workers' compensation liability was insured by American Home Assurance Company, c/o AIG Domestic Claim Services, Inc., for all periods relevant to this Award.
4. A Claim for Compensation was filed within the time prescribed by law.
5. Venue in Franklin County is proper, and the Missouri Division of Workers' Compensation has jurisdiction.
6. The claimant's average weekly wage was \$789.88. The compensation rate for temporary total disability benefits was \$526.59, as was the compensation rate for permanent total disability benefits. The compensation rate for permanent partial disability benefits was \$354.05.
7. The claimant received compensation for temporary disability benefits in the amount of \$8,124.56.

Employee: Valerie Hasenbeck

Injury No. 04-142112

8. The employer/insurer has provided medical care in the amount of \$9,422.43.
9. The parties stipulate that the amount of past medical expenses in dispute is limited to balances due and not the gross amount paid by health insurance.

ISSUES

The parties agree that the issues to be resolved in this proceeding are as follows:

1. Whether the claimant's medical condition is casually related to the December 2, 2004 incident (medical causation).
2. Whether the claimant is entitled to an award for past medical expenses.
3. Whether the claimant is entitled to an award for past temporary total disability benefits.
4. Nature and extent of permanent disability, whether partial or total.
5. Whether the claimant is entitled to an award for future medical expenses.
6. Liability of the Second Injury Fund.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence without objection:

Exhibit A	Medical records of St. John's Mercy Medical Center (12/14/04).
Exhibit B	Medical records of St. Johns' Mercy Medical Center (2/28/05).
Exhibit C	Bill from St. John's Mercy Medical Center (2/28/05).
Exhibit D	Medical records of Dr. Robert Kunkel.
Exhibit E	Bill from Dr. Robert Kunkel.
Exhibit F	Medical records of Missouri Baptist Hospital.
Exhibit G	Bill from Missouri Baptist Hospital.
Exhibit H	Medical records of Unity Corporate Health.
Exhibit I	Medical records of Dr. Joseph Dooley.
Exhibit K ¹	Physical therapy records of ProRehab.
Exhibit L	Bill from ProRehab.
Exhibit M	Medical records of Dr. Bernard Randolph.
Exhibit N	Medical records of Dr. David Lange.
Exhibit O	Medical records of Dr. Daniel Kitchens.
Exhibit P	Bill from Dr. Daniel Kitchens.
Exhibit Q	Medical records from Patients First.
Exhibit R	Bill from Patients First.
Exhibit S	Medical records of Dr. David Kennedy.
Exhibit T	Bill from Dr. David Kennedy.
Exhibit U	Medical records of Dr. Barry Feinberg.

¹ Exhibit J was withdrawn and not admitted into the record.

Employee: Valerie Hasenbeck

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Exhibit V	Bill from Dr. Barry Feinberg.
Exhibit W	Bill from Orthofix Inc.
Exhibit X	Medical records of Dr. Bruce Schlafly.
Exhibit Y	Medical bill from Dr. Bruce Schlafly.
Exhibit Z	Medical bill from St. Anthony's Medical Center.
Exhibit AA	Medical Bill from South County Anesthesia.
Exhibit BB	Bill from EMPI.
Exhibit CC	Itemization of employee's co-payments and out-of-pocket expenses.
Exhibit DD	Report from Dr. Bruce Schlafly, dated 4/04/08.
Exhibit EE	Deposition of Dr. Bruce Schlafly.
Exhibit FF	Report of Mr. James England.
Exhibit GG	Deposition of Mr. James England.
Exhibit HH	Deposition of Dr. David Kennedy.
Exhibit II	Deposition of Dr. Barry Feinberg.
Exhibit JJ	Another itemization of claimant's out-of-pocket expenses.

The employer/insurer offered the following exhibits, and they were admitted into the record without objection:

Exhibit 1	Deposition of Dr. Bernard Randolph.
Exhibit 2	Deposition of Mr. Bob Hammond.
Exhibit 3	Deposition of Dr. David Lange.
Exhibit 4	Deposition of Dr. David Brown.

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings.

1. The claimant is 49 years of age. She obtained her high school diploma in 1977, and received an Associates Degree in Business from East Central Junior College, where she tested out of several courses. The claimant is right hand dominant, and is articulate.
2. After she obtained her degree, the claimant worked in various business settings. She worked in a managerial position at Grandpa Pigeon's, where she would oversee as many as 200 employees. She last worked as a store manager and a cashier at Bahr's Discount Foods (the employer), with job duties ranging from unloading stock, working the cash register, supervising employees, and desk work.
3. The claimant sustained an injury by accident at Bahr's Discount Foods on December 2, 2004. The company had just received a shipment and the claimant attempted to help pull the corner of a pallet over when she sustained an injury and felt a

pop in her neck. The claimant experienced immediate pain in her neck and left shoulder.

