

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

Injury No.: 04-146797

Employee: Glenda Joplin
Employer: Gates Rubber Company
Insurer: Insurance Company of the State of Pennsylvania
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.¹ We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the March 21, 2011, 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.

We agree with the ALJ's conclusion that employee's primary injury combined with his preexisting disabilities to cause a greater overall disability than the independent sum of her separate disabilities. However, we find that the ALJ erred in excluding employee's preexisting 5% permanent partial disability (PPD) of the body as a whole referable to her psychiatric condition from the Second Injury Fund liability calculation. We find that said disability should be included and that the 10% load factor should be applied to the combined total of 193.7 weeks (121.2 weeks² attributable to the primary injury + 72.5 weeks³ attributable to the preexisting disabilities), instead of 173.7 weeks. In light of this correction, we find that the Second Injury Fund is liable for 19.37 weeks of compensation, or \$6,722.36.⁴

In addition to the aforementioned, we also find that the ALJ erred in concluding that employee shall have the right to choose the medical provider that will provide her future medical care.

In pertinent part, § 287.140.1 states that '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.' ... As a general rule, the employer is given control over the selection of the employee's medical providers. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995). This principle, however, is subject to an important caveat. If the employer is on notice that the employee needs treatment and fails or refuses to provide it, the employee may select his or her own medical provider and hold the employer liable for the costs thereof. *Jones v. Dan D. Services, L.L.C.*, 91 S.W.3d 214, 220-21 (Mo. App. 2002); *Sheehan v. Springfield Seed and Floral, Inc.*, 733 S.W.2d 795, 798 (Mo. App. 1987); *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 880 (Mo. App. 1984).

Martin v. Town & Country Supermarkets, 220 S.W.3d 836, 848 (Mo. App. 2007).

¹ Statutory references are to the Revised Statutes of Missouri 2003 unless otherwise indicated.

² 121.2 weeks = (35% PPD of the right shoulder = 81.2 weeks, plus 10% PPD of the body as a whole = 40 weeks).

³ 72.5 weeks = (15% PPD of each wrist = 52.5 weeks, plus 5% PPD of the body as a whole = 20 weeks).

⁴ \$6,722.36 = 19.37 weeks x \$347.05 PPD rate.

Employee: Glenda Joplin

The ALJ's decision to allow employee the right to choose her medical provider is not supported by the record. We find that employer has not waived its right to direct employee's future medical treatment. Therefore, while we agree with the ALJ's award of future medical care, we find that employer shall be in control of the selection of employee's medical providers.

Lastly, we find that the ALJ erred in denying employee temporary total disability (TTD) benefits for the period of August 3, 2005, the day following her last day of work for employer, to December 14, 2006, the date Dr. Haupt opined employee had achieved maximum medical improvement.

Employee testified that the chronic unbearable pain in her right shoulder and, to some extent the less severe pain in her left shoulder, caused her to be unable to work since she stopped working for employer in August 2005. Employee testified that there has not been a single day that she feels she could have successfully worked since August 2, 2005. Employee testified that she wanted to keep working, but her right shoulder pain simply would not let her.

Dr. Haupt treated employee's right shoulder and noted that her second procedure complicated her presentation. Dr. Haupt recommended further surgery and noted that her described pain did not seem disproportionate to his findings.

Based on our review of the evidence, we find that employee was temporarily and totally disabled from August 3, 2005, through December 13, 2006. Therefore, we find employer liable for employee's TTD benefits for the 71-1/7 week period from August 3, 2005, through December 14, 2006, at the rate of \$487.15 per week for a total of \$34,657.24.

The award and decision of Administrative Law Judge Matthew W. Murphy, issued March 21, 2011, as modified herein, 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 8th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

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

Injury No.: 05-079980

Employee: Glenda Joplin
Dependent: Denver Joplin
Employer: Gates Rubber Company
Insurer: Insurance Company of the State of Pennsylvania
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.¹ We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the March 21, 2011, 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.

We find that the ALJ erred in concluding that employee shall have the right to choose the medical provider that will provide her future medical care.

In pertinent part, § 287.140.1 states that '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.' ... As a general rule, the employer is given control over the selection of the employee's medical providers. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995). This principle, however, is subject to an important caveat. If the employer is on notice that the employee needs treatment and fails or refuses to provide it, the employee may select his or her own medical provider and hold the employer liable for the costs thereof. *Jones v. Dan D. Services, L.L.C.*, 91 S.W.3d 214, 220-21 (Mo. App. 2002); *Sheehan v. Springfield Seed and Floral, Inc.*, 733 S.W.2d 795, 798 (Mo. App. 1987); *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 880 (Mo. App. 1984).

Martin v. Town & Country Supermarkets, 220 S.W.3d 836, 848 (Mo. App. 2007).

The ALJ's decision to allow employee the right to choose her medical provider is not supported by the record. We find that employer has not waived its right to direct employee's future medical treatment. Therefore, while we agree with the ALJ's award

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

Employee: Glenda Joplin

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of future medical care, we find that employer shall be in control of the selection of employee's medical providers.

