

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

Injury No.: 04-130301

Employee: Richard Hayden
Employer: Ameriwood Industries, Inc.
Insurer: Sentry Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo¹. Having read the briefs, reviewed the evidence and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge by this supplemental opinion.

We offer this supplemental opinion to address arguments raised by employee in his application and brief.

First, employee alleges error because subpoenas issued by the administrative law judge were not enforced. The administrative law judge issued three subpoenas at employee's request (Exhibits J, K, and L). The subpoenas directed three witnesses to appear for the hearing to testify.

Section 287.560 RSMo provides, in part, that, "[t]he division, any administrative law judge thereof or the commission, shall have power to issue process, subpoena witnesses, administer oaths, examine books and papers, and require the production thereof, and to cause the deposition of any witness to be taken and the costs thereof paid as other costs under this chapter." The administrative law judge did so. The section goes on to provide that, "[a]ny party shall be entitled to process to compel the attendance of witnesses and the production of books and papers, ..."

The transcript of the hearing reflects that none of the subpoenaed witnesses testified at the hearing. The transcript of the hearing reveals no complaint by employee about the absence of the witnesses' testimony. Nor does the transcript reveal a request by employee to continue the hearing so he could secure the attendance of the witnesses. Employee failed to preserve any objection regarding the enforcement of the subpoenas. This argument must fail.

¹ All statutory references are to the Revised Statutes of Missouri 2004 unless otherwise indicated.

Employee: Richard Hayden

- 2 -

Next, employee alleges ineffective assistance of counsel. Employee directs us to no statute authorizing us to grant him relief on the basis of ineffective assistance of counsel. This argument also fails.

We affirm and adopt the award of the administrative law judge, as supplement herein. The November 3, 2010, award and decision of Administrative Law Judge Edwin J. Kohner is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 9th day of June 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

VACANT
Member

Attest:

Secretary

AWARD

Employee: Richard Hayden Injury No.: 04-130301
Dependents: N/A Before the
Employer: Ameriwood Industries, Inc. **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Sentry Insurance Company Jefferson City, Missouri
Hearing Date: October 4, 2010 Checked by: EJK/ch

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: November 18, 2004
5. State location where accident occurred or occupational disease was contracted: Warren 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:
On November 19, 2004, the claimant woke up with left hip pain after pulling on a 300 pound batch of materials with a dolly on the day before his onset of pain. He did not have any discomfort while he was actually performing this action but he awoke the next day with pain in his groin and left hip area. .
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: None
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: \$2,700.30

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$531.20
- 19. Weekly compensation rate: \$354.13/\$354.05
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

None

22. Second Injury Fund liability: No

TOTAL:

None

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 NOT be subject to a lien in favor of any attorney for necessary legal services rendered to the claimant for lack of any evidence to support an attorney's lien. See Kuczvara v. Continental Baking Co., 24 S.W.3d 712, 715 (Mo.App. E.D. 1999).

FINDINGS OF FACT and RULINGS OF LAW:

| | | |
|-------------------|----------------------------|------------------------------------|
| Employee: | Richard Hayden | Injury No.: 04-130301 |
| Dependents: | N/A | Before the |
| Employer: | Ameriwood Industries, Inc. | Division of Workers' |
| Additional Party: | Second Injury Fund | Compensation |
| Insurer: | Sentry Insurance Company | Department of Labor and Industrial |
| | | Relations of Missouri |
| | | Jefferson City, Missouri |
| | | Checked by: EJK/ch |

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, a production and design technician, suffered a left hip strain while moving production materials on a dolly. The issues for determination are (1) Medical causation, (2) Liability for Past Medical Expenses, (3) Future medical care, (4) Temporary Disability, (5) Permanent disability, (6) Second Injury Fund liability, and (7) a Medicaid lien, a Lien for Child Support, and (8) an attorney's lien for the claimant's former legal counsel. The evidence compels an award for the defense, because the weight of the credible evidence proves that the claimant's work related occurrence was not the prevailing factor causing his avascular necrosis and disability from his avascular necrosis. The request for an attorney's lien is denied for lack of any evidence to establish an attorney's lien. See Kuczvara v. Continental Baking Co., 24 S.W.3d 712, 715 (Mo.App. E.D. 1999). The Medicaid lien and lien for child support are established as a matter of law, but have no recovery, because the claim is not compensable.

At the hearing, the claimant and his former supervisor, Janice McKenzie, testified in person and offered depositions of himself and Raymond F. Cohen, D.O., medical records from St. Josephs Hospital West, three subpoenas, and a Medicaid Lien letter. The claimant also offered correspondence from the claimant's former legal counsel, four photographs, an article from Wikipedia, but objections were sustained based on the rule against hearsay. The defense offered a deposition of Thomas E. Albus, M.D., medical reports from Ronald L Pearson, D.O., and Chad J. Smith, D.O., and pharmacy records from Wal-Mart Pharmacy.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident was alleged to have occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On October 1, 2004, this fifty-five year old claimant, a production worker, suffered anterior and lateral thigh and hip pain that gradually began after moving heavy objects with a dolly for a friend. See Exhibit 3. He received a prescription muscle relaxant, Cyclobenzapr, a generic form of Flexeril. See Exhibits 3, 4. On November 19, 2004, the claimant woke up with left hip pain after pulling on a 300 pound batch of materials with a dolly on the day before his

onset of pain. He did not have any discomfort while he was actually performing this action but he awoke the next day with pain in his groin and left hip area. See Exhibit 2.