4. On the date of the injury, she told one of the owners of the business, Mr. Wes Lopez, what had occurred. She did not immediately turn in her injury as a workers' compensation injury because she "wanted to set a good example" for other employees. The claimant acknowledged that Mr. Lopez offered to contact their insurance company and send her to a doctor.
5. Although the claimant initially believed that she had sustained just a sprain, the injury did not improve. She was not able to perform some of the physically demanding aspects of her job. Consequently, she consulted her personal doctor, Dr. Robert Kunkel, on December 8, 2004. A MRI of her left shoulder was performed on December 14, 2004. The MRI revealed no evidence of a rotator cuff tear; it did show degenerative changes of the acromioclavicular joint with slight impingement, and a small amount of fluid in the subacromial bursa (minimal bursa). The claimant took pain medications, and Dr. Kunkel gave her cortisone injections. These treatment measures did not provide any relief in her symptoms.
6. On February 28, 2005, the claimant underwent nerve studies, which were normal for the left upper extremity. She eventually asked Mr. Lopez to turn her injury into the workers' compensation carrier; by this time, she had pain in her neck, left shoulder, left arm/elbow, and left leg. She was referred to Unity Corporate Health, where she was seen by Dr. Keefe on March 23, 2005. She underwent x-rays and a number of diagnostic tests. Dr. Keefe reported that the MRI of the left shoulder and the nerve conduction study of the left upper extremity did not reveal the source of her symptoms, so he referred her to a neurologist, Dr. Joseph Dooley.
7. On April 1, 2005, the claimant was seen by Dr. Dooley, who found no spasms in her neck or shoulder and reported a negative neurological examination. Dr. Dooley prescribed Darvocet, and ordered a cervical MRI and physical therapy. The claimant reported that the physical therapy made her symptoms worse. According to Dr. Dooley, an MRI of the neck, performed on April 4, 2005, showed mild disc protrusion and mild spondylosis with reversal of cervical lordosis and mild foraminal narrowing at C5-6. He also noted that she had complaints of pain and numbness in her left arm and hand, and in her left leg. In Dr. Dooley's opinion, the claimant sustained a muscle strain and sprain of her posterior cervical muscles and shoulder girdle. He was not able to explain the claimant's limitation of movement of the left shoulder and did not believe that it was due to any neurological abnormality.
8. Dr. Dooley was unable to correlate symptoms of pain the claimant experienced down her left leg as those symptoms developed several months after her injury. He recommended that she consult her primary care physician for that issue, and he encouraged her to attend physical therapy.
9. The insurer subsequently sent the claimant to Dr. Bernard Randolph, a physiatrist, for another opinion. When Dr. Randolph first saw the claimant, on April 28, 2005, she

reported pain in her neck, left shoulder, left arm, low back, and left leg. Dr. Randolph diagnosed her as having cervical and lumbar strain. He performed trigger point injections, gave her medication, and ordered additional physical therapy. She experienced only temporary relief with the trigger point injections into the trapezius muscle; the additional therapy continued to increase her symptoms.

10. Upon Dr. Randolph's suggestion, the claimant was further referred to an orthopedic spine surgeon, Dr. David Lange, for a surgical consultation. Dr. Lange examined the claimant on June 22, 2005. The claimant described pain in her neck, left shoulder, left elbow, and a shooting pain with achiness, numbness, and tingling. She described her pain level as an eight out of ten (with ten representing the highest level of pain). Dr. Lange noted that her presentation was not specific for abnormalities of the cervical spine. More specifically, her neurological exam of the left upper extremity appeared to be normal. He opined that her MRI did not reveal an acute compression lesion and that there was no diagnostic or clinical evidence of a radiculopathy. Dr. Lange did not diagnose any cervical instability. He indicated that typically, surgery in the cervical spine is offered for symptoms consistent with a radiculopathy and not mechanical neck pain. Dr. Lange did not recommend surgical intervention, and instead referred the claimant back to Dr. Randolph.
11. Dr. Randolph believed that as of July 7, 2005, the claimant had reached maximum medical improvement and released her from his care. He gave her a diagnosis of cervical strain and left shoulder girdle strain. The workers' compensation carrier stopped making temporary total disability payments as of this date.
12. The claimant testified that due to persistent symptoms, she continued to treat on her own. She saw Dr. Kunkel, her primary care physician, and she sought a second surgical opinion. She saw Dr. Daniel Kitchens for this purpose on August 23, 2005. Following an evaluation and review of the cervical MRI, Dr. Kitchens recommended additional workup to include a CT myelogram of the cervical spine. His review of the cervical MRI was consistent with minimal disc bulges at C4-5 and C5-6. He did not see any evidence of a disc herniation or specific nerve injury.
13. On August 31, 2005, after his review of the CT myelogram, Dr. Kitchens reported that there was some spondylosis but no neural foraminal narrowing and no nerve root compression. He recommended conservative measures and declined to refill a prescription for Vicodin. He wanted her to continue to take Relafen and obtained EMG/nerve conduction studies. In his September 8, 2005 note, Dr. Kitchens reported that the claimant's nerve conduction studies were unremarkable. The studies did not show any evidence of a cervical radiculopathy or entrapment neuropathy. The claimant had some cervical spondylosis, but her CT myelogram did not show any nerve root impingement. Dr. Kitchens stated that he did not feel that she would benefit from surgery, and advised her to follow up on an as-needed basis.
14. At the hearing, the claimant described persistent complaints following her release from treatment by Drs. Dooley, Randolph, and Kitchens, and after her surgical consultation with Dr. Lange. Through Dr. Kunkel, she continued to receive treatment on her own.

