

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

Injury No.: 05-142391

Employee: Vernon W. Howard
Employer: JH Berra (Settled)
Insurer: Self-Insured (Settled)
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 § 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 § 286.090 RSMo, the Commission affirms the award of the administrative law judge dated December 15, 2010, by separate opinion.

Introduction

The issues stipulated in dispute at the hearing were: (1) whether employee sustained an accident or occupational disease; (2) if employee sustained an accident or occupational disease, whether it arose out of and in the course of his employment; (3) medical causation; (4) nature and extent of permanent disability; and (5) Second Injury Fund liability.

The administrative law judge found that employee failed to prove that he sustained an accident or occupational disease arising out of and in the course of his employment, found all other issues moot, and denied employee's claim.

Employee filed an Application for Review alleging the administrative law judge erred: (1) in finding there was no evidence to connect an accident to employee's work, because both Dr. Poetz and employee testified that his left shoulder was aggravated by work; (2) because the administrative law judge did not find employee to lack credibility, and employee's testimony constitutes evidence of an injury arising out of and in the course of employment; (3) because the administrative law judge only found Dr. Poetz lacking credibility on the issue of permanent total disability, and Dr. Poetz's testimony therefore supports a finding of injury; and (4) by failing to address the other issues.

The Commission affirms the award of the administrative law judge with this separate opinion.

Discussion

Employee seeks permanent total disability benefits from the Second Injury Fund, claiming that he is unemployable as a result of an alleged 2005 left shoulder injury in combination with employee's preexisting conditions of ill. Section 287.220 RSMo requires that the employee prove a "last," or primary injury, resulting in permanent

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disability before Second Injury Fund liability can even be considered: “All cases of permanent disability where there has been previous disability shall be compensated as herein provided ...” (emphasis added).

Employee injured his right shoulder in 2003, when he was working for a previous employer, Essex Contracting Incorporated (Essex). Employee filed a claim for compensation for that injury and recovered some benefits as a result of a settlement with Essex. Employee then proceeded to hearing on his claim against the Second Injury Fund, alleging that his right shoulder disability (resulting from the 2003 primary injury) combined with the preexisting condition of his left arm (which was weakened by childhood polio) to result in enhanced permanent partial disability. That claim was heard together with employee’s claim in this matter. For the 2003 claim against the Second Injury Fund, the administrative law judge issued an award granting employee 17.94 weeks of permanent partial disability benefits, on a finding his right shoulder disability combined with his preexisting left arm condition to result in a greater disability than each of them would create considered alone. See *Award*, page 11.

Employee’s claim for compensation in this matter is premised on a theory that he aggravated his left shoulder (which, as we mentioned above, was previously weakened by childhood polio) working for a subsequent employer, JH Berra, because he was overusing his left shoulder to compensate for the 2003 right shoulder injury. Employee alleges that his “left arm had gotten progressively worse as he worked for [JH Berra], as during his employment he was repetitively using his left arm, and trying to favor his right arm, which had been previously injured at the shoulder in 2003.” *Employee’s Brief*, page 2. Dr. Poetz, employee’s medical expert, listed “left shoulder tendonitis, 7/8/05” as a diagnosis in his report, but did not otherwise discuss a 2005 injury, nor did he provide any explanation in his report or in his testimony as to what he believed caused an injury to employee on that date. Instead, Dr. Poetz merely recited employee’s complaint that his left shoulder started hurting as a result of using it more and favoring his right shoulder after the 2003 injury.

Under the law in effect at the time employee sustained the alleged primary left shoulder injury, a change in pathology that resulted from a work-related aggravation of a preexisting condition was unquestionably compensable as a workers’ compensation injury. See *Rono v. Famous Barr*, 91 S.W.3d 688, 691 (Mo. App. 2002) (pointing out that “aggravation of a pre-existing condition is a compensable injury if the claimant establishes a direct causal link between her job duties and the aggravated condition”). But here, employee is not really arguing that there is “a direct causal link”—or any kind of causation, for that matter—attributable to his work with JH Berra. Rather, he alleges that his left shoulder is worse off as a result of his favoring his right shoulder after the 2003 injury. So, the question before us is whether employee has established a 2005 primary injury where the only evidence on the question indicates that his left arm condition worsened (if at all) due to the residual effects of the 2003 work injury.