In addition to the aforementioned, we also want to address an argument raised by the Second Injury Fund.

Second Injury Fund Argument

The Second Injury Fund argues that employee's left shoulder injury does not qualify as "a subsequent compensable injury" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, which provides, as follows:

...If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed,...receives a subsequent compensable injury resulting in additional permanent partial disability...so that the degree or percentage of disability,...caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, 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. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

(Emphasis added).

We summarize our understanding of the Second Injury Fund's legal reasoning: "Injury" as defined in § 287.020.3 RSMo excludes occupational diseases. A repetitive motion injury is an occupational disease by virtue of § 287.067 RSMo. Thus, a repetitive motion injury is not an "injury." A repetitive motion injury can never be a compensable "injury" that can trigger Second Injury Fund liability under § 287.220.1.

We summarize the Second Injury Fund's argument as applied to the facts of this claim: Employee's left shoulder injury is a repetitive motion injury. Employee's left shoulder injury is an occupational disease. Employee's left shoulder injury is not an injury, as defined by § 287.020.3. Employee's left shoulder injury is not a "subsequent compensable injury." Employee has failed to prove she suffered a subsequent compensable injury, so the Second Injury Fund is not implicated in this matter.

Employee: Glenda Joplin

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Discussion

The Second Injury Fund argument fails. The Second Injury Fund fails to give effect to the complete definition of injury in § 287.020.3. The complete definition includes occupational diseases within the definition of "injury" where specifically provided in Chapter 287.

Section 287.020.3(5) RSMo states:

The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. *These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.*

(Emphasis added).

Chapter 287 specifically provides for injuries by occupational disease and specifically says those injuries are compensable.

Section 287.067 RSMo states, in relevant part:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the

Employee: Glenda Joplin

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immediate prior employer was the prevailing factor in causing the injury,
the prior employer shall be liable for such occupational disease.
(Emphasis added).

The above sections specifically refer to a condition of ill caused by occupational disease, including one caused by repetitive motion, as an "injury." That is, the legislature specifically provided that the term "injury" includes occupational disease and that injuries by occupational disease, including injuries by repetitive motion, are compensable.

Based upon the foregoing, we construe the term "injury" as it appears in the phrase "subsequent compensable injury" in § 287.220.1 to include occupational diseases.

Conclusion

The award and decision of Administrative Law Judge Matthew W. Murphy, issued March 21, 2011, as modified herein, 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 8th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Glenda Joplin Injury Nos. 04-146797
05-079980
Dependents: Denver Joplin
Employer: Gates Rubber
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Insurer: Insurance Co. of the State of PA
Appearances: Ron Little on behalf of the Employee
Kenneth McManaman on behalf of the Employer
Frank Rodman on behalf of the Fund
Hearing Date: December 13, 2010 Checked by: MM/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Both: Yes.
3. Was there an accident or incident of occupational disease under the Law?
04-146797: Yes;
05-079980: Yes.
4. Date of accident or onset of occupational disease?
04-146797: February 23, 2004;
05-079980: August 2, 2005.
5. State location where accident occurred or occupational disease contracted: Both: Poplar Bluff, Butler County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Both: Yes.
7. Did employer receive proper notice? Both: Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Both: Yes.

9. Was claim for compensation filed within time required by law? Both: Yes.
10. Was employer insured by above insurer? Both: Yes.
11. Describe work employee was doing and how accident happened or occupational disease was contracted:
04-146797: Employee was cutting and tossing tubing when she felt the acute onset of pain in her right shoulder;
05-079980: Employee developed an injury to her left shoulder due to overuse while working for Employer.
12. Did accident or occupational disease cause death? Both: No.
13. Parts of body injured by accident or occupational disease:
04-146797: Right shoulder and psychological;
05-079980: Left shoulder and psychological.
14. Nature and extent of any permanent disability: See award.
15. Compensation paid to-date for temporary total disability: \$2,318.24 for both injury numbers.
16. Value necessary medical aid paid to-date by employer-insurer: \$62,300.77 for both injury numbers.
17. Value necessary medical aid not furnished by employer-insurer:
04-146797: \$1,273.00;
05-079980: \$1,273.00.
18. Employee's average weekly wage:
04-146797: \$730.73;
05-079980: \$493.73.
19. Weekly compensation rate:
04-146797: The rate of compensation for temporary total disability and permanent total disability was \$487.15. The rate for permanent partial disability was \$347.05;
05-079980: The rate of compensation for temporary total disability and permanent total disability was \$329.15. The rate for permanent partial disability was \$329.15.
20. Method wages computation: Stipulation.
21. Amount of compensation payable: See award.
22. Second Injury Fund liability: Permanent total disability.