Dr. Kunkel recommended that she see Dr. Barry Feinberg for pain management.

15. Dr. Feinberg first saw the claimant on September 20, 2005. Besides being an anesthesiologist and board certified in pain management, he is also a lawyer and has a business interest with Dr. Kennedy in an imaging center. His treatment included physical therapy, injection therapy with a total of seven cervical epidural steroid injections, and pain medication. He testified that the claimant was unable to work during the period of time he saw her. Dr. Feinberg did not provide any lumbar epidural steroid injections. Her lumbar MRI from July 21, 2005, revealed stenosis that occurred over time and did not result from an acute injury.
16. In his deposition, Dr. Feinberg testified that his primary diagnoses referable to the December 2, 2004 incident were a cervical radiculopathy that caused pain that radiated from the neck into the left shoulder and left-sided pain in her low back that radiated down the left leg. Dr. Feinberg indicated that a cervical radiculopathy is when there is some encroachment or irritation of a nerve root that causes pain into a patient's upper extremity. He testified that the claimant's clinical examination was consistent with a radiculopathy and that imaging studies showed degenerative disc disease in the neck but no acute disc abnormality. Dr. Feinberg recommended permanent restrictions of no lifting greater than 10 pounds, no greater than 10-15 pounds of pushing or pulling, and that the claimant be restricted from any prolonged sitting, standing, walking, and going up/down stairs. He also recommended breaks every 30 minutes, and continued pain management. Dr. Feinberg indicated that he believes that the cervical surgery will, in the long term, be considered a failure.
17. On or about September 23, 2005, the claimant underwent an MRI of her left shoulder, which revealed a possible partial tear of the rotator cuff. She consulted an orthopedic surgeon, Dr. Jusrad, who did not believe that she would benefit from surgery on her shoulder.
18. On October 13, 2005, Dr. Randolph rated claimant's disability at 7% permanent partial disability (PPD) of the cervical spine, with 2% PPD attributable to a pre-existing condition and 5% due to the work injury. He also rated her as having a 6% PPD of the left upper extremity at the level of the shoulder due to the work injury. Dr. Randolph did not believe that the claimant had any evidence of a radiculopathy and thought that her injuries were soft tissue in nature that involved muscles and fascia.
19. Dr. Feinberg referred the claimant to a neurosurgeon, Dr. David Kennedy. Dr. Kennedy examined the claimant on November 2, 2005. He diagnosed instability of the cervical spine at C4-5 and C5-6, and recommended a cervical discectomy with allograft fusion and plating.
20. In making his diagnosis, Dr. Kennedy did not obtain his own x-rays, and he was not aware that the claimant had previously been evaluated and treated for a left shoulder injury. He did not review records from Drs. Kunkel, Keefe, Dooley, Randolph, Lusardi, Green, Lange, or Kitchens. He did look at previous x-rays, such as the ones from

March 23, 2005, which showed subluxation of C5 on C6 that moved between flexion and extension views with similar findings at C4-5. He reviewed the April 4, 2005 cervical MRI that showed spondylitic changes at C4-5 and C5-6, and he looked at the July 21, 2005 lumbar MRI that showed a disc prolapse at L5-S1. Dr. Kennedy reviewed the August 29, 2005 CT myelogram; this test showed significant spondylitic changes (degenerative changes) at C4-5 and C5-6.

21. Dr. Kennedy and Dr. Raskas performed surgery on the claimant on December 6, 2005; the surgery involved a two level discectomy and fusion at the C4-5 and C5-6 levels. Dr. Kennedy related the need for the treatment to the claimant's work injury of December 2, 2004. His pre-operative and post-operative diagnoses were cervical spondylosis at C4-5-6.
22. Dr. Kennedy acknowledged that diagnostic tests of the claimant's neck did not show any acute abnormality at C4-5 or C5-6. Scanning did not show any evidence of neural involvement nor nerve root compression, and his own neurologic examination did not reveal any findings consistent with neural impingement. The claimant did not describe to him any symptoms consistent with a cervical radiculopathy.
23. In February 2006, following the surgery on her neck, the claimant attended physical therapy at ProRehab. Dr. Kennedy released her to return to work on March 1, 2006. He later indicated that the claimant may be a candidate for additional therapy and injections through Dr. Feinberg, but not on an indefinite basis. He opined that additional treatment should be limited to approximately three months.
24. The claimant returned to work as a cashier on March 2, 2006, but had a difficult time performing her job duties. Over an approximately two-week period working the cash register, she described increased difficulties from her left elbow to her hand and particularly her ring and little fingers. Dr. Kennedy recommended nerve studies, which were performed on June 6, 2006. These studies had positive findings for cubital tunnel syndrome. The claimant continued to work until early July 2006.
25. On April 4, 2006, the claimant sought treatment on her own with another doctor. This time the claimant saw Dr. Bruce Schlafly, an orthopedic surgeon and hand specialist. The claimant informed him that she was in good health until December 2, 2004, when she lifted a pallet at work and felt a painful pull and pop in the general area between her neck and left shoulder. She indicated that the pain persisted with a sensation of swelling in that area, and that the symptoms began to extend into the ulnar side of her hand to the ring and small fingers. She was still experiencing intermittent numbness on the date of the exam. Dr. Schlafly diagnosed cubital tunnel syndrome, and performed an ulnar nerve transposition at the left elbow on July 7, 2006. The claimant had several post-operative office visits with Dr. Schlafly in July and August 2006.
26. At the August 4, 2006 visit, Dr. Schlafly noted that the claimant's left elbow was a little tender but that she was doing well. He directed her to remain off work until September 5, 2006. The claimant returned to Dr. Schlafly on August 30, 2006, and