Where an employee sustains an injury arising out of and in the course of his employment, every natural consequence that flows from the injury, including a distinct disability in another area of the body, is compensable

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as a direct and natural result of the primary or original injury. Every natural consequence that flows from the injury likewise arises out of employment, unless it is the result of an independent intervening cause ...

Cahall v. Riddle Trucking, 956 S.W.2d 315, 322 (Mo. App. 1997) (citations omitted), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

We conclude that employee's claimed left shoulder condition does not amount to a 2005 primary injury. This is because employee has failed to prove that he sustained a new injury arising out of his employment with JH Berra, but rather a "natural consequence that flows from" his 2003 right shoulder injury. We reach this conclusion on the basis of both employee's testimony and the testimony and report from his medical expert. Employee's claimed mechanism of injury is that he worked harder with his left shoulder because of the disability to his right shoulder. Employee fails to identify any aspect of his work duties with JH Berra that caused him injury. Employee testified he worked harder in his work for JH Berra than in previous employments, but "working hard" does not fairly come within the most liberal reading of § 287.020.2 RSMo, which defines an "accident" as "an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury," or § 287.067.1 RSMo, which defines an "occupational disease" as "an identifiable disease arising with or without human fault out of and in the course of the employment."

Likewise, Dr. Poetz, the only medical expert who provided testimony, did not identify any mechanism of injury related to employee's work for JH Berra, but instead merely recited employee's theory that he aggravated his left shoulder as a result of favoring his right. To the extent that Dr. Poetz's unadorned diagnosis of "left shoulder tendonitis, 7/8/05" can be construed as a medical causation opinion, we find it lacking credibility, because it is conclusory and fails even to identify the event or disease that is supposed to have occurred or culminated on July 8, 2005.

An instructive case is *Lahue v. Missouri State Treasurer*, 820 S.W.2d 561 (Mo. App. 1991). There, the employee sought compensation from the Second Injury Fund alleging a primary injury resulting from her fall from a chair during physical therapy for a prior injury. *Id.* at 562. The court found that the employee failed to prove a primary injury and explained why the employee could not establish Second Injury Fund liability:

The law is well settled, that where a claimant sustains an injury arising out of and in the course of her employment, every natural consequence that flows from the injury, including a distinct disability in another area of the body is compensable as a direct and natural result of the primary or original injury. ... The fall from the chair was a part of the same injury as the ankle injury, and was therefore not a "subsequent injury" added to a "previous disability." In order to be a "subsequent injury," entitling the victim to compensation from the Missouri Second Injury Fund, the fall from

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the chair must have been shown to be a separate and distinct injury from the ankle injury. This was not the case.

Lahue, 820 S.W.2d at 563 (emphasis added).

As we mentioned above, § 287.220 requires that employee prove a primary injury resulting in permanent disability before the question of Second Injury Fund liability can be reached. Because employee has failed to do this, it follows that employee has failed to prove that he is entitled to benefits from the Second Injury Fund.

We note once again that this claim was heard together with the 2003 right shoulder claim against the Second Injury Fund. If, as employee claims, his left shoulder worsened as a residual effect of that 2003 injury, nothing precluded employee from so arguing before the administrative law judge and thereby seeking additional Second Injury Fund liability in that claim. That claim is not before us, however, because, although the claims were heard together, employee only filed an Application for Review in this matter.

In sum, we find that employee failed to meet his burden of proving that he sustained a primary injury in 2005. All other issues are moot.

Decision

We affirm the award of the administrative law judge with this separate opinion. Employee's claim against the Second Injury Fund is denied.

The award and decision of Administrative Law Judge Gary L. Robbins, issued December 15, 2010, is attached solely for reference and is not incorporated by this decision.

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

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Vernon W. Howard Injury No. 03-013834,
03-043861 &
Dependents: N/A 05-142391

Employer: Essex Contracting Incorporated for 03-013834 and 03-043861; and
JH Berra for 05-142391

Additional Party: Second Injury Fund

Insurer: Missouri Employers Mutual Insurance Company for 03-013834 and
03-043861. In 05-142391 JH Berra is self-insured.