23. Future requirements awarded: See award.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Ron Little.

FINDINGS OF FACT AND RULINGS OF LAW

On December 13, 2010, the employee, Glenda Joplin, appeared in person and by her attorney, Ron Little, for a hearing for a final award. The employer was represented at the hearing by its attorney, Ken McManaman. The Missouri Treasurer was represented at the hearing by Assistant Attorney General Frank Rodman. 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 findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

Injury Number: 04-146797

1. **Covered Employer** - Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Law, and its liability was fully funded by Insurance Co. of the State of Pennsylvania.
2. **Covered Employee** - On or about the date of the alleged accident, the employee was an employee of Gates Rubber and was working under the Missouri Workers' Compensation Law.
3. **Notice** - Employer had notice of employee's accident.
4. **Statute of Limitations** - Employee's claim was filed within the time allowed by law.
5. **Average Weekly Wage and Rate** - Employee's average weekly wage rate was \$730.73. The rate of compensation for temporary total disability and permanent total disability was \$487.15. The rate for permanent partial disability was \$347.05.
6. **Medical Aid Furnished** - Employer/Insurer has paid medical aid in the amount of \$62,300.77 for care related to both injury numbers that are the subject of this award.
7. **Temporary Total Disability Paid** - Employer/Insurer has paid \$2,318.24 as temporary total disability benefits for 4.4 weeks of disability for a period of overlapping disability relating to both injury numbers that are the subject of this award.
8. **Mileage or other medical (287.140 RSMo)** - There is no claim for mileage or other medical expenses under 287.140 RSMo.

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9. **Covered Employer** - Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Law, and its liability was fully funded by Insurance Co. of the State of Pennsylvania.
10. **Covered Employee** - On or about the date of the alleged accident or occupational disease, the employee was an employee of Gates Rubber and was working under the Workers' Compensation Act.
11. **Statute of Limitations** - Employee's claim was filed within the time allowed by law.
12. **Average Weekly Wage and Rate** - Employee's average weekly wage rate was \$493.73. The rate of compensation for temporary total disability and permanent total disability was \$329.15. The rate for permanent partial disability was \$329.15.
13. **Medical Aid Furnished** - Employer/Insurer has paid medical aid in the amount of \$62,300.77 for care related to both injury numbers that are the subject of this award.

14. **Temporary Total Disability Paid** - Employer/Insurer has paid \$2,318.24 as temporary total disability benefits for 4.4 weeks of disability for a period of overlapping disability relating to both injury numbers that are the subject of this award.
15. **Mileage or other medical (287.140 RSMo)** - There is no claim for mileage or other medical expenses under 287.140 RSMo.

ISSUES

Injury Number: 04-146797

1. **Accident** - There is a dispute as to whether the employee sustained an accident arising out of and in the course of her employment.
NOTE: Accident case (Right Shoulder, resulting depression)
2. **Medical Causation** - There is a dispute as to whether the employee's injury was medically causally related to the accident.
3. **Previously Incurred Medical** - Employee is claiming previously incurred medical in the amount of \$2,223.94. There is a dispute as to authorization, reasonableness, necessity, and casual relationship.
4. **Additional or Future Medical** - Employee is claiming additional or future medical aid.
5. **Additional TTD or TPD** - Employee is claiming additional TTD.
6. **Permanent Total Disability** - Employee is claiming permanent total disability benefits.
7. **Permanent Partial Disability** - In the alternative, Employee is claiming permanent partial disability benefits.
8. **Second Injury Fund Liability** - Employee is claiming benefits against the Second Injury Fund.
9. **Schoemehl** - Employee claims dependency pursuant to Schoemehl v. Treasurer.

Injury Number: 05-079980

10. **Accident/Occupational Disease** - There is a dispute as to whether the employee sustained an accident or occupational disease arising out of and in the course of his or her employment.
NOTE: OD (Left upper extremity, Right upper extremity, resulting depression and anxiety)
11. **Notice** - There is a dispute as to whether the employer had notice of employee's accident or occupational disease.
12. **Medical Causation** - There is a dispute as to whether the employee's injury was medically causally related to the accident or occupational disease.
13. **Previously Incurred Medical** - Employee is claiming previously incurred medical in the amount of \$1,273.00. There is a dispute as to authorization, reasonableness, necessity, and casual relationship.
NOTE: Stipulate by Employer that no payments made on claimed bills.
14. **Additional or Future Medical** - Employee is claiming additional or future medical aid.
15. **Additional TTD or TPD** - Employee is claiming additional TTD.
16. **Permanent Total Disability** - Employee is claiming permanent total disability benefits.