reported that she was having more problems with her left elbow/hand. At this time, Dr. Schlafly determined that the claimant should remain off work until December 31, 2006, because of the surgery and because of the ongoing problems she was having with her neck. In his deposition, he agreed that his revised off-work slip dealt more with the claimant's neck, left leg, left face, and left shoulder complaints than with the left elbow. Dr. Schlafly did not clarify how much, if any, of this additional off-work period (from September 6, 2006 through December 31, 2006) was due to problems with the claimant's left elbow/hand.

27. Dr. Schlafly testified that the December 2, 2004 incident was the substantial factor in the need for surgical treatment and that her employment as a cashier at Bahr's would have served as a minor contributing factor to her condition. He also related the neck and left shoulder injuries to the December 2, 2004 incident, and provided disability ratings of 40% of the neck (BAW) and 15% of the shoulder due to the strain. Following her elbow surgery, Dr. Schlafly opined that the claimant had a 25% PPD of the left elbow.
28. Dr. Schlafly acknowledged on cross-examination that two nerve studies following the December 2, 2004 incident were normal with no electrodiagnostic evidence of compression of the ulnar nerve. Similarly, he acknowledged that the claimant did not claim that she suffered any traumatic blow to her left elbow as a result of the December 2, 2004 incident. Nevertheless, Dr. Schlafly testified that a negative nerve conduction study is not a definitive test for whether or not a patient has cubital tunnel syndrome. In his experience, about 20% of patients who require ulnar nerve surgery at the elbow had negative electrical studies.
29. At the request of the employer/insurer in the related case, Injury No. 06-058679, the claimant was seen by Dr. Brown on or about January 1, 2007 – nearly six months after the ulnar nerve transposition surgery. Dr. Brown is an orthopedic and plastic surgeon with a specialty in the treatment of upper extremity conditions. He obtained a history of the claimant's complaints of numbness in her little and ring fingers, which would correspond with an ulnar neuropathy. He testified that by the claimant's own recitation of her history, those symptoms began on March 3, 2006, which was well over a year after the December 2, 2004 work injury. He also noted that two previous nerve studies, performed on February 28, 2005, and September 8, 2005, were normal and had no evidence of entrapment neuropathy at the elbow or anywhere else.
30. Dr. Brown concluded that the December 2, 2004 incident did not cause an ulnar neuropathy at the elbow, and he noted that the mechanism of injury was not consistent with a direct blow to the elbow. Due to the lack of any temporal relationship between her symptoms and the date of the accident, the fact that the first positive nerve study was not until June 6, 2005 (approximately one and a half years after the accident), and the claimant's other medical risk factors (including her age, gender, and the vasal constriction effects of nicotine use from smoking), Dr. Brown did not relate the need for surgery or disability to the elbow to the December 2, 2004 incident.
31. Dr. Randolph re-examined the claimant on April 2, 2007, after she had undergone

surgery by Dr. Kennedy on her neck and surgery by Dr. Schlafly on her left elbow. Dr. Randolph did not change his assessments or ratings following this examination. He opined that the claimant's surgeries by Dr. Kennedy and Dr. Schlafly were not necessitated by the December 2, 2004 incident. He believed that the surgery by Dr. Kennedy was performed as a result of a pre-existing degenerative process occurring over time and not because of any abnormality resulting from the December 2, 2004 incident. In addition, Dr. Randolph did not believe that the claimant's symptoms of left ulnar neuropathy were related to the December 2, 2004 incident, or that the surgery by Dr. Schlafly resulted from the work incident. He noted that during the course of his treatment, nerve conduction studies were normal and he did not believe that the claimant's mechanism of injury was consistent with the development of an ulnar neuropathy at the elbow. Specifically, he opined that the claimant did not sustain a direct blow to the elbow, and that the lifting injury that she described would not be consistent with cubital tunnel syndrome.