On December 14, 2004, Dr. Pearson examined the claimant's leg and concluded that the claimant suffered from left hip pain. He prescribed Naprosyn and Darvocet-N-100 for pain relief and recommended that the claimant consult an orthopedic specialist. See Exhibit 2. He opined that the claimant could only perform sedentary work due to his hip pain. See Exhibit 2. A December 23, 2004, CT revealed ischemic necrosis and a small pathologic fracture. See Exhibit E. Dr. Roush diagnosed avascular necrosis after those tests. See Exhibit D.

The claimant consulted physicians at the U.S. Department of Veterans' Affairs for his various cardiac conditions. See Exhibit D. The left hip pain apparently resolved by April 19, 2005, but the claimant reported right hip pain. See Exhibit D. The claimant was able to flex and extend, and externally and internally rotate his left hip without pain. See Exhibit D. He had pain with internal and external rotation of the right hip. See Exhibit D. At that time, Dr. Rummell diagnosed arthritis of the hips, possible AVN, possible transient osteoporosis, tobacco addiction, alcohol use, and high cholesterol. See Exhibit D.

An April 20, 2005, bone scan revealed bilateral avascular necrosis involving both femoral heads with associated reactive changes. See Exhibit C. The increased activity on both sides of the joint was in keeping with reactive change and early degenerative change. See Exhibit C.

On May 5, 2005, Dr. Albus performed a right total hip arthroplasty. On June 29, 2005, Dr. Albus performed a right hip arthrotomy and revision of the acetabular implant. On September 23, 2005, Dr. Albus conducted an incision and drainage, irrigation and placement of drains to reduce any infection from the two prior surgeries. Dr. Albus prescribed antibiotic medicine to avoid any additional infection. On October 25, 2005, Dr. Albus performed a second look irrigation debridement of the right hip. On February 2, 2006, Dr. Albus performed a left hip arthroplasty with no intraoperative or postoperative complications. Dr. Albus' last examination of the claimant was on April 3, 2006.

MEDICAL CAUSATION

“The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job.” Royal v. Advantica Rest. Group, Inc., 194 S.W.3d 371, 376 (Mo.App.W.D.2006) (citations and quotations omitted). “Determinations with regard to causation and work relatedness are questions of fact to be ruled upon by the Commission.” Id. (citing Bloss v. Plastic Enters., 32 S.W.3d 666, 671 (Mo.App.W.D.2000)). Under the statute, “[a]n injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.” § 287.020.2. On the other hand, “[a]n injury is not compensable merely because work was a triggering or precipitating factor.” Id. “Awards for injuries ‘triggered’ or ‘precipitated’ by work are nonetheless proper *if* the employee shows the work is a ‘substantial factor’ in the cause of the injury.” “Thus, in determining whether a given injury is compensable, a ‘work related accident can be both a triggering event and a substantial factor.’ Royal, 194 S.W.3d at 376 (quoting Bloss, 32 S.W.3d at 671).

“[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence.” Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, “logic and common sense,” or an ALJ’s personal views of what is “unnatural,” cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) (“The commission may not substitute an administrative law judge’s opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert.”). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

The claimant had bilateral hip total joint replacements due to avascular necrosis. Dr. Cohen, a neurologist, opined that those conditions and resulting disability resulted from the claimant’s work incident on November 18, 2004. See Dr. Cohen deposition, pages 15, 16.

It is my medical opinion that his left hip joint while pulling this excessive weight up this ramp and pulling this heavy load with a dolly in the warehouse caused the hip to be in a position in which it had a prolonged period of increased compression, which caused an inadequate blood supply to the articular cartilage. The increased pressure within the bone is associated with avascular necrosis. And this was such an extreme effort in which he had to keep the left hip joint in this abnormally sustained period of increased compression in order to get this load up the ramp and pull this through the warehouse. This is the type of trauma to the hip joint which caused the acute injury to the left hip. Ultimately, the right hip became involved as he was favoring the left hip. Mr. Hayden had no history of any hip problem before 11/18/04. See Dr. Cohen Deposition, pages 23, 24.

Dr. Albus, the claimant’s treating orthopedic surgeon, opined that the event at work was not a substantial contributing factor of avascular necrosis in both hips, because “That just isn’t the way it works.” See Dr. Albus deposition, page 16.

If someone already had AVN, and then they had some stressful activity, could that stressful activity lead to the initial femoral collapse of the femoral head? That’s not beyond the realm of possibility in my mind, but it seems clear, as clear can to me, that the activity that you’ve described bore no relationship to the onset of his AVN. See Dr. Albus deposition, page 15.

Avascular necrosis (AVN) occurs from loss of blood to the bone. Because bone is living tissue that requires blood, an interruption to the blood supply causes bone to die. If not stopped, this process eventually causes the bone to collapse. Dr. Albus’ opinion that the event at work is not a substantial factor causing the claimant’s avascular necrosis and resulting disability is more credible for two reasons. First, Dr. Albus was the treating orthopedic surgeon and it is more likely that he has greater expertise in this area, because he is an orthopedic surgeon that treated the claimant and treats the condition as part of his medical practice. Dr. Cohen is a neurologist that does not treat this condition and has not treated the condition as a practicing physician. See Dr. Cohen deposition, page 28. He testified that he provided treatment for patients with the

condition when he did a four month internship in orthopedics. See Dr. Cohen deposition, page 28. According to his curriculum vitae, he did his internship in 1980-81, about thirty years ago.

Second, Dr. Cohen's forensic opinion is undercut by his medical history that the claimant had no prior hip problem. The evidence revealed that on October 1, 2004, the claimant suffered anterior and lateral thigh and hip pain that gradually began after moving heavy objects with a dolly for a friend. See Exhibit 3. He received a prescription muscle relaxant, Cyclobenzapr, a generic form of Flexeril. See Exhibits 3, 4. Thus, Dr. Cohen's assumption is erroneous, and he evidently did not consider the impact of the October 1, 2004, event.

Generally, where two events, one compensable and the other non-compensable, contribute to the claimant's alleged disabilities, the claimant has the burden to prove the nature and extent of disability attributed to the job related injury. Strate v. Al Baker's Restaurant, 864 S.W.2d 417, 420 (Mo.App. E.D. 1993); Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. E.D. 1991). Based on the weight of the evidence, the claim is denied.

LIABILITY FOR PAST MEDICAL EXPENSES

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 1994.

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. Id. at 111, 112.

The claimant presented a lien from the Missouri Department of Social Services showing a lien for \$5,912.35 for medical services rendered by MO Healthnet (Medicaid). The services are clearly related to the claimant's AVN, but since his AVN is not a result of his work, the defense has no liability for the services rendered.

FUTURE MEDICAL CARE

The Workers' Compensation Act requires employers "to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment[.]" § 287.120.1. This compensation often includes an allowance for future medical expenses, which is governed by Section 287.140.1. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App.2001). Section 287.140.1 states:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana, 46 S.W.3d at 622. The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App.2002). Nonetheless, to be awarded future medical benefits, the claimant must show that the medical care "flow [s] from the accident." Crowell v. Hawkins, 68 S.W.3d 432, 437 (Mo.App.2001) (quoting Landers v. Chrysler Corp. 963 S.W.2d 275, 283 (Mo.App.1997)).

Dr. Cohen opined, "He needs to be followed by an orthopedic surgeon as he will ultimately need the hip joints replaced." See Dr. Cohen deposition, page 16. He also testified that the claimant requires "an anti-inflammatory agent on an as-needed basis for pain." See Dr. Cohen deposition, page 18. Since none of the evidence establishes that his need for future medical and surgical procedures flows from the alleged occurrence at work, the claim for future medical care is denied.

TEMPORARY DISABILITY

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical

improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id.

Dr. Cohen testified that the claimant was temporarily totally disabled due to his work related injury from November 18, 2004, until the date that Dr. Albus released him from care. See Dr. Cohen deposition, page 18. Dr. Albus' last examination of the claimant was on April 3, 2006. See Dr. Albus deposition, page 14. Based on this evidence, the claimant was temporarily totally disabled from November 18, 2004, to April 3, 2006, 75 4/7 weeks, but since the claimant did not prove that his disability resulted from the alleged work related occurrence, the claim for temporary total disability is denied.

PERMANENT DISABILITY

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires

a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). "Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

Dr. Cohen opined that the claimant had a 75% permanent partial disability of each hip and "due to the significant involvement of both lower extremities, additional load factor of 15%." See Dr. Cohen deposition, page 17. He permanently restricted the claimant "from any work or activity in which he does any prolonged standing, sitting, walking, bending, lifting, stooping, twisting, climbing, ladder work or walking on uneven surfaces. He should not lift more than 10 to 15 pounds." See Dr. Cohen deposition, page 18. He opined that the claimant is permanently and totally disabled. See Dr. Cohen deposition, page 18.

Based on the evidence, the claimant has a 75% permanent partial disability of each hip and "due to the significant involvement of both lower extremities, additional load factor of 15% as a result of his avascular necrosis." Although Dr. Cohen testified that the claimant is totally and permanently disabled, none of the evidence supports a finding that the claimant is unemployable in the open labor market. However, since the claimant's disabilities are not a result of the work related occurrence, the claim is denied.

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).
2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) The employer's liability is considered in isolation - "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability;" (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Dr. Cohen opined, "There are no preexisting conditions or disabilities which combine with the primary work-related injury." See Dr. Cohen deposition, page 17. Based on Dr. Cohen's findings, there is no evidence to establish any liability for the Second Injury Fund, and the claim against the Second Injury Fund is denied.

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 3rd day of November, 2010.

/s/ NAOMI L. PEARSON
Naomi L. Pearson
Division of Workers' Compensation