17. **Permanent Partial Disability** - In the alternative, Employee is claiming permanent partial disability benefits.
18. **Second Injury Fund Liability** - Employee is claiming benefits against the Second Injury Fund.
19. **Schoemehl** - Employee claims dependency pursuant to Schoemehl v. Treasurer.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

<u>Identifier</u>	<u>Description</u>
A	Dr. Stillings Deposition and Exhibits
B	Dr. Cohen Deposition and Exhibits
C	Mr. James England Deposition and Exhibits
D	Kneibert Clinic Records and Bills
E	Ozark Foothills Industrial Medical Clinic Records and Bills
F	Ozark Physical Therapy Records and Bills
G	Orthopedic Center of St. Louis Records and Bills
H	Dr. Katherine Burns Records and Bills
I	DePaul Health Center Records and Bills
J	Bluff Radiology Group Records and Bills
K	Orthopedic Associates Records and Bills
L	Mid America Rehab Records and Bills
M	Cape Radiology Group Bills
N	Kroger Pharmacy Bills
O	Walmart Pharmacy Bills
P	Attorney Contract with Glenda and Denver Joplin

Employer-Insurer's Exhibits

<u>Identifier</u>	<u>Description</u>
1	Workers' Compensation Claims and Answers
2	Dr. Mitchell B. Rotman, Orthopedic Center of St. Louis Medical Records
3	Dr. Katherine A. Burns IME
4	Dr. Geetha Komatireddy - IME
5	Dr. Merwin Moore Records
6	Dr. Richard E Hulsey IME
8	Dr. Robert E. Gardner, IME
10	Dr. Herbert Haupt, Deposition

11	Dr. Herbert Haupt IME
12	Rechard Wtzel, Ph.D. Report
13	Dr. Stacey Smith Deposition
14	Dr. Stacey Smith Independent Psychiatric Eval
15	Donna Abram Deposition
16	Donna Abram Vocational Rehab Assessment
17	Wages, sick pay and extended sick pay
18	Dr. Jimmy Bowen Deposition
19	Dr. Jimmy Bowen IME
20	Accident Report
21	Patient status report from Dr. Burns, 4/18/2005
22	FMLA Request, 8/5/05
23	FMLA Request, 9/15/05
24	Certificate for return to work, Oct 17, 2005 - 11/17/05, Kneibert Clinic
25	FMLA Request 11/17/05
26	Certificate for RTW11/17/05 - 12/16/05
27	Gates Form, 11/25/2005
28	FMLA Request - 1/20/2006
29	Gate Form Dated 1/23/2006
30	Gate Form Dated 2/20/2006

Second Injury Fund Exhibits

No Exhibits Identified.

SUMMARY OF EVIDENCE

Testimony of Glenda Joplin

Employee Joplin (hereinafter referred to as “Employee”) testified live at the trial. Employee was born on October 1, 1943 and was 67 at the time of trial. She married Denver Joplin in 1963 and they have lived together continuously since their marriage. They have grown children - none of whom were dependent on her for support at the time of her work injuries.

Employee has lived in Ripley County, Missouri most of her life. She graduated from Doniphan High School where she learned to read, write and do simple math. She testified that she can add, subtract, multiply and divide. She is able to work with common fractions and decimals to some extent. Employee does not know anything about algebra, geometry, or trigonometry. She was never in the military and never served in the armed forces.

Employee does not have a home computer and has never had email. Her only exposure to computers was her work at Gates. There, they filled out their time cards on the computer and looked up information on blueprints as necessary.

Employee's last job was at Gates Rubber Company where she last worked on August 2, 2005. She testified that she is not able to work because she injured her shoulders at Gates. She injured her right shoulder when she cut off the end of a hose and tossed it up the line. She continued working and told the girl she was working with that her shoulder was hurting. A short time later she told Matt Day, a supervisor who came to her work station. Employee asked him to pick up a tub for her because her shoulder was hurting. He asked her if she wanted to file a report. She declined the opportunity, thinking that the pain would subside.

Employee attended a Gates safety meeting in March 2004 after she injured her right shoulder. After the safety meeting she officially reported her work injury and filled out the requisite accident form. Employee believes she filed the formal accident report a couple of weeks after the February 23, 2004 injury. It may have been a little longer than that.

Employee was then told she would be scheduled to see a doctor across the street at Ozark Foothills Industrial Medical Clinic (hereinafter "Ozark Clinic"). She didn't get any treatment until after she filed the accident report. It was several more days after filing the report before she was provided a medical appointment at the Ozark Clinic. She doesn't remember who she saw on the first visit to the Ozark Clinic. Employee was told that it sounded like she strained her shoulder. She was prescribed Flexeril and told to continue taking Celebrex. She already had a prescription for Celebrex at home, previously prescribed for her at Kneibert Clinic.

Employee took the prescription for Flexeril back the plant and talked to Leon to determine the procedure for getting the prescription filled. When she showed Leon the prescription, he told her they were supposed to give her samples. He then took the Flexeril prescription, told her he would return it to her the following day, but never did. She testified that she was afraid to ask Leon for her prescription when he did not volunteer to return it or give her instructions on where to get it filled.