32. On October 3, 2007, the claimant was evaluated at her attorney's request by Mr. James England, a vocational counselor. Mr. England acknowledged that the claimant, at age 48, was not of such an advanced age that she would be precluded from seeking employment. This, combined with the fact that she has a two year associate's degree, transferable skills, and that she tested well on the wide range of achievement tests, would otherwise allow her to obtain a variety of jobs on the open labor market. Nonetheless, based primarily on her physical presentation and on the functional limitations as set out by Dr. Feinberg and Dr. Kennedy, Mr. England concluded that the claimant is not capable of competing for employment on the open labor market. Mr. England also noted that based on her presentation, he didn't believe that she would come across well at an interview or be successful in obtaining employment.
33. Mr. Bob Hammond, a vocational expert, evaluated the claimant and testified on behalf of the employer/insurer. In his June 22, 2008 report, Mr. Hammond acknowledged that the claimant's presentation would be an important factor in whether she would be considered for employment at a sedentary position. He believed that it would be very important for her to present herself in a positive fashion about wanting to return to work and that she would benefit from assistance provided through the state of Missouri and/or with vocational assistance. Mr. Hammond determined that the claimant is extremely bright, articulate, and would be valuable in a number of different business settings. He testified that the opinions by Dr. Feinberg and Dr. Kennedy that the claimant was not capable of working were opinions outside their expertise, and that the claimant's ability to work at a sedentary position falls within the physical restrictions they imposed. He found no medical correlation to support their opinions regarding her ability to work. He noted that she is able to drive and that she renewed her driver's license in 2006 without listing any restrictions.
34. At the hearing, the claimant described continued complaints of neck pain of a throbbing nature. In order to reduce the pain she takes medication and props herself up in a recliner. She lies down every 30 minutes or so and uses a pain patch. Her left shoulder hurts all of the time, and she described those symptoms as a throbbing pain. Her

trapezius swells, and she props it up with a pillow to minimize her discomfort. Her left elbow symptoms are no worse than before surgery, although she still uses a brace at times. She requires Tylenol PM to sleep, and only gets two-and-a-half to three hours of sleep in an average night. She has similar complaints, to a lesser degree, in her right upper extremity, and states that she had been told that she has right carpal tunnel syndrome. She acknowledged that she did not injure her right upper extremity on December 2, 2004.

35. The claimant described difficulty performing household chores. She uses a microwave, but otherwise she no longer cooks. She is able to rinse out cups and dishes, but calls on other people to help her with household tasks. She stated that she has not driven a car for five months, but acknowledged that she can drive for six to seven miles at a time. She is concerned that if she were to return to work, she would be under the constant influence of pain medications.
36. The claimant described episodes of depression before and after the December 2, 2004 incident. She testified that she does not get out of the house very often, and that she usually watches mass on television.

CONCLUSIONS OF LAW

The injury in this case occurred on December 2, 2004. Therefore, the substantive changes that became effective in August 2005 do not apply. The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment.² Under the case law in place at the time of the injury, the "law is to be broadly and liberally interpreted, extending its benefits for the largest possible class. Questions as to the right of an employee to compensation are resolved in favor of the employee."³

1. Medical Causation

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim, including the casual connection between the accident and the injury.⁴ Whether employment is a substantial factor in causing the injury is a question of fact.⁵ An injury is clearly work related "if work was a substantial factor in the cause of the resulting medial condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor."⁶ Proof is made only by competent and

² *Cochran v. Industrial Fuels & Res.*, 995 S.W.2d 489, 492 (Mo. App. 1999).

³ *Id.*

⁴ *Fisher v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

⁵ *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo. App. 1999).

⁶ Section 287.020.2 (RSMo). All statutory references are to the Revised Statutes of Missouri (RSMo), 2000, unless otherwise noted.

substantial evidence, and may not rest on speculation.⁷ Medical causation not within lay understanding or experience requires expert medical evidence.⁸ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.⁹

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹⁰ Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.¹¹

In this case, the claimant contends that as a result of the December 2, 2004 incident, she sustained injuries to her neck, left shoulder, low back, left leg, and left elbow. She further contends that the injury to her neck necessitated fusion surgery by Dr. Kennedy, and that she developed left cubital tunnel syndrome at the elbow which required surgery by Dr. Schlafly. The employer/insurer does not dispute compensability of the December 2, 2004 incident. The employer/insurer, however, claims that the claimant's injuries were limited to a cervical strain and shoulder girdle strain. Thus, the employer/insurer argues that the surgery performed by Dr. Kennedy was neither necessary nor medically causally related to the December 2, 2004 incident. The employer/insurer further alleges that the claimant did not develop left cubital tunnel syndrome as a result of the December 2, 2004 incident.

The claimant underwent many diagnostic tests and procedures and treated with numerous doctors, both authorized and unauthorized. Based on the medical evidence and on the claimant's testimony, I find that the claimant's injuries from the December 2, 2004 incident were to her neck, left shoulder, and left elbow. I also find that the evidence does not support a finding relating any low back and/or left leg symptoms to the December 2, 2004 incident. Dr. Dooley's evaluations in April 2004 were consistent with a muscle strain and sprain of the claimant's posterior cervical muscles and shoulder girdle. He was unable to relate any symptoms of pain the claimant experienced down the left leg due to the fact that those symptoms developed months after her injury. Additionally, the claimant's own rating doctor, Dr. Schlafly, did not document any low back or left leg symptoms referable to the injury.