Hearing Date: September 16, 2010 Checked by: GLR/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes. PPD benefits in 03-013834 and 03-043861. See Award.
2. Was the injury or occupational disease compensable under Chapter 287? Yes in 03-013834 and 03-043861. See Award.
3. Was there an accident or incident of occupational disease under the Law? Yes in 03-013834 and 03-043861.
4. Date of accident or onset of occupational disease? February 26, 2003 in 03-013834, May 8, 2003 in 03-043861 and July 8, 2005 in 05-142391.
5. State location where accident occurred or occupational disease contracted: Jefferson County, Missouri in 03-013834 and 03-043861 and St. Louis County, Missouri in 05-142391.
6. Was above employee in employ of above employers at time of alleged accident or occupational disease? Yes.
7. Did the employers receive proper notice? Yes in 03-013834 and 03-043861.

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8. Did the accidents or occupational diseases arise out of and in the course of the employment?
Yes in 03-013834 and 03-043861.
9. Were the claims for compensation filed within time required by law? Yes.
10. Were the employers insured by above insurers? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: In 03-013834, the employee injured his back and right shoulder in a fall on February 26, 2003. In 03-043861, the employee contracted carpal tunnel syndrome from his work as of May 8, 2003. In 05-142391, the employee claimed he injured his left upper extremity as of July 8, 2005.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Right shoulder and low back referable to the body as a whole in 03-013834. Bilateral wrists in 03-043861. Left arm at the shoulder in 05-142391.
14. Nature and extent of any permanent disability: See Awards.
15. Compensation paid to date for temporary total disability: \$5,147.02 in 03-013834. \$3,085.14 in 03-043861. Disputed in 05-142391.
16. Value necessary medical aid paid to date by employer-insurer: \$5,999.66 in 03-013834. \$9,754.30 in 03-043861.
17. Value necessary medical aid not furnished by employer-insurer: None.
18. Employee's average weekly wage: \$750.00 in 03-013834 and 05-142391. \$665.00 in 03-043861.
19. Weekly compensation rate: In 03-013834, \$493.55 for temporary total and permanent total disability and \$340.12 per week for permanent partial disability. In 03-043861, \$440.82 for temporary total and permanent total disability, and \$340.12 per week for permanent partial disability. In 05-142391, \$500.00 per week for temporary total and permanent total disability and \$365.08 for permanent total disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.

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23. Future requirements awarded: None.

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: Ellen E. Morgan.

FINDINGS OF FACT AND RULINGS OF LAW

On September 16, 2010, Vernon W. Howard, the employee, appeared in person and by his attorney, Ellen E. Morgan, for a hearing for a final award in three separate cases. The cases were consolidated at the request of the parties for trial purposes. The parties agreed to a change of venue to Jefferson County, Missouri in 05-142391. The employer-insurers were not represented at trial as the employee and the employer-insurers settled their claims prior to the trial date. The Second Injury Fund was represented by Assistant Injury General Eileen R. Krispin. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

Injury No. 03-013834

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Missouri Employers Mutual Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Essex Contracting Incorporated and was working under the Workers' Compensation Act.
3. On or about February 26, 2003 the employee sustained an accident or occupational disease that arose out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$750.00 per week. His rate for temporary total disability and permanent total disability is \$493.55 per week. His rate for permanent partial disability is \$340.12 per week.
7. The employee's injury was medically causally related to his accident or occupational disease.
8. The parties agreed that the employer-insurer paid \$5,999.66 in medical aid.
9. The parties agreed that the employer-insurer paid \$5,147.02 in temporary disability benefits.
10. The employee had no claim for previously incurred medical bills.
11. The employee has no claim for mileage.
12. The employee has no claim for future medical care.
13. The employee had no claim for any temporary disability benefits.
14. The employee has no claim for permanent total disability in this case.

Injury No. 03-043861

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1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Missouri Employers Mutual Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Essex Contracting Incorporated and was working under the Workers' Compensation Act.
3. On or about May 8, 2003 the employee sustained an accident or occupational disease that arose out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$665.00 per week. His rate for temporary total disability and permanent total disability is \$440.82 per week. His rate for permanent partial disability is \$340.12 per week.
7. The employee's injury was medically causally related to his accident or occupational disease.
8. The parties agreed that the employer-insurer paid \$9,754.30 in medical aid.
9. The parties agreed that the employer-insurer paid \$3,085.14 in temporary disability benefits.
10. The employee had no claim for previously incurred medical bills.
11. The employee has no claim for mileage.
12. The employee has no claim for future medical care.
13. The employee had no claim for any temporary disability benefits.

Injury No. 05-142391

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and duly qualified as a self-insured employer.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of JH Berra Construction Company Incorporated and was working under the Workers' Compensation Act.
3. The employer had notice of the employee's accident.
4. The employee's claim was filed within the time allowed by law.
5. The employee's average weekly wage is \$750.00 per week. His rate for temporary total disability and permanent total disability is \$500.00 per week. His rate for permanent partial disability is \$365.08 per week.
6. The parties agreed that the amount of medical aid that the employer-insurer paid was disputed.
7. The parties agreed that the amount of temporary disability benefits that the employer-insurer was disputed.
8. The employee had no claim for previously incurred medical bills.
9. The employee has no claim for mileage.
10. The employee has no claim for future medical care.
11. The employee had no claim for any temporary disability benefits.

ISSUES

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Injury No. 03-013834

1. Liability of the SIF for permanent partial disability.

Injury No. 03-043861

1. Liability of the SIF for permanent partial or permanent total disability.

Injury No. 05-142391

1. Accident
2. Medical Causation
3. Liability of the SIF for permanent partial or permanent total disability

EXHIBITS

The following exhibits were offered and admitted into evidence in each of the three cases:

Employee's Exhibits

- A Deposition of Robert P. Poetz, D.O.
- B Deposition of Timothy G. Lalk.
- C Division of Workers' Compensation Injury Report for February 26, 2003.
- D Medical records from The Orthopedic Center of St. Louis/Mark D. Miller, M.D.
- E Medical records of Edwin J. Masters, M.D.
- F Medical records of K. Charles Cheung, M.D.
- G Medical record from Southeast Missouri Hospital.
- H Medical records of Neal Frauwirth, M.D.
- I Medical records from Orthopedic Associates/Michael C. Trueblood, M.D.
- J Medical records from Cape Radiology Group.
- K Medical records from River City Imaging.
- L Medical records from Orthopedic & Sports Medicine, Incorporated/James T. Doll, D.O.
- M Medical records from St. Louis Orthopedic Institute, Incorporated/Christopher R. Rothrock, M.D.
- N Medical records from Orthopedic Associates, L.L.C./Herbert A. Haupt, M.D.
- O Medical records from Pro Rehab Impact, P.C.
- P Medical records of Henry G. Ollinger, M.D.
- Q Medical records from Neurological & Electrodiagnostic Institute, Incorporated/Daniel Phillips, M.D.
- R Medical records from Missouri Baptist Medical Center.
- S Stipulations For Compromise Settlement in Case Numbers 03-013834, 03-043861 and 05-142391.

Second Injury Fund Exhibits

None.

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STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT-

Vernon W. Howard, the employee, was the only witness to provide live testimony in this case. All other evidence was presented in the form of written reports, medical records or deposition testimony.

Procedural History

In 03-013834, the employee filed his Claim for Compensation on February 22, 2005. The date of the accident was reported to be February 26, 2003 for an accident to his low back, right elbow and right shoulder against Essex. In addition, the employee filed a claim against the SIF for permanent partial disability. The pre-existing injury was listed as polio. The employer-insurer admitted this accident. The parties settled the claim through a Stipulation for Compromise Settlement on March 20, 2008. The employer-insurer agreed to pay the employee \$28,842.19 representing 12½% permanent partial disability to the low back regarding the body as a whole and 15% permanent partial disability to the right shoulder. The employee filed no claim for permanent total disability with either the employer-insurer or the SIF.

In 03-043861, the employee filed his Claim for Compensation on February 22, 2005. The date of the accident was reported to be May 8, 2003 for injury to both arms. In addition, the employee filed his claim against the SIF for permanent partial disability. The pre-existing injuries were listed as polio and the low back, right elbow and the right shoulder which were the body parts claimed in the above 2003 case. No claim was included for permanent total disability. The employer-insurer admitted this accident. The employee filed an Amended Claim on December 29, 2005. At that time the employee claimed permanent total disability against the SIF. The parties settled this claim through a Stipulation for Compromise Settlement on March 20, 2008. The employer-insurer agreed to pay the employee 17½% permanent partial disability for each wrist with a 10% load.