Employee followed up at the Ozark Clinic a few days later and saw Amy Robertson, a nurse practitioner. Nurse Robertson talked to her about the accident and her pain, ordered x-rays and asked her if the Flexeril was helping. Employee told Nurse Robertson that she was unable to get the Flexeril prescription filled. Nurse Robertson ordered physical therapy. The physical therapy was done at Ozark Physical Therapy. Employee also told the therapists about injuring her right shoulder at work. She could not remember how many therapy visits she had for this initial course of physical therapy.

Employee was then authorized to see Dr. Rotman, an orthopedic surgeon in St. Louis. She told Dr. Rotman about her right shoulder injury which occurred while working at Gates. He prescribed some injections in her right shoulder which gave her some limited relief. He also ordered an MRI that was done at a nearby hospital. Dr. Rotman recommended surgery for her right shoulder. The surgery was on June 23, 2004 at the Surgery Center of Kirkwood. He ordered more physical therapy.

Employee continued to have pain and problems with her right shoulder even after the surgery and she reported the same to Dr. Rotman. Employee reported to Dr. Rotman that she was also having pain and problems with her left shoulder. Dr. Rotman told her he had fixed her right shoulder. Dr. Rotman released her from treatment on September 14, 2004. Employee remembered crying all the way home because her right shoulder was still painful and had not been fixed by Dr. Rotman's surgery. On the day he released her, Employee told Dr. Rotman she was still having right shoulder pain. Tracy Redburn, the nurse case manager for Gates attended most, if not all of the appointments Employee had with Dr. Rotman. Employee was certain Tracy was at the final appointment with Dr. Rotman because Tracy asked Dr. Rotman if he would do some more diagnostic tests since she was still having pain. He said he had done all he could do.

Subsequently, Employee went back to Dr. Hickey at Kneibert Clinic. Dr. Hickey suggested a new right shoulder MRI and also recommended a left shoulder MRI because of her left-sided complaints.

Employee was then referred to Dr. Katherine Burns by Employer. She believes Tracy Redburn attended the appointments with Dr. Burns. Employee talked to Dr. Burns about her persistent right shoulder pain and also told her that her left shoulder was hurting as well. Dr. Burns injected her right shoulder. Dr. Burns told Employee she could not treat her left shoulder until she got her right shoulder to 100%. Dr. Burns performed a second surgery on her right shoulder, followed up after surgery, ordered more physical therapy and also a work hardening program. After surgery and therapy, Employee reported to Dr. Burns that she was still having throbbing pain in her right shoulder and continuing to have left shoulder pain as well. Despite her continuing pain complaints, Dr. Burns released Employee from her care.

Employee again returned to Dr. Hickey at Kneibert Clinic. Dr. Hickey referred her to Dr. Komatireddy a/k/a "Dr. Reddy". Dr. Reddy ordered some steroids for some polymyalgia, a condition Employee was suffering during this time. Employee said she no longer has those problems and no longer takes anything for polymyalgia.

Employee was then evaluated in St. Louis by Dr. Schlafly and Dr. Hulsey. Dr. Hulsey is a shoulder specialist and did not provide any treatment. The evaluations with Dr. Schlafly and Dr. Hulsey were arranged by her attorney's office.

After those evaluations, Employer set Employee up in St. Louis with Dr. Haupt. Dr. Haupt prescribed additional therapy. He wanted her therapy to be done at a different facility. He sent her Mid America Rehab in Cape Girardeau. After therapy she returned to Dr. Haupt two or three times.

Dr. Haupt gave her four treatment options for her right shoulder. He could prescribe more therapy, perform another surgery, she could decide to learn to live with her right shoulder pain, or injections. He stressed that any further surgery would need to be done with great care and that he could not make her any promises that more surgery would improve her pain. In fact he said her right shoulder pain could be even worse after the third surgery. Employee also recalled that Dr. Burns had told her she should never let anyone do more surgery on her right shoulder.

Employee talked to Dr. Haupt about the pain and problems she was having with her left shoulder. Dr. Haupt did not want to seriously consider surgery on her left shoulder until they decided her right shoulder was as good as it was going to get. Employee finally opted against having a third right shoulder surgery. She informed Dr. Haupt of her decision and she was released from his care in December of 2006.

Employee's employment at Gates began in October of 1995 and she became a full-time employee in November of 1995. She worked for Gates continuously until the time of her 2004 accident. During that period, Employee missed very little work and if she did miss she made it up. She took the vacation time she earned but only after scheduling her vacation days in advance as required by Gates company policy.

She was classified as a finisher but she operated a large saw and would use the saw to cut hoses of different sizes, weights and lengths. She also had other duties at Gates. She would have to go get products and blueprints. She would put them on the line and cut off the ends and verify it was the proper length. If it was a certain kind of hose she may box them herself if it didn't require any more applications such as a pin or spring. She would work on several hoses at time. She would take them out of the cage, put them in a tub and carry the tub back to her station. The loaded tubs were quite heavy and difficult for her to carry even before the 2004 right shoulder injury. It varied how far she would have to carry them and sometimes someone would help her. That job required repetitive pulling and reaching. She did that job for a long time. She doesn't remember when she went to that job, but basically they are all the same. When she was cutting she would stand up on a platform and feed the saw with a foot pedal. It runs in water to keep the hose from getting too hot and sticky. She cut the end off of hoses over and over again.

She often worked a 50-60 hour week during her time at Gates.

She first began having pain in her left shoulder when she returned to work on light duty after seeing Nurse Robertson at the Ozark Clinic. Her restrictions then were no use of her right arm overhead and no lifting more than some number of pounds; she is uncertain of the weight limitation at the beginning.

Employee had carpal tunnel surgery in 1991. She had a workers' compensation claim for that. She settled but she doesn't remember how much the settlement was for or what percentage of disability was assigned to her hands. The carpal tunnel surgery helped a great deal although she did continue to have some problems after the surgery with some numbness, less strength in her hand grip and she would drop things from her hands periodically. In the years after the carpal tunnel surgery, her hands were more problematic upon waking from sleep. First thing of a morning she may not even be able to make a fist because of the swelling and stiffness. As the day progressed and she used them more, her hands would loosen up and feel much better. She wore wrist braces while working at Gates because she was concerned about further injury.

When Employee saw Dr. Reddy, she really didn't see her for her shoulder. Dr. Hickey referred her to Dr. Reddy to rule out rheumatoid arthritis and MS; those were both quickly ruled out.

Employee's blood pressure was out of control because of her persistent and unbearable right shoulder pain.

Employee suffered from mild depression before February of 2004. She first had depression when she lost her son, in 1984. He was 18. He was hunting with his twin brother and a friend. His friend shot and at a deer, the bullet ricocheted and struck her son Larry. When he died she just wanted to go into her room and never come out. She was treated with some medication and after awhile she discontinued it. She flushed them. Since then she had not taken any medication for depression until after the 2004 work accident when she started having depression and anxiety once again. It started after she had her first surgery and it didn't get any better. That is when she first noticed it. They gave her some medicine for it. They started her on Cymbalta. She thinks she might have been taking some Elavil before that. Definitely when she was off work it got bad. She is taking medication now for depression. She is taking Elavil. Dr. Hickey prescribes it. She is also taking Neurontin and Naproxen for the shoulder pain. These are also prescribed by Dr. Hickey.

Some days are unbearable. She does not want to even leave the house. She'll just go back to her room and shut the door. She has headaches. She thinks the headaches are because she does not rest well. She sleeps maybe three hours a night total and that is not all at one time. She can't get in a comfortable position because of her shoulders (right greater than left). She sleeps with pillows to prop her arms up and try to get in the most comfortable position. She usually sleeps with three pillows to prop her arms up. She takes her small pillow with her everywhere for her right arm. She rests it under her right arm either on the console if she is driving or on the window if she is a passenger. Using the pillow helps. Her clavicle area pulls down and it makes it really tired and she'll have to go lay down. She has to lie down at least three times a day, for maybe an hour at a time. Some days are better than others but none of them are good. Other than lying down she uses ice packs for pain control. In fact, she used an ice pack twice the day before the hearing. She does not use ice everyday but at least a few times each week. She doesn't always lie down completely, sometimes she will sit back in the recliner and that helps to straighten out the kink in her right shoulder/right clavicle.

Tension makes her shoulder worse. If she uses her shoulder it makes it worse. Writing, turning pages in a book, causes it to hurt worse. Her right shoulder is worse than her left shoulder. She can't use her left shoulder to do a lot of things. She can't raise a window. Her daughter, Tammy comes and helps her clean. Her husband helps her some too. She does fix her own hair. She washes it and lets it air dry or holds her head over the air vent. Then she'll take a roller brush to put a few curls in it. She'll hold her right elbow with her left hand and push her right arm to use the roller brush and pick through it. She usually cannot fix her hair without taking a break because the pain gets too great and her arms get weak and tired feeling.

She hasn't worked since 2005 because she can't. Her shoulders won't allow her to because they hurt too much. She is now on social security disability.

Ms. Abrams suggested that Employee could work and use morning break, lunch period and afternoon break times to accommodate her need to lie down during the work day. Employee said that her pain is not that predictable and she wouldn't be able to sustain work in that manner.

She said her pain does not reach the point that she needs to lie down at the same time each day. Only on a rare occasion would 10-15 minutes be a sufficient amount of down time to reduce her shoulder pain to a point that she would feel like getting up again and try to be engaged in some limited activity.

The level of her depression corresponds with her pain level. She feels her depression now is primarily because she can't physically do what she wants to because of her shoulder pain.

She and Denver own a cattle farm. She doesn't do any work on the farm. She goes with her husband some when he is seeing about something but she never helps. He doesn't allow her to pick things up. He never has. She will open a gate from time to time but they swing freely and it doesn't require a lot of effort or force. It is really just a matter of undoing the chain and hooking it back. Other than opening a gate on occasion, the only other thing she might do is take her husband or sons some ice water when it is hot or relay messages when necessary.

She doesn't drive very much. She never liked to drive and now she can't drive much. Driving makes her shoulders real achy and she has to lie down afterward. She can drive from here to her home. That is about 20 miles and she is already having pain. She does shopping. She loads the car sometimes. She'll load one or two bags at a time. She never unloads the car when she gets home.

Testimony of Faye McKelroy

The only other live witness at the hearing was Faye McKelroy, the current director of workers' compensation at Gates Rubber Company. Ms. McKelroy was not employed by Gates in February of 2004 when Employee injured her right shoulder working on the line.

She is the director of work comp now at Gates. She came after this case began. She had an opportunity to work with Employee while she was on light duty. Gates light duty policy is always abiding by the doctor's orders and staying within the restrictions. Employee was filing blueprints and things.

While on light duty they had to ask Employee not to work overtime because she did like overtime. This was about a two week time while she was getting the injections. She knows it wasn't an issue the whole time but she doesn't know the time frame.

When Employee's employment ceased she talked to her. She said that she was going to have to quit due to health reasons. She talked briefly about problems she was having and she knew about FMLA. She talked to her about extending the extended sick leave and Employee said no because she wasn't going to be able to come back to work. They talked briefly about all her health issues.

They provided light work. She doesn't recall Employee working full time after her injury. There may have been a time she was but she doesn't recall it. They always abided by the doctor's restrictions.

Ms. McKelroy started working at Employer in 2004 as the human resources manager. She has been the human resources manager the whole time.

She doesn't specifically recall Employee being on full duty. She doesn't know one way or another if she worked full duty for about three months. She isn't 100% sure she was always on light duty. She would have been aware at the time but she doesn't recall. There were times they would put Employee on light duty even when the doctor would not because Employee had so many complaints of pain.

Ms. McKelroy does not know whether or not she was back on line doing production work after her first surgery. After her first surgery she does not know if she was back on the line for a month. She does not know if she was back on the line for more or less than three months. They always abide by the doctor's restrictions.

When Employee complained of pain all over Ms. McKelroy did not know Employee had an anterolisthesis. Ms. McKelroy knew Employee had FMLA papers that mentioned different things but Ms. McKelroy did not recall anything like anterolisthesis.

She does not keep track day-to-day, week-by-week, or month-by-month of which employees are teamed together mostly because of frequent changes for those on vacation or sick or moving between departments. Ms. McKelroy stated that teamwork was used throughout the whole plant.

FINDINGS OF FACT AND RULINGS OF LAW:

Having reviewed the evidence admitted at the hearing, considering the testimony of the experts and the live testimony elicited at the hearing, I make the following findings on the issues presented:

Issue 1. Accident

On February 23, 2004, Employee suffered an accident in the course and scope of her employment when she tossed or threw the section of hose down the line. At that time, Employee suffered an unexpected trauma to her right shoulder which produced objective symptoms of an injury at the time of the occurrence.

Issue 2. Medical Causation

After reviewing the medical evidence in the record I find that the accident of February 23, 2004 was a substantial factor resulting in the right shoulder injury addressed in the evidence.

Issue 3. Previously Incurred Medical Expenses

Employee is claiming reimbursement of \$1,273.00 for medical care to her right shoulder. Employee's expert established that this care was reasonable and necessary to cure and relieve

Employee from the effects of her injury. While Employer did not authorize this medical care, Employer had denied the treatment, effectively waiving its defense of 'authorization'. For these reasons, Employer is ordered to pay Employee \$1,273.00 as reimbursement of the medical bills claimed.

Issue 4. Additional or Future Medical Care

Having previously found that the right shoulder injury is medically causally related to the accident that occurred on February 23, 2004, in the course and scope of her employment with Employer, I further find that Employer is responsible for such medical care that is required to cure and relieve Employee from the effects of that injury. Employee has sufficiently demonstrated that she will require additional/future medical care to cure and relieve her from the effects of her right shoulder injury. Such care includes but is not necessarily limited to ongoing medication and medical management of that medication. Employee shall have the right to choose the medical provider that will provide such future care.

Issue 5. Additional TTD

Employee was released by Dr. Haupt on December 14, 2006 at maximum medical improvement (MMI). She last worked for Employer or any other employer on August 2, 2005. The authorized treating physician did not restrict Employee from working. When Employee filled out her paperwork for FMLA, she did not give her shoulders as a reason for her inability to work. I do not find that Employee was totally disabled from employment during the period from August 3, 2005 through December 14, 2006 due to this injury. Employee's claim for unpaid benefits during this period is denied.

Issue 6. Permanent Partial Disability

I do not find that Employee is permanently and totally disabled due to this injury alone.

Issue 7. Permanent Partial Disability

I find that Employee has suffered a permanent disability to her right shoulder in the amount of 35% PPD of at the 232 week level. I further find that Employee suffered an associated psychiatric disability of 10% to the body as a whole for the mood disorder and pain disorder associated with the right shoulder injury. Employer is ordered to pay benefits in the amount of $((0.35 * 232 + 0.10 * 400) * \$347.05 =)$ \$42,062.46.

Issue 8. Second Injury Fund Liability

On February 23, 2004, Employee suffered from pre-existing disability, to wit, 15% PPD at each wrist due to bilateral carpal tunnel syndrome and bilateral carpal tunnel release and 5% PPD to the body as a whole due to a pre-existing psychiatric condition. I find that Employee's right shoulder injury and the associated psychiatric conditions combine with her pre-existing bilateral carpal tunnel syndrome and associated disability such that the overall disability due to these conditions is greater than the sum of the parts. I further find that a 10% load factor accurately

accounts for the synergistic aspect of the combined disability. The Second Injury Fund is ordered to pay $((52.5 + 121.2) * 0.10 * \$347.05 =)$ \$6,028.26.

I do not find that Employee is permanently and totally disabled due to the combination of this injury and her pre-existing injuries/disabilities.

Issue 9. Schoemehl v. Treasurer

Because there is no finding of permanent total disability associated with this injury number, a finding of dependency under Schoemehl is not indicated.

Issue 10. Occupational Disease

Section 287.067 defines an occupational disease as an identifiable disease arising with or without human fault out of and in the course of the employment. I find that Employee suffered an injury to her left shoulder do to overuse. I find that her left shoulder injury is an identifiable disease that arose in the course and scope of Employee's employment with Employer.

Issue 11. Notice

The injury date for this injury is August 2, 2005. This predates the enactment of the 2005 amendments to Missouri Workers' Compensation Law. Prior to the 2005 amendments, Section 287.420 did not require notice to be given for occupational diseases. Employer's defense of failure to provide notice pursuant to 287.420 fails on this point.

Issue 12. Medical Causation

After reviewing the medical evidence in the record I find that Employee's employment with Employer was a substantial factor resulting in the right shoulder injury addressed in the evidence. I further find that Employee's left shoulder injury was medically causally related to her employment.

Issue 13. Previously Incurred Medical Expenses

Employee is claiming reimbursement of \$1,273.00 for medical care to her left shoulder. Employee's expert established that this care was reasonable and necessary to cure and relieve Employee from the effects of her injury. While Employer did not authorize this medical care, Employer had denied the treatment, effectively waiving its defense of 'authorization'. For these reasons, Employer is ordered to pay Employee \$1,273.00 as reimbursement of the medical bills claimed.

Issue 14. Additional or Future Medical Care

Having previously found that the left shoulder injury is medically causally related to the occupational exposure Employee suffered in course in scope of her employment with Employer,

I further find that Employer is responsible for such medical care that is required to cure and relieve Employee from the effects of that injury. Employee has sufficiently demonstrated that she will require additional/future medical care to cure and relieve her from the effects of her left shoulder injury. Such care includes but is not necessarily limited to ongoing medication and medical management of that medication. Employee shall have the right to choose the medical provider that will provide such future care.

Issue 15. Additional TTD

Employee was released by Dr. Haupt on December 14, 2006 at maximum medical improvement (MMI). She last worked for Employer or any other employer on August 2, 2005. The authorized treating physician did not restrict Employee from working. When Employee filled out her paperwork for FMLA, she did not give her shoulders as a reason for her inability to work. I do not find that Employee was totally disabled from employment during the period from August 3, 2005 through December 14, 2006 due to this injury. Employee's claim for unpaid benefits during this period is denied.

Issue 16. Permanent Partial Disability

I do not find that Employee is permanently and totally disable due to this injury alone.

Issue 17. Permanent Partial Disability

I find that Employee has suffered a permanent disability to her left shoulder in the amount of 10% PPD of at the 232 week level. I further find that Employee suffered an associated psychiatric disability of 5% to the body as a whole for the mood disorder and pain disorder associated with the left shoulder injury. Employer is ordered to pay benefits in the amount of $((0.10 * 232 + 0.05 * 400) * \$347.05 =)$ \$ 14,992.56.

Issue 18. Second Injury Fund Liability

I find that Employee is permanently and totally disabled due to a combination of her left shoulder injury and her prior injuries when considered in combination. The Second Injury Fund is ordered to compensate Employee at the rate of \$329.15 per week for the remainder of Employee's life commencing on December 14, 2006 pursuant to Section 287.220. The Second Injury Fund shall receive a credit for 43.2 weeks of compensation.

Issue 19. Schoemehl v. Treasurer

I find that Employee's husband, Denver Joplin, at the time of this injury, was and continues to be a dependent of Employee. Denver Joplin is entitled to the previously awarded weekly payments from Second Injury Fund in the event he survives Employee.

ATTORNEY'S FEE

Employee: Glenda Joplin

Injury No. 04-146797 & 05-079980

Ron Little, 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.

Made by:

Matthew W. Murphy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

Date: _____