In the surgical consultation ordered by the employer/insurer, Dr. Lange did not find any evidence of a disc injury or other acute abnormality resulting in the need for surgery. Similarly, the claimant's imaging studies and clinical evaluations were not consistent with a radiculopathy. Dr. Lange did not believe that surgery would be appropriate for mechanical neck pain or degeneration in the absence of a radiculopathy. In addition, the claimant consulted a neurosurgeon, Dr. Kitchens, on her own. Dr. Kitchens ordered additional diagnostic tests, including a cervical CT myelogram. These findings were consistent with spondylosis without any evidence of nerve impingement. Based on a review of Dr. Kitchens' records, it is clear that he, like Dr. Lange, did not believe that the claimant was a surgical candidate.

⁷ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1974).

⁸ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

⁹ *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

¹⁰ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1985).

¹¹ *Webber b. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

The claimant's subsequent referral by Dr. Kunkel to Dr. Feinberg for pain management by Dr. Kunkel was unauthorized. The claimant was free to obtain this treatment on her own and at her own expense under Section 287.140. Unauthorized treatment, however, does not automatically translate into a finding that the treatment was reasonable, necessary, or even related to her injury. Although Dr. Feinberg's impression was that the claimant's symptoms were consistent with a cervical radiculopathy, he did not believe that her imaging studies showed any acute abnormality. Whereas he believed that the subsequent fusion surgery at C4-5 and C5-6 performed by Dr. Kennedy, upon his referral, was due to a radiculopathy, Dr. Kennedy acknowledged that the claimant's imaging studies were consistent with degeneration and that her physical exam findings did not show any evidence of a radiculopathy. Dr. Kennedy offered the claimant surgery for a diagnosis of cervical instability, a condition that had not previously been diagnosed.

Two previous evaluations, one by Dr. Lange, an orthopedic spine surgeon, and one by Dr. Kitchen, a neurosurgeon, had found no cervical instability or need for cervical surgery. I find the opinions of Dr. Lange and Dr. Kitchen to be more credible than those of Dr. Kennedy and Dr. Feinberg. I note that although Dr. Feinberg supports Dr. Kennedy's surgical intervention, Dr. Feinberg's testimony that the claimant had a cervical radiculopathy is inconsistent with Dr. Kennedy's testimony that the claimant did not have any clinical or diagnostic evidence of a radiculopathy.

I also find the opinion of Dr. Randolph, a treating physician, to be credible and persuasive to the limited extent that it addresses the causation and date of maximum medical improvement (MMI) for the claimant's neck and shoulder injuries. Dr. Randolph determined that the claimant had reached MMI as of July 7, 2005, which I find to be appropriate as to the claimant's neck and shoulder injuries. I also find that the December 2, 2004 work accident was not a substantial factor in causing any cervical instability, and that the accident did not result in the need for a two level fusion. Instead, I find that the credible medical evidence shows that the claimant's neck and shoulder injuries from the December 2, 2004 incident were limited to a cervical strain and left shoulder girdle strain.

As the employer/insurer refused to provide treatment for the claimant's left elbow injuries, she was forced to seek treatment on her own. Thus, her doctor, Dr. Schlafly, is the only treating physician as far as claimant's cubital tunnel syndrome is concerned. Dr. Schlafly is an orthopedic surgeon and hand specialist. Dr. Schlafly diagnosed cubital tunnel syndrome, and performed an ulnar nerve transposition at the left elbow on July 7, 2006. He testified credibly and persuasively that the December 2, 2004 incident was the substantial factor in the need for the surgical treatment. He also testified credibly that the claimant's brief employment as a cashier at Bahr's would have served as only a minor contributing factor to her condition. Dr. Schlafly acknowledged on cross-examination that two nerve studies following the December 2, 2004 incident were normal with no electrodiagnostic evidence of compression of the ulnar nerve. Similarly, he acknowledged that the claimant did not claim that she suffered any traumatic blow to her left elbow as a result of the December 2, 2004 incident. Nevertheless, Dr. Schlafly testified that a negative nerve conduction study is not a definitive test for whether or not a patient

has cubital tunnel syndrome. In his experience, about 20% of patients who require ulnar nerve surgery at the elbow had negative electrical studies.

I find Dr. Schlafly's testimony regarding causation to be more credible than that of Dr. Brown. Dr. Brown was not the treating doctor. He did not see the claimant until early January 2007 – nearly six months after the ulnar nerve transposition surgery. Moreover, he appears to have placed undue reliance on the fact that the claimant gave him a history in which she stated that her hand symptoms did not begin until March 3, 2006 (more than a year after the work accident). Dr. Brown apparently discounted the numerous and ongoing references in the medical records to claimant's left hand and elbow complaints. These complaints were first noted within weeks of the accident, and were repeated throughout the medical records. And as for the two negative nerve conduction studies, I find Dr. Schlafly's explanation on this matter to be credible and convincing. For these reasons, I find that the claimant's cubital tunnel syndrome and the resulting surgery were medically causally related to the December 2, 2004 incident.

2. Past Medical Expenses

Although the claimant seeks an award for payment of past medical expenses, the parties stipulated that the amount of medical expenses in dispute is limited to the balances due and not the gross amount of bills paid by health insurance.

Section 287.140.1 requires the employer to provide medical treatment as may be reasonably required after an injury or disability to cure and relieve the employee from the effects of the injury. Under this provision, if the employee desires, the employee has the right to select his own physician or surgeon at his own expense. All of the medical expenses in dispute are related to treatment the claimant received on her own. Some of this treatment, however, was for conditions that were not medically and causally related to the December 2, 2004 injury. Specifically, the expenses related to the cervical fusion performed by Dr. Kennedy are related to a condition, cervical instability, that was not medically causally related to the December 2, 2004 incident. Therefore, these expenses are not the responsibility of the employer/insurer. Likewise, the expenses related to the treatment by Dr. Feinberg are not medically causally related to the December 2, 2004 injury and are not the responsibility of the employer/insurer. The claimant's request for reimbursement for medical expenses due to treatment with Dr. Kennedy and Dr. Feinberg is denied. In addition, this denial includes any diagnostic testing, injections, medication, or physical therapy ordered by either Dr. Kennedy or Dr. Feinberg.

The claimant's treatment with Dr. Schlafly, however, was medically and causally related to the December 2, 2004 accident. This treatment was reasonable and necessary to cure and relieve the claimant from the effects of the injury, and the employer/insurer bears responsibility. As noted above, the parties have stipulated that the claimant is seeking recovery only of the balances due. Therefore, the employer/insurer is liable for the following: \$52.23 due to Hand Surgery Associates for treatment and surgery on June 6, 2006, and July 7, 2006 (Claimant's Exhibit Y); \$102.19 due to St. Anthony's Medical Center for surgery provided on July 7, 2006 (Claimant's Exhibit Z); and \$42.00 to South County Anesthesia for services provided during the July 7, 2006 surgery (Claimant's Exhibit AA). The total of these amounts is \$197.42.

3: Future Medical Needs

Section 287.140, RSMo (1994) requires that the employer/insurer provide “such medical, surgical, chiropractic and hospital treatment . . . as may reasonably be required . . . to cure and relieve (the employee) from the effects of the injury.” Future medical care can be awarded even though the claimant has reached maximum medical improvement.¹² The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment.¹³ Conclusive evidence is not required. However, evidence that shows only a mere possibility of the need for future treatment will not support an award.¹⁴

In this case, there is no credible and convincing evidence that the claimant needs additional medical treatment related to her cervical strain, shoulder strain, or cubital tunnel syndrome. The claimant’s request for future medical care is denied.

4. Nature and Extent of Permanent Disability, Whether Partial or Total

The claimant alleges that she is permanently and totally disabled as a result of the December 2, 2004 injury. The employer/insurer contends that the claimant’s disabilities are limited to a 10% PPD of the neck and a 10% PPD of the shoulder.

An employer is liable for permanent total disability benefits under Section 287.200 only where there is evidence in the records that the primary accident alone caused the claimant to be permanently and totally disabled.¹⁵ Here, the only medical testimony to support an award for permanent total disability would be from Drs. Feinberg and Kennedy, whose opinions I have found to be neither persuasive nor credible. Most importantly, I have previously found that the treatment they provided was neither causally related nor necessitated by the December 2, 2004 injury. Dr. Randolph and Dr. Schlafly limited their ratings to permanent partial disability. I too find that an Award limited to permanent partial disability as a result of the December 2, 2004 incident is appropriate.

Based on the credible medical evidence, I have found that the claimant sustained a cervical strain and left shoulder girdle strain as a result of the December 2, 2004 incident. I find that she did not sustain any acute pathology in the cervical spine or shoulder requiring anything more than conservative treatment. For soft tissue injuries to the neck and shoulder, I believe that her level of permanent partial disability is 12.5% of the body as a whole (referable to the neck) and 10% of the upper extremity at the level of the shoulder. As for the cubital tunnel syndrome, I find that the claimant has sustained a permanent partial disability of 19% to the left elbow.

Neither the cervical instability/degenerative condition nor the fusion surgery were medically causally related to the December 2, 2004 accident. In addition, I do not find the employer/insurer to be liable for any post-accident worsening of the claimant’s pre-existing cervical degenerative condition.

¹² *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 278 (Mo. App. 1996).

¹³ *Williams v. A.B. Chance*, 676 S.W.2d 1 (Mo. App. 1984).

¹⁴ *Dean v. St. Luke’s Hospital*, 936 S.W.2d 601, 603 (Mo. App. 1997); *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 278 (Mo. App. 1996); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo. App. 1995).

¹⁵ *Mathia* at 276.

5. Temporary Total Disability Benefits

The claimant is seeking an award of temporary total disability benefits under Section 287.170 for the time period from July 8, 2005 (when Dr. Randolph found her to be at MMI), through March 2, 2006 (the date she returned to work as a cashier).

Compensation for temporary total disability benefits is payable until the employee is able to find any reasonable or normal employment or until her medical condition has reached the point where further improvement is not anticipated.¹⁶ With respect to possible employment, the test is “whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in his or her present physical condition.”¹⁷

I have found Dr. Randolph’s opinion that the claimant reached maximum medical improvement as of July 7, 2005 to be persuasive and credible as far as the neck and shoulder condition are concerned. Consequently, the claimant’s claim for past temporary total disability benefits from July 8, 2005, through March 2, 2006, is denied.

Nevertheless, I find that the claimant is eligible for TTD for the period after her ulnar nerve transposition surgery until she was at MMI for that condition. As discussed above, the cubital tunnel syndrome was medically causally related to the December 2004 accident. The ulnar nerve transposition surgery was reasonable and necessary to cure and relieve the effects of that injury.

Dr. Schlafly’s August 4, 2006 report indicates that the claimant was released to return to work after the elbow surgery as of September 5, 2006. He later revised that date, and determined that she should remain off work until December 31, 2006. However, in his deposition he explained that the additional off-work period (from September 6, 2006, through December 31, 2006) was primarily due to the claimant’s ongoing problems with her neck, left shoulder, left leg, and left face. Dr. Schlafly did not clarify how much, if any, of this additional period was due to problems with the claimant’s left elbow/hand. Therefore, the credible and convincing evidence shows that the claimant reached MMI as to her left elbow/hand on September 5, 2006. Thus, the employer/insurer is liable for TTD benefits for a period of 8 and 5/7 weeks, beginning on July 7, 2006 (the date of the elbow surgery), and ending on September 5, 2006 (the date at which the claimant reached MMI for this condition).

6. Liability of Second Injury Fund

The Second Injury Fund is a creature of statute, and benefits from the Fund are awarded only if the employee proves that under Section 287.220.1, that she is entitled to such benefits. The employee has the burden of proving all essential elements of her workers’ compensation claim.¹⁸ Second Injury Fund liability for permanent partial disability exists only if the employee suffers from a pre-existing permanent partial disability that combines with a compensable injury

¹⁶ *Vinson v. Curators of Un. Of Missouri*, 822 S.W.2d 504 (Mo. App. 1991).

¹⁷ *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo. App. 1996)

¹⁸ *Lawrence v. Joplin R-VIII School District*, 834 S.W.2d 789, 793 (Mo. App. S.D. 1992).

to create a disability greater than the simple sum of disabilities.¹⁹ When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities.²⁰ In addition, in order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as the result of the last compensable injury, and that the disability has combined with a prior permanent partial disability to result in total disability.²¹

Although there are brief references in the record to a history of depression and bi-polar disorder, there is insufficient evidence to show that the claimant suffered from any disabling pre-existing condition. No expert testimony was presented regarding any pre-accident, or even post-accident, history of depression and whether such depression is disabling, nor was such evidence provided for bi-polar disorder. The record does not provide substantial or convincing evidence to support an award against the Second Injury Fund for permanent total disability or permanent partial disability. Therefore, the claim against the Fund fails.

Summary

In summary, the issues and their resolutions are as follows:

1. Whether the claimant's medical condition is casually related to the December 2, 2004 incident (medical causation)? The claimant's cervical strain and left shoulder girdle strain was medically causally related to the December 2004 incident. The claimant's alleged cervical instability was not medically causally related to the work incident. The claimant's cubital tunnel syndrome and the resulting surgery were medically causally related to the December 2, 2004 accident. Any alleged leg, low back, or other complaints were not medically causally related to the work incident.
2. Whether the claimant is entitled to an award for past medical expenses? The claimant is entitled to an award for past medical expenses related to the cubital tunnel syndrome and the treatment thereof. By stipulation, the parties agreed that the claimant sought only reimbursement for balances still outstanding, and not for payment of amounts covered by health insurance.
3. Whether the claimant is entitled to an award for past temporary total disability benefits? The claimant is entitled to an award for 8 and 5/7 weeks of temporary total disability (TTD) benefits, for the period beginning on July 7, 2006, and ending on September 5, 2006.
4. What is the nature and extent of permanent disability, whether partial or total? The claimant sustained the following permanent partial disabilities: 12.5% of the body as a whole (neck), 10% of the left shoulder, and 19% of the left elbow.

¹⁹ Section 287.220.1, RSMo.; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo. App. 1985).

²⁰ *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990).

²¹ Section 287.220.1, RSMo.; *Brown* at 482; *Anderson* at 576.

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5. Whether the claimant is entitled to an award for future medical expenses? No, the claimant is not entitled to an award for future medical expenses.
6. What is the liability, if any, of the Second Injury Fund? The Second Injury Fund has no liability in this case.

Any pending objections not expressly ruled on in this award are overruled.

Date: _____

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation