

**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying Award and Decision of Administrative Law Judge  
by Separate Opinion)

Injury No.: 06-100307

Employee: Wade Jenkins

Employer: University of Missouri

Insurer: Self-Insured

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence and briefs, heard the parties' oral arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the June 21, 2010, award and decision of the administrative law judge (ALJ). We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

The ALJ found that employee should be rated at 25% overall disability for the left shoulder and 18% of the left elbow. The ALJ stated that the ratings include "all the shoulder and elbow injuries to [employee]." The ALJ went on to conclude that he believes that the October 2006 work-related injury only contributed to 14% of the permanent partial disability to employee's left shoulder and only 9% of the permanent partial disability to his left elbow. We disagree with the ALJ's apportionment for preexisting disabilities.

The ALJ indicated in the award that he was "disregarding the ratings from all the experts to some degree...." The ALJ disagreed with Dr. White's and Dr. Concannon's ratings of no or minimal damage to employee's shoulder and elbow. The ALJ found that Dr. White's and Dr. Concannon's ratings did not accurately reflect the severity of the work-related injury suffered by employee and employee's consistent complaints, which continued even after the treatment and release by Drs. White and Concannon.

With regard to Dr. Volarich's ratings, the ALJ agreed that employee suffered some permanent partial disability to his shoulder and elbow, but nevertheless stated that he did not accept Dr. Volarich's ratings.

After discrediting all of the experts' opinions, the ALJ discussed previous injuries suffered by employee and came to the conclusion that these previous injuries contributed to employee's overall permanent partial disability. We find that the ALJ erred in arriving at this conclusion.

There is no evidence that employee's preexisting conditions involving his shoulder and elbow constituted a hindrance or obstacle to his employment or in any way resulted in an impediment to the performance of his job duties. The only expert that even discussed preexisting disability was Dr. Volarich, who opined that employee did **not** have preexisting disability. Although employee acknowledged that he had treatment for his upper extremities in the 1990s, employee testified that he was asymptomatic on the

Employee: Wade Jenkins

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left upper extremity at the time of the October 2006 accident. Lastly, no doctor ever placed restrictions on employee with regard to his shoulder or elbow prior to the October 2006 injury.

While we agree with the ALJ that under *Elliott v. Kansas City Sch. Dist.*, 71 S.W.3d 652 (Mo. App. 2002), he was within his bounds as an administrative law judge in arriving at percentages of disability that were below those opined by Dr. Volarich, we find that his apportionment for preexisting disabilities was in error because it was based upon "conjecture or [his] own mere personal opinion unsupported by sufficient competent evidence." *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 179 (Mo. App. 2004) (citations omitted). There was simply no evidence to support his apportionment for preexisting disabilities.

We agree with the ALJ's conclusion that employee's left shoulder is 25% permanently partially disabled and that his left elbow is 18% permanently partially disabled; however, we find that all of said permanent partial disability is attributable to the October 31, 2006, accident. Therefore, employee is awarded \$21,500.02 permanent partial disability benefits for his left shoulder (= 25% of 232 weeks x \$370.69) and \$14,012.08 permanent partial disability benefits for his left elbow (= 18% of 210 weeks x \$370.69).

In addition, although the parties stipulated to 7 weeks of disfigurement, the ALJ neglected to include the same in his award. Therefore, in addition to the aforementioned benefits, we also award employee 7 weeks of disfigurement, which amounts to \$2,594.83 (7 weeks x \$370.69).

The award and decision of Administrative Law Judge Henry T. Herschel, issued June 21, 2010, as modified, is attached and incorporated by reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of January 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Wade Jenkins

Injury No. 06-100307

Dependents: N/A

Employer: University of Missouri

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Additional Party: N/A

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

Insurer: Self-Insured

Hearing Date: March 25, 2010

Checked by: HTH/sb

### 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: October 31, 2006.
5. State location where accident occurred or occupational disease was contracted: Boone 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: Claimant slipped while cleaning floor, fell and struck left shoulder on the floor.
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: Left shoulder.
14. Nature and extent of any permanent partial disability: Yes.
15. Compensation paid to-date for temporary disability: \$1,043.92 (2 weeks and 5 days of TTD).
16. Value necessary medical aid paid to date by employer/insurer? \$33,624.28

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- 17. Value necessary medical aid not furnished by employer/insurer? None.
- 18. Employee's average weekly wages: \$556.04.
- 19. Weekly compensation rate: \$370.69 (TTD and PPD).
- 20. Method wages computation: Stipulation of parties.

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: Permanent Partial Disability \$19,046.05
- 23. Future requirements awarded: No.

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: Truman Allen.

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## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Wade Jenkins

Injury No. 06-100307

Dependents: N/A

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: University of Missouri

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

Additional Party: N/A

Insurer: Self-Insured

Checked by: HTH/sb

### **PRELIMINARIES**

The parties appeared before the undersigned Administrative Law Judge on March 25, 2010. The Division has jurisdiction to hear this case pursuant to §287.110 RSMo 2000. The parties provided briefs on the relevant issues on approximately April 15, 2010.

### **STIPULATIONS**

1. The employee and the employer were operating under the provisions of the Missouri Workers' Compensation Law on or about October 31, 2006;
2. The employer's liability was self insured;
3. The employer had notice of the alleged accident and a claim for compensation was timely filed;
4. The employee's average weekly wage was \$556.04;
5. The rate of compensation for temporary total disability (TTD) was \$370.69 and \$370.69 for permanent partial disability (PPD); and
6. The employer has paid \$1,043.92 in TTD and \$33,624.28 in medical benefits to date.

### **DISPUTED ISSUES**

1. Nature and extent of the elbow, shoulder, and wrist injuries.

### **EVIDENCE**

#### **JOINT EXHIBITS:**

- A Medical Records

### **FINDINGS OF FACTS**

Wade Jenkins (Claimant) is a 40-year-old male who worked in a cleaning crew for the University of Missouri for eight years. In October 2006, he was lifting a full biohazard tub at the University Hospital when he slipped and fell and hit his left shoulder, elbow, and wrist on the floor. (J. Exh. A, p30, 32.) Claimant immediately suffered pain and was referred to medical professionals for examination and treatment.

At first he received conservative care for his elbow, wrist, and shoulder. The treatment did not resolve his symptoms. When his symptoms did not resolve, Claimant was ordered to have an MRI in December 2006. The MRI indicated that Claimant had a possible tear or sprain of the superior glenoid humeral ligament. (*Id.* at p60.) This finding was consistent with an x-ray arthrogram, which resulted in a positive test of an impingement of his shoulder. Dr. R. White performed surgery in February 2007. (*Id.* at pp92-93.)

Claimant's rehabilitation from shoulder surgery was rocky. Although the physical results indicated improvement, Claimant still complained of pain and weakness in his shoulder. (*Id.* at p37.) In June 2007, Claimant was rated at maximum medical improvement for his shoulder. (*Id.* at pp145-146; 160-161.)

Claimant's treatment of his elbow and wrist seemed to be delayed in relation to his shoulder care. (*Id.* at p169.) Claimant was independently evaluated by Dr. M. Concannon and he concluded that the wrist and elbow injury were work related, and he recommended a surgical decompression and transposition of the ulnar nerve. In July 2007, Claimant underwent a left cubital tunnel release and partial submuscular anterior transposition and Z-plasty lengthening of the forearm flexor fascia. (*Id.* at p172.) In September 2007, Claimant was released from this treatment without restriction in his elbow.

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Dr. White provided a permanent partial impairment rating of 0% of the left shoulder and 0% for body as a whole (BAW). (*Id.* at p161.) Dr. Concannon rated Claimant's elbow at 2%, noting that the ulnar nerve injury had been completely resolved. (*Id.* at pp327-328.)

Dr. D. Volarich examined Claimant and rated his shoulder at 40%, 35% of the elbow, and 15% of the wrist. (*Id.* at pp383-403.)

Claimant had a pre-existing injury to his left arm and elbow from a motorcycle accident in 1995. Later in 1998, Claimant slipped and injured his left shoulder. (*Id.* at p447, 452.) He underwent conservative treatment with Dr. D. Clark for this and related injuries. (*Id.* at p450.)

### **CONCLUSIONS OF LAW**

It is the claimant's burden of proof to prove all the issues that are alleged in the hearing under Chapter 287. As noted by the Court in Cook:

Claimant has the burden of proving all the essential elements of the claim and must establish a causal connection between the accident and injury. Cook v. Sunnen Products Corp., 937 S.W.2d 221, 223 (Mo.App.E.D. 1996) citing: Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute, 793 S.W.2d 195 (Mo.App.E.D. 1990) overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. Banc 2003).

This case's resolution is based on the assessment of the credibility of the respective experts. The Employer/Insurer proposes that I do not rely on Claimant's expert, Dr. Volarich, because he is a doctor of osteopath. Claimant dismisses the Employer/Insurer experts because the doctors are "rating" their own work rather than Claimant's actual disability.

Although the Commission cannot disregard unrefuted medical testimony, the Commission is permitted to review and weigh it along with the other factors in determining PPD. The Court in Elliott v. Kansas City Sch. Dist., 71 S.W.3d 652 (Mo.App.W.D. 2002) opined that the Commission is not restricted merely to the medical evidence during its determination of the percentage of disability of a claimant:

The Commission "may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences in arriving at the percentage of disability." This is a determination within the special province of the Commission. The Commission is also not bound by the percentage estimates of the medical experts and is free to find a disability rating higher or lower than that expressed in medical testimony. This is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical



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Radial Deviation	20	20	20
Ulnar Deviation	30	30	30

(J. Exh. A, p392)

It is not enough to merely dismiss Dr. Volarich as an osteopath or a “usual” claimant’s expert, although this is true. I believe the test performed by Dr. Volarich has bolstered his credibility and should not be dismissed prematurely. I believe that the Claimant suffered some PPD to his shoulder and elbow. Having made that finding, I do not necessarily accept Dr. Volarich’s ratings.

The Employer/Insurer’s expert, however, had the advantage of treating Claimant for his injuries. I am disregarding the ratings from all the experts to some degree because of the following considerations. I believe that Claimant suffered a work-related injury when he hoisted the 70-pound biohazard box and then slipped to the ground. The weight of the box had some impact on this injury to his left elbow and shoulder. Claimant consistently complained about “popping” and soreness in his shoulder. In a similar fashion, Claimant suffered pain in his elbow from this accident. I do not believe that Claimant suffered no or minimal damage to his shoulder and elbow as a result of this injury, as is proposed by Dr. White and Dr. Concannon.

From the evidence, it is clear that Claimant had suffered some disability to his left shoulder and elbow in earlier accidents. In 1995 and 1996, Claimant injured his left shoulder and elbow. In 1998, he again injured his left elbow and shoulder when carrying a load of steel in his automobile detailing jobs. I believe that the earlier injuries have some impact on the total disability to Claimant’s left elbow and shoulder. Claimant has consistently complained about the pain in his shoulder and elbow, even after the treatment and release of Dr. White and Dr. Concannon.<sup>1</sup> (*Id.* at pp37, 38,40, 45, 50,52,60-61,70-73,108,153-168.) Claimant testified that his strength and flexibility of his shoulder is not what it was before the injury.

Claimant’s elbow, in a similar fashion, is also stiff and weaker than before the injury. I believe that the elbow and shoulder injuries before 2006 contributed to Claimant’s overall PPD. I have reduced the award based on the medical evidence and Claimant’s testimony.

I believe that Claimant should be rated at 25% overall disability for the left shoulder and 18% of the left elbow. This rating includes all the shoulder and elbow injuries to the Claimant. I believe that the October 2006 work-related injury contributed 14% of the PPD to Claimant’s left shoulder and 9% of the PPD to his left elbow.

I do not believe that Claimant has borne his burden to proof in regards to his left wrist. Except for Dr. Volarich, I cannot find any convincing collaboration for the PPD of his left wrist. Further, Claimant did not seem to emphasize the pain and permanent disability in his left wrist in his testimony at the March 2010 hearing.

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<sup>1</sup> My refusal to accept the rating of Dr. White and Dr. Concannon should not be considered as criticism of their treatment. I believe that the medical treatment Claimant received was excellent.

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**CONCLUSION**

Claimant is awarded 14% PPD for his left shoulder in the amount of \$12,040.01 (32.48 weeks at 232 week level x \$370.69). Claimant is awarded 9% PPD for his left elbow in the amount of \$7,006.04 (18.9 weeks at 210 week level x \$370.69.)

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Henry T. Herschel  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*