In 05-142391, the employee filed his Claim for Compensation on August 18, 2006. The date of the accident was reported to be July 8, 2005 for injury to the left shoulder and left upper extremity. In addition, the employee filed a claim against the SIF for permanent total disability claiming the prior injuries claimed in the prior cases. The employer-insurer denied this case also indicating that they did not receive proper notice. The parties settled the claim through a Stipulation for Compromise Settlement on November 9, 2006. The parties agreed that all issues were in dispute but settled the case for 5% permanent partial disability of the left arm at the shoulder “regarding aggravating effect of work duties on pre-existing polio condition”.

Vernon W. Howard

Mr. Howard’s left arm has been affected by polio since early childhood. He described the problems that he has had with his left arm throughout his life. It is quite clear that the polio

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affected everything he did. His right arm has always been much stronger than his left arm. According to the employee, he has to do things differently because of his left arm, and there are some jobs that he cannot do. He has a high school diploma and has held supervisory positions. Despite his polio problem, the employee worked in construction for most of his adult life. More specifically he worked as a heavy equipment operator, mostly operating dozers.

On February 26, 2003, while working for Essex, Mr. Howard unloaded a truck in the ice and snow and fell off the back of a truck. He had right low back pain and shoulder pain and underwent an MRI of the right shoulder. Surgery for the right shoulder was recommended, but Mr. Howard declined because he did not want to take a chance on the surgery. He went back to work without restrictions. In March of 2003, he was treated conservatively for low back pain. According to Mr. Howard, he has problems sitting and standing for long periods of time because of his back. He has difficulty sleeping through the night because of pain in his right arm and low back.

Also while working for Essex, Mr. Howard had complaints of pain in his wrists and underwent carpal tunnel surgery on each wrist in 2004. He has since experienced a loss of grip and feels that his wrists are weaker. Mr. Howard testified that he cannot mow the grass nor do many chores.

After the carpal tunnel surgeries in 2004, Mr. Howard began working at J.H. Berra through the union. Mr. Howard testified that he worked regular hours at J.H. Berra. According to Mr. Howard, the work at J.H. Berra was harder and more intense than at Essex.

In July of 2005, Mr. Howard saw Dr. Trueblood complaining of pain in his left shoulder. Mr. Howard did not ask his supervisor for treatment regarding his left shoulder in July of 2005. He sought treatment on his own. The employer-insurer claimed that no notice was given about this accident.

Timothy Lalk

Mr. Lalk is a vocational rehabilitation counselor who interviewed the employee on June 7, 2006. He reviewed medical records prior to the interview including the report of Dr. Poetz dated March 30, 2006. He testified by deposition on August 15, 2006.

Mr. Lalk's testimony did not concern the 2005 case as his testimony was given prior to the date that claim was filed. Therefore, Mr. Lalk did not testify as to whether the employee was employable as a result of the 2005 disability in combination with prior disabilities.

Mr. Lalk testified that although Mr. Howard had a significant disability with regard to his left shoulder prior to 2003, he was under no physician imposed restrictions. The prior left shoulder disability did not prevent Mr. Howard from performing any of his duties as a heavy equipment operator. In fact, Mr. Howard performed bulldozing work outside of his employment, using his

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own bulldozer, high lift and backhoe. Prior to 2003 and in spite of his left shoulder disability, Mr. Howard also brush hogged forty acres of his property and worked on stock cars.

Mr. Lalk testified that Mr. Howard had to lie down occasionally during the day, but that he did not have to do that until sometime after he left his employment with J.H. Berra.

Mr. Lalk stated that he could not recommend any vocational rehabilitation service for Mr. Howard unless he would be able to demonstrate a greater control of his symptoms so that he would be able to function in a sedentary job or greater through a full workday. In considering his symptoms, Mr. Lalk included emotional symptoms. On cross-exam, however, Mr. Lalk admitted that Mr. Howard could work at a sedentary level. Other than Mr. Lalk's report, there is no evidence from any medical records or Mr. Howard's testimony that there is any anger or emotional issues. The only "emotional" problems testified to by Mr. Howard were memory problems. According to Mr. Lalk, Mr. Howard's memory problems do not seem to be related to issues that he might have at work.

After Mr. Howard received treatment for his low back and right shoulder up through May of 2003, Mr. Howard was released to return to work, and did in fact return to work. Mr. Howard had carpal tunnel surgery in 2004 and was then released to return to work in January of 2004. Mr. Howard returned to work as a heavy equipment operator until July of 2005. Mr. Howard worked eight hour shifts up until July of 2005.

Mr. Lalk testified that the treating doctors for the employee's low back, carpal tunnel syndrome and right shoulder injury did not place any restrictions that would preclude Mr. Howard from returning to any gainful employment. He also testified that if he takes into consideration the restrictions or functional limitations addressed by the treating physicians, Mr. Howard would be capable of returning to gainful employment. Mr. Lalk also testified that if he took the restrictions that Dr. Poetz put on Mr. Howard and Mr. Howard's self-imposed limitations, that Mr. Howard could do unskilled entry level positions such as security guard or clerk work.

Robert Poetz, D.O.

Dr. Poetz testified on behalf of Mr. Howard. He saw the employee on two occasions, February 2, 2006 and again on October 2, 2006. He prepared reports dated March 30, 2006 and October 12, 2006. He testified by deposition on November 14, 2006. Dr. Poetz does not do assessments to determine whether there are jobs in the open labor market to determine if someone is capable of doing jobs.

Dr. Poetz evaluated the employee almost a year after the injury in July of 2005. Dr. Poetz reported a history of treatment to the left shoulder on July 15, 2005. Dr. Poetz reviewed these records and completed an examination, which included Mr. Howard's left shoulder, but provided no diagnoses or rating with regard to any injury in 2005. Dr. Trueblood treated Mr. Howard for his left shoulder pain in 2005. Dr. Poetz did not see anything in the records to indicate that Dr.

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Trueblood attributed any of the problems Mr. Howard was having with his left shoulder to his work at J.H. Berra.

Dr. Poetz found that Mr. Howard was permanently and totally disabled due to the May, 2003 injury in combination with prior disabilities. Dr. Poetz then re-evaluated Mr. Howard on October 12, 2006 (after Mr. Lalk's deposition and after a claim on the 2005 injury was filed). Dr. Poetz did not review any additional records regarding Mr. Howard's left shoulder. Dr. Poetz provided a diagnosis and rating (20%) for the alleged July, 2005 left shoulder injury. He then found that Mr. Howard was permanently and totally disabled due to the alleged July 2005 injury in combination with prior disabilities. Dr. Poetz's restrictions were the same at both evaluations.

Dr. Poetz gave the following ratings:

- 20% permanent partial disability of the left shoulder due to the July 8, 2005 injury.
- 25% permanent partial disability of the body as a whole due to the childhood polio.
- 30% permanent partial disability of the body as to the lumbar spine due to the 2003 fall.
- 5% permanent partial disability of the body as a whole as to the lumbar spine, pre-existing.
- 30% permanent partial disability of the right shoulder due to the 2003 fall.
- 10% permanent partial disability of the right elbow due to the 2003 fall.
- 40% permanent partial disability of the right hand and wrist due to the 2003 carpal tunnel condition.
- 35% permanent partial disability of the left hand and wrist due to the 2003 carpal tunnel condition.
- 15% permanent partial disability of the left elbow due to the May 8, 2003 injuries.

Michael Trueblood, M.D.

On July 15, 2005, Mr. Howard treated with Tammy Hahn-Brown, ANP at Dr. Trueblood's office with complaints of pain in his left shoulder. There is no notation in the records regarding any injury at work. After an MRI and a Medrol Dosepak, Mr. Howard followed up with Dr. Trueblood. Again, there is no notation of any work-related injury.

RULINGS OF LAW:

Injury No. 03-013834

After a consideration and review of all of the evidence the Court finds that:

1. The employee had a pre-existing condition of polio to his left arm that existed prior to February 26, 2003.
2. The employee's condition of polio in his left arm was a hindrance and or obstacle to employment prior to February 26, 2003 and synergistically combined with the disabilities

that the employee received as a result of his February 26, 2003 injury to create a greater disability than each of them would create considered alone.

3. The employee injured his back and right shoulder as a result of his accident of February 26, 2003.
4. The employee settled his claim with the employer-insurer on March 20, 2008 for 12½% permanent partial disability of the low back referable to the body as a whole, and 15% permanent partial disability of the right shoulder.
5. The Court finds that the employee's disability caused by the accident of February 26, 2003 created 12½% permanent partial disability of the low back referable to the body as a whole, and a 15% permanent partial disability of the right shoulder.
6. The Court finds that the employee has a 15% permanent partial disability at the level of the shoulder due to his pre-existing polio.
7. The Courts finds that the facts in this case justify a15% load.
8. The Court finds that the threshold requirements of Section 287.220 RSMo. have been met generating SIF liability for permanent partial disability.
9. The Court orders that the SIF pay the employee \$6,101.75 for permanent partial disability (17.94 weeks x \$340.12 = \$6,101.75).

Injury No. 03-043861

In addition to the findings and orders of the Court in 03-043861, the Court further finds that:

1. The employee injured his left wrist and his right wrist as a result an accident/occupational disease of May 8, 2003.
2. The employee settled this case with the employer-insurer on March 20, 2008 for 17½ % permanent partial disability of each wrist with a 10% load.
3. The Court finds that the employee's disability caused by the accident of May 8, 2003 created a 17½ % permanent partial disability to each wrist.
4. The employee's pre-existing disabilities due to his polio and his pre-existing disabilities due to his accident of February 26, 2003 combine with the disabilities from this case and are a hindrance or obstacle to employment and create greater disability then each of them considered alone.
5. The employee has not met his burden of proof on the issue of permanent total disability as his testimony and the opinions of Dr. Poetz on the employee's employability in the open labor market are not credible, are not justified or supported by the facts of this case. The opinions of Mr. Lalk are more credible and are supported by the evidence. Hence, the Court does not find that the employee is permanently and totally disabled due to a combination of the employee's pre-existing conditions that predated February 26, 2003, the disabilities that occurred as a result of the accident of February 26, 2003, and the disabilities that were created as a result of the occupational disease of May 8, 2005.
6. The Court finds that the threshold requirements of Section 287.220 RSMo. have been met generating SIF liability for permanent partial disability.
7. The Courts finds that the facts in this case justify a15% load.
8. The Court orders that the SIF pay the employee \$9,227.46 for permanent partial disability (27.13 weeks x \$340.12 = \$9,227.46).

Employee: Vernon W. Howard

Injury No. 03-013834
03-043861
05-142391

Injury No. 05-142391

In addition to the findings and orders of the Court in 03-013834, and 03-043861, the Court further finds that:

1. The employee settled this case with the employer-insurer on November 9, 2006 for “5% of the left arm at the shoulder regarding aggravating effect of work duties on pre-existing polio condition”. As part of the stipulation, the parties indicated that all issues were in dispute.
2. The SIF is not bound by any agreements that were made between the employee and the employer-insurer.
3. The employee had not met his burden of proof showing that he sustained an accident or occupational disease arising out of and in the course his employment in that there is no evidence connecting the accident to the employee’s work at JH Berra. While the parties settled this case, accident was placed in dispute. The settlement appears to be a compromise of all issues. The Court nor the SIF is bound by the agreement made between the employee and the employer-insurer. The employee has not met his burden of proof on the issue of permanent total disability as his testimony and the opinions of Dr. Poetz on the employee’s employability in the open labor market are not credible, are not justified or supported by the facts of this case. The opinions of Mr. Lalk are more credible and are supported by the evidence. Hence, even if the employee proved accident, the Court does not find that the employee is permanently and totally disabled due to a combination of the employee’s preexisting conditions that predated July 8, 2005 and any disabilities that were created as a result of the event of July 8, 2005.
4. All other issues in this case are moot as the Court has denied accident.
5. The Court denies the employee’s claim against the SIF for either permanent partial or permanent total disability.

ATTORNEY’S FEE

Ellen E. Morgan, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney’s fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Employee: Vernon W. Howard

Injury No. 03-013834
03-043861
05-142391

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

Date: _____

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation